12-6-2012

Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy

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FORMAL EXECUTION AND INFORMAL REVOCATION: MANIFESTATIONS OF PROBATE'S FAMILY PROTECTION POLICY

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INTRODUCTION

For millennia, ceremonies have accompanied the exercise of testamentary power.[1] From the early Egyptian dynasties to the Roman Empire to the time of the Norman Conquest, testators have followed various formalities while executing their wills.[2] With the adoption of the Statute of Wills in 1540[3] and the Statute of Frauds in 1676,[4] the will formalities that would eventually find their way into American law became mandatory elements of valid will execution in England.[5] Today, all states require that a testator follow some of these centuries-old formal

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1. *See* Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 415–18 (1988).

2. *See id.*

3. Statute of Wills of 1540, 32 Hen. 8, c. 1 (Eng.); *see* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 199 (1991) (providing a brief description of the Statute of Wills).

4. An Act for Prevention of Fraud and Perjuries, 29 Car. 2, c. 3, §§ 18–21 (1676); *see* Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893, 1910–12 (1996) (providing a brief description of the Statute of Frauds).

5. *See* Beyer, *supra* note 1, at 415–19; *see also* Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 164–66 (1989) (providing a brief description of "[t]he development of the modern will in England"). "'Most American states developed their laws of estates and trusts from English statutes and judicial decisions known to their legislators at the time of the American revolution, or from English and American statutes and judicial decisions available as models upon admittance to the union.'" Mark L. Kaufmann, Note, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill*, 1988 U. ILL. L. REV. 1019, 1023 n.28 (1988) (quoting J. RITCHIE, N. ALFORD & R. EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 9 (6th ed. 1982)).

requirements to validly execute a will.[6] Typically these formalities include requiring that the will be in writing, contain the testator's signature, and be attested by at least two witnesses.[7] The traditional justification for will formalities is that they aid the court in fulfilling the decedent's intent by protecting against fraud and undue influence and by providing credible evidence of testamentary intent.[8]

Fulfillment of testamentary intent provides one explanation of the presence of formal requirements in the will-execution process, but perhaps will formalities serve an additional purpose. Legal scholars have argued that many probate[9] doctrines, including will formalities, undue influence, and mental capacity, provide courts the opportunity to invalidate wills that make disfavored bequests.[10] Specifically, scholars argue that courts use these doctrines to invalidate testamentary gifts to nonfamily members: overlooking faulty execution of wills leaving the decedent's estate to the family while strictly applying these doctrines in cases involving gifts to radical political organizations,[11] homosexual partners,[12] unmarried cohabitants,[13] and other equally disfavored beneficiaries. This view of will formalities fits nicely with probate's firmly established family-protection policy,[14] which is evident in a

6. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 202 (7th ed. 2005).

7. *Id.*

8. *In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975) ("The formalities are designed to perform functions which will assure that [the testator's] estate really is distributed according to his intention.").

9. "Probate" is used throughout this article generally and not only as the process of determining the validity of a will. *See* BLACK'S LAW DICTIONARY 557 (8th ed. 2004).

10. *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37 (1996); *see also* E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 314 (1999) ("[T]estamentary freedom may be unfairly abridged when the trier of fact uses doctrines intended to protect testamentary freedom to redistribute the 'abhorrent' testator's probate estate to a legal spouse or close blood relations in line with the trier of fact's majoritarian values and choices."). *But see* Langbein, *supra* note 8, at 500 (dismissing the possibility that courts use will formalities to further a "systematic bias toward invalidity").

11. *See, e.g.*, *In re* Strittmater's Estate, 53 A.2d 205 (N.J. 1947) (striking down a bequest to the National Women's Party based on the testator's insane delusions).

12. *See, e.g.*, *In re* Kaufmann's Will, 247 N.Y.S.2d 664 (App. Div. 1964) (invalidating a will leaving most of the estate to a homosexual partner with whom the decedent had been romantically involved for over ten years).

13. *See, e.g.*, Gaines v. Frawley, 739 S.W.2d 950 (Tex. App. 1987) (striking down a bequest to a live-in boyfriend of five years).

14. *See* Leslie, *supra* note 10, at 268–73 (describing family-protection policies in the

number of probate doctrines that explicitly protect familial interests, such as the elective spousal share, statutes protecting pretermitted heirs, and the distributive scheme of intestacy.

This article adds to previous scholarly analysis explaining will formalities as protecting family interests but recognizes a different role that formal requirements play in family protection. Instead of protecting family interests by merely providing courts a means to invalidate wills to nonfamily members, will formalities promote family protection by their very operation. Even if courts do not manipulate the formal requirements of will execution to further a bias in favor of the family, by requiring testators to follow the mandates of will formalities, the probate process protects family interests in a number of ways.[15]

Not only do formal requirements in the will-execution process further probate's family-protection policy, but the relative lack of formalities in the will revocation process also promotes this policy.[16] Unlike valid will execution, valid will revocation is relatively easy.[17] A testator can revoke a will by simply tearing it up.[18] The testator need not go through the ceremonial process of writing out a revocation; he need not affirm the revocation by attaching his signature; no one even need observe the revocatory act.[19] This article asserts that this informal process of will revocation promotes probate's family-protection policy[20] by channeling a decedent's estate into intestacy.[21] If a decedent dies without a testamentary plan in place, the estate passes according to the intestacy statute of the decedent's home state, which in all states means property is distributed to the decedent's family.[22] Therefore, the probate process furthers its family-protection policy not only by requiring a formal process of will execution but also by providing testators a relatively easy and informal method of revocation.

U.S. and other western countries); *see also* Carolyn S. Bratt, *Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?*, 76 KY. L.J. 387, 387 (1988) ("Courts and legislatures always have granted widows some protection from the economic hardships that their husbands' deaths cause.").

15. *See infra* Part III.

16. *See infra* Part V.

17. *See infra* Part IV.B.

18. *See* UNIF. PROBATE CODE § 2-507(a)(2) (1993) (permitting revocation by "burning, tearing, canceling, obliterating, or destroying the will or any part of it").

19. *See id.*

20. *See infra* Part V.

21. *See* DUKEMINIER ET AL., *supra* note 6, at 59.

22. *See id.* at 78–80 (describing the basic schemes of intestacy).

This article proceeds in five parts. Part I briefly describes the historical and modern manifestations of probate's family-protection policy. Part II explains the will-execution process and the place of formal requirements in that process. Part III argues that a formal will-execution process promotes probate's family-protection policy. Part IV shifts the focus of the article from execution to revocation and describes the process by which a testator may revoke a will. Finally, Part V argues that, like the formal execution process, the informal revocation process furthers probate's family-protection policy.

I. PROBATE'S FAMILY PROTECTION POLICY

One of probate's "principal function[s] is to maintain and perpetuate the social unit that Americans have traditionally deemed essential for a stable and productive society—the family."[23] Inheritance laws' family-protection function is evident in historical doctrines protecting widowed wives, as well as in a number of modern probate doctrines such as the elective spousal share, pretermitted heir statutes, and the distributive scheme of intestacy. While this list may comprise the most obvious manifestations of probate's family-protection policy, it is not exhaustive, as scholars have recognized other probate doctrines that serve a policy of family protectionism.[24]

A. Historical Doctrines

"A prominent characteristic of the American inheritance system throughout the centuries has been its steady focus on the nuclear family."[25] This focus on the family can be traced back to several

23. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 204 (2001); *see* EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 76 (6th ed. 2000) ("Many of the policy conflicts in the area of decedents' estates and trusts concern the policies favoring freedom of property disposition as opposed to the policies favoring protection of the family . . . .").

24. *See, e.g.*, SCOLES ET AL., *supra* note 23, at 76 ("Among the most fundamental of the safeguards provided for a property owner's immediate family members . . . is the requirement that those who would make wills be competent and act free of deception or excessive imposition by others."); Bratt, *supra* note 14, at 388–89 (describing the family-protection function of the probate homestead exemption and the family allowance); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 577 (1997) ("[F]amily protectionism is built into the very fabric of the undue influence doctrine.").

25. CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO

doctrines of early English common law that provided for the needs of widows.[26] For example, to satisfy the widow's immediate needs upon the death of her husband, the common law provided her the right of quarantine.[27] This right allowed the widow to continue living in the deceased husband's house for "forty days after her husband's death."[28] Similarly, "the right of estrovers [permitted] the widow to take reasonable sustenance from the decedent's property including the right to kill animals for food during her quarantine."[29]

While the rights of quarantine and estrovers provided for the widow's immediate necessities, the right of dower served her more long-term needs.[30] This right provided the surviving wife a claim to a portion of her husband's real property that was inheritable by the decedent's heirs.[31] In medieval England, the right of dower adequately served the needs of widows because the husband's real property was the primary source of familial wealth.[32] However, "in the modern era of intangible wealth, dower makes very little sense and often results in little or no support at all."[33] As a result, most states have abolished the right of dower and have adopted more effective, modern, family-protection measures.[34]

THE PRESENT 207 (1987).

26. *See* Bratt, *supra* note 14, at 387 ("At the earliest common law, a surviving wife was entitled to dower."); George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 42 (1948) ("From very early times, English law assured to a wife certain rights in her husband's property if she survived him.").

27. *See* Bratt, *supra* note 14, at 388; Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1660 (2003).

28. Bratt, *supra* note 14, at 388; Dubler, *supra* note 27, at 1660.

29. Bratt, *supra* note 14, at 388.

30. *See id.* (explaining the relationship between the right of dower and the rights of quarantine and estrovers).

31. Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at my Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 741–47 (2006) (providing a detailed history of the widow's right of dower).

32. *See id.* at 746 ("In jolly old England when land was the major source of wealth for most well-off families, the dower system actually worked well in terms of adequacy of support."). *But see* Dubler, *supra* note 27, at 1662 ("A widow's legal entitlement[] to dower . . . , although framed by the law as [a] protective measure[] and hailed by legal commentators as greatly favored, did little systematically to alleviate her often precarious financial state after her husband's death.").

33. Turnipseed, *supra* note 31, at 746–47.

34. DUKEMINIER ET AL., *supra* note 6, at 423. Only four states have not abolished the right of dower, including Arkansas, Kentucky, Michigan and Ohio.

B. Elective Spousal Share

Under modern law, probate's family-protection policy is most evident in the elective spousal share. This probate doctrine allows a surviving spouse to take a legislatively prescribed portion of the decedent spouse's estate regardless of the terms of the will.[35] For example, if a husband dies leaving a will that completely disinherits his surviving wife, under the laws of most states, the widow can choose to take a portion of her husband's estate.[36] If the surviving wife does not wish to take the elective share, she need not do so, and instead she can take from the decedent's estate according to the terms of the will.[37] The size of the elective share varies across jurisdictions, but the typical state statute allows the survivor to take a third of the decedent spouse's estate.[38]

"The policy underlying traditional elective-share statutes . . . is to protect the surviving spouse from disinheritance by the deceased spouse."[39] Two theories explain the elective share's role in providing this protection. Under the spousal support theory, the elective share protects a surviving spouse by providing financial support.[40] The testator is free to exercise considerable testamentary power, but a "portion of the estate is subject to the support obligation toward the surviving spouse."[41] Commentators have recognized several possible sources from which this

> See Ark. Code Ann. §28-11-301 (2004); Ky. Rev. Stat. Ann. §392.020 (2004); Mich. Comp. Laws §558.1 (2004); Ohio Rev. Code Ann. §2103.02 (2004).
> In all of these except Michigan, dower has been extended to the husband as well as the wife. . . . In Ohio and Michigan, the surviving spouse must elect to take dower, or to take a statutory share of the decedent's estate, or to take a share under the decedent's will.

Id.

35. *See id.* at 425.

36. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1246 (reporting that forty of forty-one separate property states have elective share statutes).

37. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 592 (3d ed. 2002); Turnipseed, *supra* note 31, at 748.

38. WAGGONER ET AL., *supra* note 37, at 592–93; Turnipseed, *supra* note 31, at 739.

39. Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 493 (2000).

40. *Id.* at 493 n.29; J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 230 (1987).

41. Oldham, *supra* note 40, at 230.

spousal support obligation may arise, including "a moral duty that each spouse owes to the other; expectations of the surviving spouse that he or she will be supported; or a public desire that the surviving spouse not rely on the state for support when support is available from the testator's estate."[42]

The second theory of the elective share's role in protecting surviving spouses is based upon "the partnership nature of contemporary marriage."[43] Under the marital partnership theory, the elective share recognizes that the surviving spouse contributed to the accumulation of marital property and, therefore, protects the survivor's interest in wealth built over the course of the marriage.[44] In other words, the deceased spouse can dispose of his property through a will but cannot dispose of the entirety of the couple's marital property because the surviving spouse has a right to a portion of those assets.

The spousal support theory and the marital partnership theory are not necessarily mutually exclusive,[45] and under either theory, one can see the elective share's role in family protection. Under the spousal support theory, the elective share protects the family by providing support to a needy surviving spouse. Under the marital partnership theory, the elective share protects the family by protecting the surviving spouse's property rights in the marital estate.

C. Pretermitted Heir Statutes

In addition to protecting disinherited spouses, the law also provides some protection to children omitted from their parent's will. While most states have enacted some form of pretermitted heir statute, these statutes vary widely.[46] Nonetheless, a common theme running throughout

42. Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 577 (1995).

43. Oldham, *supra* note 40, at 231.

44. Newman, *supra* note 39, at 493 n.29; *see* WAGGONER ET AL., *supra* note 37, at 592–93 (arguing that "[e]lective-share law . . . has not caught up to the partnership theory of marriage" because it does not provide the surviving spouse a claim to "fifty percent . . . of the couple's combined assets"); Oldham, *supra* note 40, at 231 (criticizing the traditional elective spousal share).

45. Gary, *supra* note 42, at 577.

46. *See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 3.5 (2d ed. 2001); *see, e.g.*, ALA. CODE § 43-8-91 (LexisNexis 1991); HAW. REV. STAT. § 560:2-302 (2006); IDAHO CODE ANN. § 15-2-302 (1996); IND. CODE ANN. § 29-1-3-1 (LexisNexis Supp. 2008).

American pretermitted heir statutes is the parents' ability to intentionally disinherit their children.[47] With one exception, these statutes protect children only from mistaken disinheritance and not from the parents' conscious decision to disinherit their offspring.[48] Furthermore, these statutes generally fall into one of two categories.[49] The first category provides a portion of the parent's estate only to children born after the creation of the will; children born before will execution are not provided the same protection.[50] The second category protects all unintentionally omitted children by not discriminating between children born before creation of the will and those born afterwards.[51]

Scholars have criticized the pretermitted heir statutes of most states for not completely protecting children from disinheritance by their parents.[52] Parents have a moral responsibility to care for their children, and critics of America's pretermitted heir statutes believe that "[p]robate laws should not permit a parent to shirk his moral obligation to his minor child."[53] States could design more effective pretermitted heir statutes by providing protection from intentional as well as unintentional disinheritance.[54] However, the statutes that are in place do provide a partial obstacle to the disinheritance of children, which to some extent protects the testator's family and furthers probate's family-protection policy.

47. *See* DUKEMINIER ET AL., *supra* note 6, at 466; Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 (1996) (commending Louisiana as the only state that protects children from intentional disinheritance); Brian C. Brennan, Note, *Disinheritance of Dependent Children: Why Isn't America Fulfilling Its Moral Obligation?*, 14 QUINNIPIAC PROB. L.J. 125, 125 (1999).

48. *See* DUKEMINIER ET AL., *supra* note 6, at 466 ("There is no requirement that a testator leave any property to a child, not even the proverbial one dollar."); Brashier, *supra* note 47, at 1.

49. *See* DUKEMINIER ET AL., *supra* note 6, at 480.

50. *Id. see, e.g.*, UNIF. PROBATE CODE § 2-302 (1993).

51. DUKEMINIER ET AL., *supra* note 6, at 480.

52. *See* Brashier, *supra* note 47, at 1; Brennan, *supra* note 47, at 125–26.

53. Brashier, *supra* note 47, at 26; *see* Brennan, *supra* note 47, at 158–63.

54. For example, Louisiana provides that children who are twenty-three years old or younger at the time of their parents' death are forced heirs and their parents cannot disinherit them without just cause. LA. CIV. CODE ANN. art. 1493–1495 (1996). Additionally, several countries protect children from disinheritance to a greater extent than most states. *See* Brashier, *supra* note 47, at 1 n.3.

D. Intestacy

If a decedent did not create a will, the probate court will distribute the estate according to the distribution scheme of an intestacy statute.[55] Under the intestacy statutes of all states, the estate is distributed within the decedent's family.[56] Close family members benefit first (i.e., surviving spouses,[57] children, or parents), and more remote relatives benefit if closer relatives are no longer living.[58] The primary goal of intestacy is to distribute the estate in accordance with the decedent's probable wishes; an intent the law assumes is to direct assets to surviving family members.[59] The assumption that most testators would leave the bulk of their estates to their families appears to be correct. "Despite almost complete testamentary freedom, Americans have whenever possible limited their substantial bequests to spouse, sons, and daughters."[60] Indeed, scholars have conducted a number of probate-record surveys that confirm that the vast majority of testators distribute their estates within the family.[61]

Though fulfillment of the decedent's probable intent is the primary goal of intestacy laws, "the desires of normal or average decedents do not provide the sole basis for framing or justifying an intestacy

55. *See* DUKEMINIER ET AL., *supra* note 6, at 59 (describing intestacy as the "*default rule*" that "lawyers plan around").

56. *See id.* at 78 ("If the decedent is not survived by a spouse, descendant, or parent, in all jurisdictions intestate property passes to brothers and sisters and their descendants.").

57. "Under current law, the surviving spouse usually receives at least a one-half share of the decedent's estate. There are many variations in the specifics, however . . . ." *Id.* at 63.

58. *See, e.g.*, UNIF. PROBATE CODE §§ 2-101 to -103 (1993).

59. *See* DUKEMINIER ET AL., *supra* note 6, at 62–63.

60. SHAMMAS ET AL., *supra* note 25, at 207; *see* JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS CASES AND MATERIALS 158 (2d ed. 2003) ("Most people who write wills leave the bulk of their property to close family members, and particularly to spouses.").

61. *See, e.g.*, Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 254 (1962) (reporting that a study of the probate records of Cook County, Illinois, for the years of 1953 and 1957, shows that most testators left their estates to a surviving spouse or, if no surviving spouse, to surviving descendents); Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3, 21–30 (2008) (reporting in a study of the probate records of Los Angles County from 1893 that most testators left the bulk of their estates to family); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 413 (1950) (reporting that in a study of Wisconsin probate proceedings from the 1930s and 1940s that "practically all testators transferred their property 'within the family.'").

[statute]."[62] In fact, other considerations, besides the decedent's probable intent, may be of greater importance when formulating a distributive scheme in the absence of a will.[63] However, regardless of the relative importance of intestacy laws' policy goals, one "policy of the intestacy laws is family protection."[64]

The primary way in which intestacy laws achieve their family-protection goal is by directing assets to the family. Specifically, distributive schemes under intestacy direct assets to the surviving relatives in order "to protect the financially dependent family."[65] If the primary economic provider dies, leaving immediate family members who are unaccustomed to providing for themselves, intestacy laws protect these family members by distributing the decedent's assets to them. "Protection of financially dependent family members benefits not only an intestate's dependents who inherit under well-crafted intestacy statutes, but also other family members and the public at large, upon whom the burden of supporting the dependents would otherwise fall . . . ."[66] Therefore, directing assets to closely related family members not only protects the decedent's immediate family by alleviating their economic need but also protects the decedent's extended family by reducing the burden of support that would ultimately fall on more remote

62. Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1313 (1969).

63. *See* Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 324 (1978) ("If society's well-being requires a distributive pattern different from the determined wishes of intestate decedents, the decedents' wishes should be subordinated."); Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 946 (1995) ("[S]atisfying a decedent's presumed intentions seems relatively unimportant in comparison to more compelling goals of intestacy schemes, such as producing a fair pattern of distribution among surviving family members and serving society's interests.").

64. DUKEMINIER ET AL., *supra* note 6, at 64; *see* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 27 (2000) ("Intestacy statutes attempt to distribute a decedent's property to the decedent's family, either because the intestacy statute strives to approximate the decedent's wishes or because society has decided that intestacy statutes should benefit and strengthen families if a decedent does not express a contrary wish in a will."); Jennifer Seidman, Comment, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 225 (2004) ("Intestacy law's social and economic aims reflect an intent to protect financially and emotionally committed family units.").

65. Lomenzo, *supra* note 63, at 947.

66. *Id.*

relatives.

Intestacy laws also protect familial interests by fulfilling the expectations of the family members who benefit from the distribution. The vast majority of decedents that execute a will leave their estates to family members.[67] As a result, relatives form expectations that a decedent's estate will be distributed within the family.[68] By distributing the decedent's estate to these family members and fulfilling their expectations, intestacy laws avoid dissatisfaction among surviving relatives and promote family harmony.[69]

The final way that intestacy laws protect familial interests is by treating the family as a single economic unit.

> Consistent with . . . the partnership theory of marriage, intestacy law logically assumes that those to whom a person is economically tied during life would be those for whom the decedent intended to provide upon death. [Additionally], this emphasis implies that long-term economic investments and decisions often reflect a desire to provide for self and family both in the present and in the future.[70]

Therefore, intestacy laws protect a group of relatives as a single economic unit, thereby "promot[ing] and encourag[ing] the nuclear family."[71]

In sum, intestacy laws provide the plan of distribution of a decedent's estate in the absence of a will and promote probate's family-protection policy by distributing the estate's assets to the decedent's relatives. Intestacy laws distribute a decedent's estate so effectively that courts have occasionally questioned the appropriateness of permitting

67. *See supra* notes 60–61 and accompanying text.

68. *See* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 587–88 (1999) (explaining that family members form expectations of inheritance through knowledge "of the cultural tradition of passing wealth intergenerationally" and because "a devise flows naturally as the final act of reciprocity in an ongoing relationship").

69. *See* Lomenzo, *supra* note 63, at 946-47 ("Producing a fair pattern of distribution among surviving family members involves creating a pattern 'that the recipients believe is fair and thus does not produce disharmony within the surviving family members . . . .'" (quoting LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 71 (1991))).

70. Seidman, *supra* note 64, at 222 (citation omitted).

71. Lomenzo, *supra* note 63, at 947.

testamentary dispositions.[72] Indeed, the Supreme Court of California once declared that "[i]n the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise . . . that the policy of permitting wills at all is often gravely questioned."[73] Despite this skepticism, California follows the majority's lead and allows decedents to dispose of their assets through a will.[74] Nonetheless, this testamentary freedom does not diminish probate's interest in family protection. However, before one can see how probate protects the families of decedents who exercise their testamentary power, one must first understand the process of will execution and the role of formal requirements in that process.

II. WILL EXECUTION

A. Freedom of Testation & Testamentary Intent

"The first principle of the law of wills is freedom of testation."[75] In other words, the law generally allows a testator to dispense his estate at death as he so chooses. However, in order to ensure that the will disposes of the estate in accordance with the decedent's intent, a testator must meet certain basic requirements to exercise this testamentary power. First and foremost, the testator must possess a minimum level of mental capacity.[76] The Restatement of Property explains that a testator "must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property."[77] Furthermore, the testator must be able to understand these three elements

72. *See* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1049 (1994) ("[O]ne occasionally glimpses a belief that intestacy should have a privileged status.").

73. *In re* Walker's Estate, 42 P. 815, 818 (Cal. 1895).

74. *See In re* Silva's Estate, 145 P. 1015, 1016 (Cal. 1915) ("A will is always to be interpreted so as to prevent intestacy if such interpretation is reasonably possible."); *In re* Buechley's Estate, 128 A. 730, 731 (Pa. 1925) ("[A] construction [of a will] should be adopted that avoids intestacy.").

75. Langbein, *supra* note 8, at 491.

76. *See* Pyle v. Sayers, 34 S.W.3d 786, 789 (Ark. Ct. App. 2000) ("Every person of sound mind and disposing memory has the untrammeled right to dispose of his or her property by will as he or she pleases."); *see also* DUKEMINIER ET AL., *supra* note 6, at 146.

77. RESTATEMENT (THIRD) OF PROPERTY § 8.1(b) (2003); *see also* M.I. Marshall & Ilsley Trust Co. of Ariz. v. McCannon (*In re* Estate of Killen), 937 P.2d 1368, 1371 (Ariz. Ct. App. 1996); Cunningham v. Stender, 255 P.2d 977, 981 (Colo. 1953).

in relation to each other and must be capable of forming a desire to dispose of his property based on this understanding.[78] This level of mental capacity is relatively low and is generally recognized as a lower level of capacity than that required to enter into a contract.[79] If a testator lacks this requisite mental capacity, he is unable to formulate a testamentary intent and, therefore, is unable to create a valid will.[80]

Second, the testator must be free of fraud and undue influence. This requirement ensures that the will carries out the testator's intent and not the wishes of someone else.[81] Fraud and undue influence are similar yet distinct concepts.[82] "Fraud occurs where the testator is deceived by a misrepresentation and does that which the testator would not have done had the misrepresentation not been made."[83] Unlike fraud, which is the result of deception, undue influence is the result of coercion and occurs when one "subverts the will of the testator and replaces the will of the testator with that of the one doing the influencing."[84] A will subject to either fraud or undue influence does not reflect the testamentary intent of the decedent, and, consequently, the law does not recognize such will as valid. In sum, the doctrines of mental capacity, undue influence, and fraud are "ostensibly designed to ascertain whether the testator formulated testamentary intent." [85] If a decedent lacked mental capacity or was the victim of undue influence or fraud, he did not form a testamentary intent or validly exercise testamentary power.

B. Will Formalities

Though testamentary freedom has consistently been heralded as the bedrock of America's law of wills,[86] testators have never been free to

78. *See* 1 PAGE ON THE LAW OF WILLS § 12.21 (William J. Bowe et al. eds., 2003) [hereinafter PAGE ON WILLS].

79. *See* DUKEMINIER ET AL., *supra* note 6, at 145–46. "Legal capacity to make a will requires a greater mental competency than is required for marriage, however." *Id.* at 146.

80. *See* PAGE ON WILLS, *supra* note 78, § 12.46.

81. *See* Joseph W. deFuria, Jr., *Testamentary Gifts Resulting From Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 201 (1989).

82. *See* Madoff, *supra* note 24, at 576 ("[T]he undue influence doctrine is akin to the doctrines of fraud and duress in its attempt to protect testators' rights to freely dispose of their property.").

83. DUKEMINIER ET AL., *supra* note 6, at 186.

84. Madoff, *supra* note 24, at 576 n.12.

85. Leslie, *supra* note 10, at 236–37.

86. *See In re* Caruthers' Estate, 151 S.W.2d 946, 948 (Tex. Civ. App. 1941) ("A

create their wills in whatever method they so choose.[87] In addition to possessing the requisite mental capacity and exercising testamentary power free of fraud and undue influence, a testator must adhere to several formal requirements in the execution process to validly create a will. These formal requirements have ancient roots and eventually found their way into American law through the colonial adoption of the English common law and through the influence of English statutes on American legislators.[88] Though the formal requirements of will execution vary somewhat from state to state, all states require three basic formalities for the valid execution of a will.[89] These basic formalities include that the will be in writing, contain the testator's signature, and be attested by at least two witnesses.[90]

All states require that the will be in writing,[91] and usually, both typed and handwritten documents are sufficient.[92] Additionally, all states require that the testator sign the will.[93] In most states, however, another may sign the will if expressly directed by the testator.[94] States differ on

testator's right to bestow his property by will at death is as absolute as his right to convey it during his life time."); WAGGONER ET AL., *supra* note 37, at 581 ("Freedom of disposition is the hallmark of the American law of succession."); J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177, 183 (1985) ("The principle of testamentary freedom is the cornerstone of the Anglo-American law of succession . . . ."); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989) ("[C]ourts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy."); Langbein, *supra* note 8, at 491; Spitko, *supra* note 10, at 278 ("The ideal of testamentary freedom grounds the law of testation.").

87. *See* Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 365 ("'[F]ree testation' refers only to the choice of people who are to share in one's estate; it does not apply to the manner in which the document of gift is drawn up.").

88. *See* PAGE ON WILLS, *supra* note 78, § 2.18; DUKEMINIER ET AL., *supra* note 6, at 202 (describing the influence of the Statute of Frauds and the Wills Act of 1837); Beyer, *supra* note 1, at 418–19.

89. DUKEMINIER ET AL., *supra* note 6, at 202.

90. *Id.*

91. PAGE ON WILLS, *supra* note 78, § 19.5; *see, e.g.*, FLA. STAT. ANN. § 732.502 (West 2005); LA. CIV. CODE ANN. art. 1577 (2000); KY. REV. STAT. ANN. § 394.040 (LexisNexis 1999).

92. PAGE ON WILLS, *supra* note 78, § 19.6.

93. *Id.* § 19.40; *see, e.g.*, § 732.502(1)(a)(1); N.J. STAT. ANN. § 3A:3-2 (West 2004); TEX. PROB. CODE ANN. § 59(a) (Vernon 2007).

94. PAGE ON WILLS, *supra* note 78, § 19.45 ("All but four states, Connecticut, Louisiana, New Jersey and Utah, now authorize and provide for a signature by some other person for the testator . . . ."); *see, e.g.*, § 394.040; N.C. GEN. STAT. § 31-3.3(b) (2007).

where the testator's signature must be located, as some states require that the testator sign the will at the end of the document[95] and others allow the testator to sign anywhere on the will.[96] Finally, "[m]ost of the American states have adopted statutes which require attestation and subscription by witnesses."[97] This formality requires that the witness observe the execution of the will and sign the testamentary document.[98] Most states require two attesting witnesses, while a minority of states require three.[99] In sum, a testator has great latitude in planning the substance of his testamentary scheme, but the testator does not enjoy the same freedom during the process of executing the testamentary document because he must comply with the statutorily-prescribed formal requirements.

C. Functions of Will Formalities

Will formalities "should have a clearly demonstrable affirmative value [because they] always present[] the possibility of invalidating perfectly genuine and equitable transfers that fail to comply with [them]."[100] Courts and scholars have recognized that the value of will formalities stems from their ability to aid the court in distributing an estate in accordance with the testator's wishes.[101] In their classic article *Classification of Gratuitous Transfers*, Gulliver and Tilson identified three functions of formalities that aid courts in fulfilling testamentary intent.[102] These functions include the ritual, evidentiary, and protective functions.[103] Almost thirty-five years later, Professor Langbein added to Gulliver and Tilson's analysis by identifying the channeling function of will formalities.[104] Generally speaking, these four "functions . . . assure

95. PAGE ON WILLS, *supra* note 78, § 19.57; *see, e.g.*, § 732.502(1)(a)(1).
96. PAGE ON WILLS, *supra* note 78, § 19.54; *see, e.g.*, § 3A:3-2.
97. PAGE ON WILLS, *supra* note 78, § 19.73, at 138.
98. *Id.* § 19.74.
99. *Id.* § 19.75. Louisiana requires the presence of two witnesses as well as that of a notary public. LA. CIV. CODE ANN. art. 1577 (2000).
100. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 9 (1941).
101. *See In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991) ("The primary purpose of [will] formalities is to ensure that the document reflects the uncoerced intent of the testator."); Langbein, *supra* note 8, at 492.
102. Gulliver & Tilson, *supra* note 100, at 5–13.
103. *Id.*
104. *See* Langbein, *supra* note 8, at 493–94.

that [the testator's] estate really is distributed according to his intention."[105]

i. The Ritual Function

Will formalities force testators to consider the consequences of will formation and impress upon them the legal nature of the process.[106] Formalities collectively encourage testator contemplation through "the general ceremonial" nature they provide the will-formation process and "preclude[] the possibility that the testator was acting in a casual or haphazard fashion."[107] Langbein described this function as the cautionary function and explained that will formalities "caution the testator[] and . . . show the court that he was cautioned."[108]

As will formalities collectively serve the ritual function, several formal requirements do so individually. The writing requirement prohibits informal oral declarations of testamentary intent and forces the testator to expend more thought and effort when planning a testamentary scheme.[109] Furthermore, "[t]he signature [requirement] tends to show that the instrument was finally adopted by the testator as his will and [also tends] to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling."[110] Lastly, the presence of witnesses during the will-execution process adds to the overall ceremonial nature of the event. In total, will formalities fulfill their ritual function by making it "difficult to complete the [will-execution process while] remain[ing] ignorant that one is making a will."[111]

ii. The Evidentiary Function

Determining the validity of wills has inherent evidentiary obstacles.

105. *Id.* at 492.
106. *Id.* at 495. "One purpose of many of the forms is to impress the testator with the seriousness of the testatment, and thereby to assure the court 'that the statements of the transferor were deliberately intended to effectuate a transfer.'" *Id.* (citing Gulliver & Tilson, *supra* note 100, at 3.
107. Gulliver & Tilson, *supra* note 100, at 5.
108. Langbein, *supra* note 8, at 495.
109. *See id.*
110. Gulliver & Tilson, *supra* note 100, at 5 (footnote omitted).
111. Langbein, *supra* note 8, at 495.

First, the testator is usually dead at the time of probate.[112] Consequently, the court lacks the opportunity to question the testator to determine his testamentary intent.[113] Second, long periods of time may lapse between will execution and probate.[114] During this time witnesses may die or their memories may fade.[115] Will formalities are "unusual probative safeguards" that aid in overcoming these obstacles by providing "evidence of testamentary intent . . . in reliable and permanent form."[116]

Perhaps the most useful formality in providing evidence of testamentary intent is the requirement that the will be in writing. "A written statement of intention may be ambiguous, but, if it is genuine and can be produced, it has the advantage of preserving in permanent form the language chosen by the testator to show his intent."[117] Furthermore, the requirement of attestation before disinterested observers provides the court potential witnesses to testify regarding the testator's competency and potential problems of undue influence.[118] Finally, the general signature requirement "produce[s] evidence of genuineness,"[119] and the requirement that the signature appear at the end of the document provides evidence that no one added to the will after its execution.[120]

iii. The Protective Function

Will formalities "protect the testator against several things including:

112. Gulliver & Tilson, *supra* note 100, at 6. Statutes in three states now allow probate during a testator's life. *See* ARK. CODE ANN. § 28-40-202 (2004); N.D. CENT. CODE § 30.1-08.1-01 (2004); OHIO REV. CODE ANN. § 2107.081 (LexisNexis 2007). "These statutes authorize a person to institute during life an adversary proceeding to declare the validity of a will and the testamentary capacity and freedom from undue influence of the person executing the will." DUKEMINIER ET AL., *supra* note 6, at 156.

113. Gulliver & Tilson, *supra* note 100, at 6.

114. *See* Langbein, *supra* note 8, at 492 (explaining that "years, even decades" may pass from the date of formation to the time of probate).

115. Gulliver & Tilson, *supra* note 100, at 6.

116. *Id.*

117. *Id.*

118. *See* Langbein, *supra* note 8, at 493.

119. *Id.*; *see* Gulliver & Tilson, *supra* note 100, at 7 ("The requirement of the testator's signature also has evidentiary value in identifying, in most cases, the maker of the document.").

120. *See* Gulliver & Tilson, *supra* note 100, at 7 ("[T]he requirement that the will be signed at the end has an evidentiary purpose of preventing unauthenticated or fraudulent additions to the will made after its execution by either the testator or other parties."); Langbein, *supra* note 8, at 493 ("The requirement that [the testator] sign at the end prevents subsequent interpolation.").

fraud, undue influence, mistake, and fraudulent suppression of a valid will after the testator dies."[121] The attestation formality provides the bulk of this protection by requiring witnesses who can deter potential "scoundrels" from interfering in the execution of the will and who can later testify as to the validity of the process.[122] Additionally, the formality requirement that witnesses be disinterested serves the protective function because witnesses who are not testamentary beneficiaries will "not be financially motivated to join in a scheme to procure the execution of a spurious will by dishonest methods."[123] Finally, the writing requirement protects against fraud by preventing testators from making oral testamentary dispositions that leave no evidence of testamentary intent and that are more susceptible to fraud than written wills.[124]

iv. The Channeling Function

As Professor Langbein explained, "[c]ompliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills."[125] In other words, by requiring every testator to comply with specific formal requirements, all wills tend to look the same. As a result, courts more easily identify and interpret the decedent's testamentary intent.[126] Additionally, will formalities encourage testators to seek legal advice to ensure compliance with the formal requirements.[127] This further standardizes most wills and therefore advances the channeling function.[128]

121. JOEL C. DOBRIS & STEWART E. STERK, RITCHIE, ALFORD AND EFFLAND'S ESTATES AND TRUSTS CASES AND MATERIALS 194 (2003).
122. *Id.*
123. Gulliver & Tilson, *supra* note 100, at 11.
124. *See* Miller, *supra* note 3, at 274.
125. *See* Langbein, *supra* note 8, at 494.
126. *Id.*
127. *See* Friedman, *supra* note 87, at 368.
128. *See* Langbein, *supra* note 8, at 494 & n.26.

D. Compliance with Will Formalities

i. Strict Compliance

"The traditional rule is that the formalities required by the Wills Act must be complied with strictly, and almost any mistake in execution will invalidate the will."[129] Though will formalities are seen as aids in determining testamentary intent,[130] some courts have required strict compliance with will formalities even when fully satisfied that the decedent intended to create a will.[131] For example, the West Virginia Supreme Court of Appeals heard a case in which the decedent failed to sign his will in the presence of the statutorily-required witnesses and also failed to observe the witnesses sign the will.[132] The court ruled the will invalid and held that the "mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of [the statutorily-prescribed will formalities]."[133]

ii. Substantial Compliance

Requiring strict compliance with will formalities has drawn much criticism. One dissenting judge criticized a majority opinion strictly applying the state's will formalities by writing, "[t]he majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance."[134] Likewise, scholars have long criticized will formalities for undermining the decedent's testamentary intent in situations where the defect in will execution appears trivial.[135] As a

129. DUKEMINIER ET AL., *supra* note 6, at 225.

130. *See* Langbein, *supra* note 8, at 492.

131. *See* Miller, *supra* note 3, at 222 ("In [some] cases, there is no question as to the testator's intent, but probate is denied because . . . of failure to comply with [will] formalities.").

132. Stevens v. Casdorph, 508 S.E.2d 610, 611–12 (W. Va. 1998).

133. *Id.* at 613.

134. *Id.* (Workman, J., dissenting).

135. *See* Langbein, *supra* note 8, at 489 ("The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential."); *see also* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1145–47 (1993); Mann, *supra* note 72, at 1036 ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding—always ruefully, of course—that the document clearly represents the

result, in the mid-1970s proponents of substantial compliance began to urge for the abandonment of the "mistaken and needless" adherence to "harsh and relentless formalism."[136]

Professor Langbein, the "architect" of substantial compliance,[137] proposed that a court should validate a will that does not comply with every will formality if "the noncomplying document express[es] the decedent's testamentary intent, and [if] its form sufficiently approximate[s] Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act."[138] Thus, the substantial compliance doctrine does not simply ignore will formalities but applies them purposively.[139] If a decedent intended to create a will and if the ritual, evidentiary, protective, and channeling functions were served, a court should deem that the formal requirements were fulfilled and recognize the document as a validly-executed will.[140] The movement toward substantial compliance has received significant support from academics, but the reaction of courts is less clear.[141] Some jurisdictions have explicitly adopted the substantial compliance doctrine,[142] but even these courts have noted that "resort to the substantial compliance doctrine is infrequent at best."[143]

iii. The Dispensing Power

Displeased with courts' applications of the substantial compliance doctrine, Professor Langbein began to favor the adoption of a dispensing power, under which the court would focus not on whether the purposes of will formalities were accomplished but solely on whether the decedent intended to create a will.[144] Based on observations from Australia's use

wishes and intent of the testator.").

136. *See* Langbein, *supra* note 8, at 489.

137. DUKEMINIER ET AL., *supra* note 6, at 233.

138. Langbein, *supra* note 8, at 489.

139. *See* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 6–7 (1987).

140. *See id.*

141. *See* Bonfield, *supra* note 4, at 1906 ("[While] American courts ha[ve] given Langbein's plea for adopting substantial compliance a cool reception, academic commentators are nearly uniform in their support for a broad remedy for validating wills that do not conform to the letter of will execution statutes." (footnote omitted)).

142. *See, e.g.*, *In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991).

143. *In re* Will of Ferree, 848 A.2d 81, 90–91 (N.J. Super. Ct. Ch. Div. 2003).

144. *See* Langbein, *supra* note 136, at 7.

of both the substantial compliance doctrine and the dispensing power, Langbein concluded that "courts read into their substantial compliance doctrine a near-miss standard, ignoring the central issue of whether the testator's conduct evidenced testamentary intent."[145] Therefore, he suggested that courts should not attempt to deem defective wills as compliant with will formalities but should simply dispense with formal requirements when testamentary intent is clear.[146]

The dispensing power has garnered some support. For instance, the Uniform Probate Code ("UPC") codified the dispensing power by adopting a harmless error standard.[147] Under the harmless error standard, a writing that lacks the formal requirements of will formation may nonetheless constitute a validly executed will "if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent's will."[148] Six states[149] and the Restatement of Property[150] have adopted the UPC's harmless error standard.

III. FORMAL EXECUTION AS FAMILY PROTECTION

Now that the background of will execution and probate's family-protection policy has been explained, one can appreciate the role a formal will-execution process plays in accomplishing family protection. Formal will execution furthers probate's family-protection policy in a number of ways, including making the exercise of testamentary power difficult, encouraging testators to think about specific family needs when creating a testamentary plan, fostering efficient administration of the probate estate, and providing the testator a therapeutic experience during a potentially stressful time. This list is not necessarily comprehensive, as a formal will-execution process may further probate's family-protection policy in various other ways.

145. *Id.* at 53.
146. *See id.* at 6–7.
147. *See* UNIF. PROBATE CODE § 2-503 (1993).
148. *Id.*
149. DUKEMINIER ET AL., *supra* note 6, at 234 (identifying "Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah" as having adopted the UPC harmless error standard).
150. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (1999) ("A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.").

A. Barriers to the Exercise of Testamentary Freedom

In 1975, Professor Langbein suggested that courts might use will formalities as a means to invalidate testamentary dispositions to beneficiaries whom they disfavor.[151] Langbein "suspect[ed] that in construing whether particular conduct amounted to compliance with a required formality, the courts are silently looking to other factors, including the testator's 'fairness' to his family and others."[152] Invalidation of disfavored wills would then serve a family-protection policy by directing the estate through an intestacy statute to the decedent's relatives.[153] However, Langbein "confidently reject[ed] the notion that judicial insistence on literal compliance with the Wills Act formalities is a surrogate for unexpressed hostility to free testation" because he believed courts examined wills with a "presumption against intestacy" and because most wills better provide for a surviving spouse than do most intestacy statutes.[154]

However, Professor Langbein's dismissal of "a disguised policy preference for the family protection system of . . . intesta[cy]"[155] has not gone unchallenged. Professor Melanie Leslie asserts that "courts impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator's assets, usually a financially dependent spouse or persons related by blood to the testator."[156] Furthermore, she argues that "[c]ourts impose and enforce this moral duty to family through the covert manipulation of doctrine,"[157] the precise argument that Professor Langbein rejected twenty years earlier. In support of her argument, Professor Leslie studied a number of probate cases and discovered numerous instances where courts validated one will leaving the bulk of the estate to family members and invalidated another will disinheriting close relatives, despite both wills equally complying with the required formalities.[158] Professor Leslie concluded

151. *See* Langbein, *supra* note 8, at 499–500.
152. *Id.* at 500.
153. *See id.* at 499–500 (describing the family-protection function of intestacy).
154. *Id.* at 500.
155. *Id.*
156. Leslie, *supra* note 10, at 236.
157. *Id.*
158. *See id.* at 258–68 (describing a number of cases in which courts inconsistently applied will formalities apparently to further a family-protection policy, including cases involving the requirement that the testator sign the will and the requirement that witnesses sign the will in the presence of the testator).

that "the decisions often hinge on whether the testator has preferred distant or non-relatives over more immediate family and [whether] the court can[] infer a sufficient justification."[159]

Regardless of whether courts purposefully manipulate the formal requirements of will execution to further a family-protection policy or blindly apply them with no hidden agenda, will formalities are barriers to the valid execution of a will. Put differently, absent formalities, testators would more easily exercise their testamentary power.[160] Compliance with will formalities can be a tedious process that requires close attention and often the time and money to consult an attorney.[161] As a result, "will making may seem daunting and the formality and ritualized nature of the venture may act as a barrier for people who might otherwise make a will."[162] In addition to deterring people from attempting will execution, formalities also frustrate the testamentary intent of some of those who do try to create a valid will. Critics of strict compliance routinely argue that will formalities frustrate testamentary intent because of the burdens they place on prospective testators,[163] and courts invalidate wills that they acknowledge clearly express the testator's intent.[164]

159. *Id.* at 260.

160. *See id.* at 274 (reporting that by eliminating some formal requirements in the will-execution process "the drafters [of the Revised UPC] believe they have removed a needless barrier to the probate of documents that embody testamentary intent").

161. *See In re* Taylor's Estate, 100 A.2d 346, 348 (N.J. Super. Ct. App. Div. 1953) ("Indeed one not so advised may easily trip in the execution of those formalities, and it would rather seem that the Legislature may have intended him therefore to look to counsel for assistance."); Friedman, *supra* note 87, at 368 ("[will formalities] encourage the use of middlemen (lawyers)"); Gulliver & Tilson, *supra* note 100, at 18 ("Doctrinal barriers to the effectuation of intent are raised most frequently by the requirements of the statutes of wills, because they are more complex and less likely to correspond with instinctive human actions . . . .").

162. DOBRIS & STERK, *supra* note 121, at 194–95.

163. *See* Langbein, *supra* note 8, at 489; Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 579 (2007) ("[O]ver-enforcement of Wills Act formalities . . . can result in frustration of testator intent."); Mann, *supra* note 72, at 1036.

164. *See* Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 39 (1985) ("Courts routinely invalidate wills because of minor defects in execution, even when no one questions that the will represents the wishes and intent of the testator."); *see, e.g.*, *In re* Estate of Peters, 526 A.2d 1005, 1015 (N.J. 1987)) ("If the testator has not complied with the statutes which regulate the execution of the will, his intention to pass his property by will has no legal effect; and it will be ignored by the courts." (quoting PAGE ON WILLS, *supra* note 78, § 19.4); Murray v. Lewis, 121 A. 525, 527 (N.J. Ch. 1923) ("A writing may express clearly the wish or intention of a decedent, but if the statutory formalities have not been followed, it is not a valid will,

Despite the burdens and potentially harsh consequences that accompany will formalities, all states require that testators comply with certain formal requirements in the will-execution process.[165] The ritual, evidentiary, protective, and channeling functions of will formalities partially explain this restriction on will formation.[166] However, the law's distrust of testators to adequately provide for their families, as exemplified by numerous family-protection measures such as the elective spousal share and pretermitted heir statutes,[167] may also provide an explanation of why the law dissuades some potential testators from creating wills and makes the execution process difficult for those who do. While the law provides testators great freedom to dispose of their estates as they so desire, the law also places formal requirements in the will-execution process, which serve as potential stumbling blocks in the valid exercise of that testamentary freedom. If the testator fails to hurdle these barriers by not complying with the statutorily mandated will formalities, the probate court will invalidate the will. Without a will, the decedent's estate passes through intestacy and ultimately ends up in the hands of the decedent's family.[168] Therefore, because it ushers decedents into intestacy, the formal execution process can be seen as one of probate's family-protection mechanisms, alongside the elective spousal share and pretermitted heir statutes.

B. Promotion of Family Tailored Estate Planning

That will formalities serve as barriers to valid will execution illustrates probate's distrust of a testator's ability to adequately provide for his family. However, most testators do not disinherit their relatives.[169] In fact, most wills direct the testator's estate primarily to close family members.[170] Therefore, probate's distrust of a testator's ability to adequately provide for his family's needs is not based fully on

because it cannot be a question of what he intended to do, but whether he has actually followed the provisions of the statute."); *In re* Will of McElwaine, 18 N.J. Eq. 499, 504 (N.J. Prerog. Ct. 1867) ("I have no doubt that this paper was intended by the testatrix as her will, and that but for the [will formality] statute, it ought to have effect given to it so far as she had legal power to make a will.").

165. *See supra* Part II.B.
166. *See supra* Part II.C.
167. *See supra* Part I (describing in detail probate's family-protection policy).
168. *See supra* Part I.D.
169. *See supra* notes 60–61 and accompanying text.
170. *See supra* notes 60–61 and accompanying text.

the possibility that a testator may disinherit family members but is also founded upon a concern regarding how the testator dispenses assets within the family. If a testator wants to dispose of his estate through a validly executed will, probate attempts to ensure that the testator disposes of his assets in a manner that best serves the needs of his family.

One traditional justification of freedom of testation is that it allows the testator to create an intelligent estate plan.[171] Every family is different, and only the testator knows the particular needs of his family.[172] The law acknowledges these familial differences and provides the testator the freedom to dispense his estate as he so chooses, which allows the testator to take into account the special needs of his family when creating his testamentary scheme.[173] The roots of this justification of testamentary freedom, which scholars have characterized as the "'father knows best' hypothesis,"[174] extend as far back as the eighteenth century when "Blackstone argued [that] restrictions on testamentary freedom 'prevented many provident fathers from dividing or charging their estates as the exigence of their families required.'"[175]

The father-knows-best hypothesis has received some criticism. Scholars have argued that while the law allows the testator to form a family-tailored estate plan, there is no guarantee that the testator will consider the special needs of his family.[176] "[C]ertain factors militate against the proposition" that "testamentary freedom typically gives rise to intelligent estate planning."[177] One such factor is the possibility that

171. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12 (1992).

172. *See* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 44 (1995) ("Certainly, benefactors can be expected to possess the information and insight into their families' affairs necessary to distribute their wealth in a rational manner."); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 484 (2006) ("[T]he testator knows his family members better than anyone else . . . .").

173. *See* Hirsch & Wang, *supra* note 171, at 12; Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 177 (1996) ("Testamentary freedom . . . allows the testator to weigh the varying needs of his family."); Tate, *supra* note 172, at 484 ("[T]he testator . . . can distribute property in accordance [with] each family member's needs.").

174. Hirsch & Wang, *supra* note 171, at 12.

175. Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 126–27 (2006) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *12).

176. Hirsch & Wang, *supra* note 171, at 13 ("Father may know best; but, alas, we have no assurance that in practice he will do what is best." (emphasis omitted)).

177. *Id.*

testators may put little thought into the process of creating an estate plan.[178] If the testator does not fully consider the special needs of his family, he likely will not create an intelligent testamentary scheme. However, while merely providing the testator the freedom to develop a testamentary scheme does not assure that he will develop a family-tailored estate plan, the presence of formalities in the will-execution process can be seen as a mechanism to encourage the testator to consider his family's specific needs.

Formalities transform the will-execution process into a ceremony.[179] The testator must perform certain tasks; witnesses must observe the testator's actions, and oftentimes legal assistance is needed to complete the process.[180] This ceremonial nature of the process encourages the testator to fully consider the consequences of the testamentary disposition of his estate, including not only the legal nature of the process, but also the importance of how the will disposes of his estate.[181] Certainly, this ritual function of will formalities does not ensure that the testator will create a family-tailored estate plan, but it does encourage the testator at least to consider the consequences of his actions. Absent will formalities, the testator may hastily create a will without carefully considering how best to devise the estate's assets. However, the formal nature of the will-execution process encourages the testator to fully consider the needs of his family. After contemplating these needs, the testator may be more likely to "direct property to those family members, close or distant in relation, that have the greatest need."[182]

C. Efficient Administration of the Probate Estate

Mandatory formal requirements in the will-execution process and testators' use of lawyers to meet those requirements[183] standardize the vast number of wills that courts probate each year.[184] The result of this channeling function of will formalities is "considerable uniformity in the organization, language, and content of most wills."[185] In turn,

178. *Id.*; Rosenbloum, *supra* note 173, at 177; Tate, *supra* note 172, at 484.
179. *See supra* Part II.C.i.
180. *See supra* Part II.B.
181. *See supra* Part II.C.i.
182. Turnipseed, *supra* note 31, at 760.
183. *See* Friedman, *supra* note 87, at 368.
184. *See supra* Part II.C.iv.
185. Langbein, *supra* note 8, at 494.

standardization and uniformity of wills promotes the efficient administration of the testator's estate, which furthers probate's family-protection policy in two ways.

First, the more efficiently the court probates the estate, the less the estate's funds are depleted through payment of attorney fees and court costs. "Much is heard [today] about the excessive cost of probate—or, as some have put it, the high cost of dying."[186] In fact, studies have found that, even in relatively simple cases, attorney fees alone can consume as much as five percent of the testator's estate.[187] In addition to attorney fees, the administrative costs of probate include "probate court fees, the commission of the personal representative, . . . and sometimes appraiser's and guardian ad litem's fees."[188] The channeling function of will formalities and the resulting efficiency of the probate process help keep down these court costs and legal fees. Absent formalities in the will-execution process, the probate court would spend more time and effort interpreting the will.[189] Consequently, legal fees and court costs would consume an even greater portion of the estate. Therefore, because the majority of testators leave the bulk of their estates to close relatives,[190] will formalities protect the family by preserving the estate's assets through the channeling function. With less consumption of the estate by probate's administrative costs, more money is put in the hands of the family.

186. DUKEMINIER ET AL., *supra* note 6, at 37; *see* Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 108 (2007) ("[N]on-lawyers warn [people] of the incredible expenses, delays, and frustration their heirs will experience when dealing with probate . . . ."); Ben Kusmin, Note, *Swing Low, Sweet Chariot: Abandoning the Disinterested Witness Requirement for Advance Directives*, 32 AM. J.L. & MED. 93, 100 (2006) (reporting that "[n]umerous trust arrangements have . . . been developed to avoid the delay and expense of probate"); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116 (1984) ("The probate system has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse.").

187. *See* DUKEMINIER ET AL., *supra* note 6, at 37 (describing a 1988 study of ten large states); *see also* David S. Lande, *Explaining Legal Fees for Probate*, 60 N.Y. ST. B.J. 40, 44 (1988) ("[T]he national average cost of probate was roughly about . . . five (5%) percent of the gross estate . . . ." (emphasis omitted)); Garry A. Pearson & Chad E. Pearson, *Introduction to Probate and Estate Planning*, 74 N.D. L. REV. 177, 181 (1998) (reporting "hav[ing] seen advertisements claiming that up to twelve percent of a decedent's estate may be consumed by probate costs.").

188. DUKEMINIER ET AL., *supra* note 6, at 37.

189. *See supra* Part II.C.iv.

190. *See supra* notes 60–61 and accompanying text.

The second way in which efficient administration of the probate estate furthers probate's family-protection policy is simply by reducing the amount of time the court takes to probate the estate. The probate process can be a difficult time for the family members of the decedent. Though some elderly clients may possess unfounded fears of probate, exemplified by the common sentiment of not "'want[ing] [their] famil[ies] to go through the horrors of probate,'"[191] practicing lawyers do recognize the toll probate can have on families. One practitioner has observed that "[i]t's hard to lose someone you love, and then deal with all of the financial and legal complexities resulting from a probate."[192] Another explained that "[t]he months following a death in the family can be hard—not only because of the grief and sorrow you feel, but also because there are many components related to the estate that must be dealt with."[193] The channeling function of will formalities provides will uniformity, ease in judicial interpretation, and, consequently, efficient administration of the estate.[194] By fostering this swift probate process, will formalities protect families by quickly removing a distraction from the lives of still grieving family members.

D. The Psychological Effect of the Ceremony

Estate planning and the preparation of a will can be a very difficult process because it forces the testator to contemplate his own death.[195] No one enjoys thinking about and preparing for such things.[196] In fact,

191. Jeffrey McKenna, *Legal Issues for the Elderly: Probate—What is it?*, SENIOR SAMPLER WEEKLY MAGAZINE, Oct. 3, 2007, *available at* http://web.archive.org/web/20071014055109/http://seniorsampler.com.

192. StaceyRomberg.com, http://www.staceyromberg.com/legal-services.htm (last visited Oct. 10, 2009).

193. SallyMihlon.com, http://web.archive.org/web/20080116151337/http://www.sallymihlon.com/CM/Custom/TOCPracticeAreaDescriptions.asp (last visited Oct. 10, 2009).

194. *See supra* Part II.C.iv.

195. *See* Beyer, *supra* note 1, at 419 ("[M]any individuals procrastinate making a will since the execution of a will is an admission of their mortality."); *see also* Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 348 (1979) ("It is perhaps true that facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life.").

196. *See* Beyer, *supra* note 1, at 419 ("Most people do not enjoy thinking about death, especially their own."); Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed By Death*, 55 IOWA L. REV. 376, 377 (1969) ("[D]eath is an unpleasant fact to modern man.").

"personal death is a thought modern man will do almost anything to avoid."[197] Consequently, a testator may experience great anxiety and other psychological and emotional effects from contemplating his own mortality.[198] Absent some other coping mechanism, the testator's family would be left to help the testator deal with this anxiety, a responsibility that may be quite burdensome and may be difficult to fulfill given that the family may experience the same anxiety from contemplating the testator's death.

Fortunately,

> [a] proper ceremony, coupled with sensitive and tactful counseling by the attorney during the entire estate planning process, may make it easier for clients to cope with the inevitability of death. . . . [I]t may [also] help clients become "more aware of their lives [and] more reconciled to what is real in their lives . . . ."[199]

Therefore, by requiring testators to perform the ceremony of proper will execution and by encouraging consultation with an attorney to meet these formal requirements,[200] will formalities provide the testator an opportunity to receive counseling from a lawyer, which can relieve some of the fear and anxiety of estate planning.[201] Furthermore, the ceremony

197. Shaffer, *supra* note 196, at 377.

198. *See* Beyer, *supra* note 1, at 419–20. Beyer identified seven consequences of death on which testators may focus, including that:

> (1) they no longer can have any life experiences;
> (2) they may be uncertain as to what will happen to them if there is a life after death;
> (3) they may be afraid of what will happen to their bodies after death;
> (4) they realize they will no longer be able to care for their dependents;
> (5) they realize that their death will cause grief to their relatives and friends;
> (6) they realize that all their plans and projects will come to an end; and
> (7) they may be afraid that the process of dying might be painful.

Id.

199. *Id.* at 420 (quoting Shaffer, *supra* note 196, at 377).

200. *See* Friedman, *supra* note 87, at 368.

201. *See* Shaffer, *supra* note 196, at 376 ("Lawyers who advise clients and draft documents in the 'estate planning' practice are counselors in more than the traditional legal sense. They are also counselors in the therapeutic or developmental sense."); Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 345, 377 (1969) (suggesting "that advertent, informed planning for property settlement is therapy for death anxiety").

itself can provide great intangible satisfactions about the significant decisions that accompany the exercise of testamentary power.[202] In sum, will formalities' ceremonial function furthers probate's family-protection policy by reducing the burden of consoling a testator, who is dealing with the negative psychological and emotional effects of estate planning that would inevitably fall upon the testator's family.

The formal will-execution process promotes probate's family-protection policy in various ways, but the law does not require testators to navigate a formal process in all contexts. While the law requires a formal process of will execution, testators are able to revoke their wills in a relatively informal manner. Scholars have argued that this difference in the execution and revocation processes makes little sense.[203] Conversely, this article argues that when viewed in the context of probate's family-protection policy, the rationale for requiring a formal execution process while providing an informal revocation process becomes clear. However, to appreciate how informal revocation promotes probate's family-protection policy, one must first understand the nature of the revocation process.

IV. WILL REVOCATION

"[O]ne of the inherent characteristics of a will is its revocability."[204] Because of a will's ambulatory nature, a testator who still possesses the mental capacity required to create a will may alter, amend, or completely invalidate a will.[205] All states allow revocation by two primary methods—revocation by a subsequent writing and revocation by a physical act.[206]

202. Beyer, *supra* note 1, at 420. In Herman Melville's classic novel *Moby-Dick*, Ishmael describes the psychological effect of creating a will: "After the ceremony was concluded upon the present occasion, I felt all the easier; a stone was rolled away from my heart." HERMAN MELVILLE, MOBY-DICK OR, THE WHALE 249 (Penguin Books 2003) (1851).

203. *See* Langbein, *supra* note 139, at 29 n.133.

204. PAGE ON WILLS, *supra* note 78, § 21.1.

205. *See* Cozzort v. Cunningham, 130 S.E.2d 171, 173 (Ga. Ct. App. 1963) ("It is fundamental that a person having the right to dispose of his property by will may, during his lifetime while he retains testamentary capacity, change, modify or completely revoke a previously executed will . . . .").

206. DUKEMINIER ET AL., *supra* note 6, at 251.

A. Revocation by Subsequent Writing

The first method of revocation is the execution of a subsequent writing, which may either explicitly or implicitly revoke a will.[207] A subsequent writing may explicitly revoke a will by declaring the testator's intent to revoke.[208] If a document that explicitly revokes a will provides instructions for the testamentary disposition of the decedent's estate, the estate will be distributed accordingly.[209] However, if the testator simply revokes the will without providing further instruction, the decedent's estate will pass through intestacy.[210] In either case, the writing must satisfy the formal requirements of will execution.[211] If the decedent does not follow the requirements of the will formalities in executing the revocatory document, the revocation is invalid and the decedent's estate will pass according to the terms of the will.[212]

In all states, a testator may implicitly revoke a will with a subsequent writing by executing a will that is inconsistent with a previous will.[213] A presumption arises that the testator intended revocation of the previous will if the subsequent will completely disposes of the decedent's estate.[214] However, if the subsequent will does not make a complete disposition, courts treat the subsequent writing as a codicil and still recognize the original will as valid.[215]

207. PAGE ON WILLS, *supra* note 78, § 21.33; *see* UNIF. PROBATE CODE § 2-507(a) (1993) ("A will or any part thereof is revoked . . . by executing a subsequent will that revokes the previous will or part expressly or by inconsistency . . . .").

208. PAGE ON WILLS, *supra* note 78, § 21.43.

209. *Id.*

210. *Id.*

211. *See id.* § 21.1 ("It is almost universally required that the instrument be a formal one executed with the same formalities required in the making of a will."); *see also* Kronauge v. Stoecklein, 293 N.E.2d 320, 320 (Ohio Ct. App. 1972) (holding that will formalities "must be strictly complied with in order to make [a] revocation effective").

212. *See* Flagle v. Martintelli, 360 N.E.2d 1269, 1271–72 (Ind. Ct. App. 1977); Sanchez v. Martinez (*In re* Estate of Martinez), 985 P.2d 1230, 1232 (N.M. Ct. App. 1999) ("[T]he trial court erred in concluding that the decedent revoked his will, and did so because this instrument purporting to do so does not satisfy the will requirement . . . .").

213. PAGE ON WILLS, *supra* note 78, § 21.1; *see* UNIF. PROBATE CODE § 2-507(a) (1993) ("A will or any part thereof is revoked: (1) by executing a subsequent will that revokes the previous will or part . . . by inconsistency . . . .").

214. DUKEMINIER ET AL., *supra* note 6, at 252; *see* UNIF. PROBATE CODE § 2-507(c) (1993).

215. DUKEMINIER ET AL., *supra* note 6, at 252; *see* UNIF. PROBATE CODE § 2-507(d) (1993).

Revocation by subsequent writing can be seen as a formal process because subsequent revocatory writings must satisfy the formal requirements of will execution. Like the difficulty testators may experience when executing a will,[216] testators may find revocation by subsequent writing difficult because of the formal nature of the process. However, testators who want to revoke their wills can avoid this difficulty. Revocation by physical act provides testators an informal revocatory process and a much easier path to revocation.

B. Revocation by Physical Act

The Statute of Frauds allowed a testator to revoke a will "by burning[,] cancelling[,] teareing or obliterating the [document]."[217] Today, most states have adopted revocation statutes containing substantially similar language.[218] To achieve revocation through this process, a testator must not only perform the destructive act but must also intend to revoke the will.[219] In other words, a testator cannot accidentally revoke a will through a destructive act.[220]

Revocation by destruction is a relatively simple and informal process. Despite the significance of revocation and unlike the process of revocation by subsequent writing, a testator may revoke a will by physical act without adhering to the formal requirements of will execution. As a result, the testator may achieve revocation without executing a written, signed, and witnessed document.

V. INFORMAL REVOCATION AS FAMILY PROTECTION

Compared to the formal process of will execution, revoking a will by physical act is a relatively informal process. Revocation occurs if the testator destroys the will with an intent to revoke. The testator need not complete any of the formal requirements of will execution. With the

216. *See supra* Part III.A.

217. Act for Prevention of Fraud and Perjuries, 29 Car. 2, c. 3, § 6 (1676).

218. *See* MCGOVERN & KURTZ, *supra* note 46, § 5.2 ("The slight differences in wording among the statutes are not usually important."); *see also* UNIF. PROBATE CODE § 2-507(a)(2) (1993) (permitting revocation by "burning, tearing, canceling, obliterating, or destroying the will or any part of it").

219. PAGE ON WILLS, *supra* note 78, § 21.4; *see* UNIF. PROBATE CODE § 2-507(a)(2) (1993).

220. *See* PAGE ON WILLS, *supra* note 78, § 21.28.

absence of formal requirements arises the question of why the law places barriers on will execution while leaving the way to will revocation relatively free and clear. This article asserts that, like the formal execution process, an informal revocation process promotes probate's family-protection policy.

A. Channeling Testators to Intestacy

i. The Purpose of the Destructive Act

Originally, the "essential" element of will revocation was the testator's intent to revoke.[221] Destruction of the will was not needed, and a testator could revoke a will by a simple oral declaration.[222] "This loose method of revocation resulted in many bold attempts to defeat wills by false testimony concerning the declaration of the testator."[223] In part because of the fraud that accompanied this method of revocation, England adopted the Statute of Frauds in 1676, which altered the available methods of revocation so that "a written will disposing of either real estate or personal property could not be revoked by mere parol."[224] The prohibition of oral revocation found its way into American law, and today no state recognizes will revocation based solely on an oral

221. *In re* Grattan's Estate, 138 P.2d 497, 499 (Kan. 1943).

222. *See* PAGE ON WILLS, *supra* note 78, § 21.2; Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1038 (1992) (providing a brief history of English revocation law).

223. *In re Grattan's Estate*, 138 P.2d at 499. The English case of *Cole v. Mordaunt* illustrates the fraud that accompanied oral revocation:

> In that case, an elderly testator had married a woman many years his junior. The testator had written a will three years before his death that devised a large portion of his estate to charity. After the testator's death, the widow "induced nine persons to perjure themselves" and testify that the testator had, while on his deathbed, orally revoked the will and made a new nuncupative will leaving his estate to his wife. When the fraudulent scheme was uncovered on appeal, the nuncupative will was rejected at probate. One judge who presided over the case, Lord Nottingham, "remarked that he hoped 'to see one day, a law, that no written will should be revoked but by writing.'"

Whitman, *supra* note 222, at 1038 (quoting ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 9 (1928) (footnotes omitted)).

224. *In re Grattan's Estate*, 138 P.2d at 499–50; *see* Statute for the Prevention of Fraud and Perjuries, 1676, 29 Car. 2, c. 3, § 6 (Eng.); Whitman, *supra* note 222, at 1038.

declaration by the testator.[225] With this historical background in mind, one can view the destructive act requirement as a formality designed to fulfill the protective, evidentiary, ritual, and channeling functions associated with other will formalities.

The destructive act's fulfillment of the protective function is closely tied with its fulfillment of the evidentiary function. The requirement's main objective was to protect against fraud, but the destructive act accomplished this by providing evidence of the testator's intent to revoke. An oral revocation leaves the probate court with nothing but the testimony of witnesses to determine whether the testator intended revocation, but a destructive act provides the court the remnants of a destroyed will or at least the absence of a will as evidence of revocatory intent. Additionally, the requirement of a destructive act to some extent achieves the ritual and channeling functions of will formalities. Like the will-execution requirements of a written document accompanied by the testator's signature, the requirement of a destructive act could be seen as a ceremonial process forcing the testator to devote some minimal amount of thought to the consequences of revocation. If allowed to orally revoke a will, a testator could impulsively make a revocatory declaration, but the destructive act requirement forces the testator to take the time to find the will and actually go through with the destructive act. Additionally, a destructive act channels all nonwritten revocations into a similar form, which the court may be more able to recognize and interpret than a mere oral revocation.

ii. Informal Revocation v. Formal Revocation

Though the requirement of a destructive act partially fulfills the functions of will formalities, a destructive act does not do so as effectively as the formal requirements of will formation, namely a written, signed, and witnessed document.[226] To begin with, while the law places prohibitions on oral revocation to prevent fraud, revocation by destruction does not fulfill the protective function as well as other formal

225. *In re Grattan's Estate*, 138 P.2d at 500; *see* DUKEMINIER ET AL., *supra* note 6, at 252 ("On the assumption that oral revocations would open the door wide for fraud, an oral declaration that a will is revoked, without more, is inoperative in all states.").

226. Langbein, *supra* note 8, at 522 n.117 (stating that a "revoking instrument usually serves the evidentiary, cautionary and channeling policies far better than unwitnessed physical mutilation").

requirements.[227] Though fraudulent destruction may be more difficult than mere fraudulent testimony, the possibility of fraudulent destruction may be great, as those family members who stand to benefit from revocation and the subsequent distribution of the decedent's estate through intestacy may have ample opportunity to destroy a testator's will.[228] A formal process, requiring compliance with will formalities to revoke a will, would place additional burdens that a wrongdoer would have to overcome to fraudulently revoke a will.[229] Additionally, revocation by physical act provides minimal protection from undue influence. In order for someone to unduly influence the testator to revoke a will by physical act, the person's influence over the testator must only be brief because of the ease with which the testator may perform the revocation. Contrarily, the influencer would have to overcome the testator for an extended period of time to achieve revocation if the testator were required to execute a formal written document. In sum, the formalities of will execution would better protect the testator from fraud and undue influence than the sole requirement of a destructive act.

Likewise, a written, signed, and witnessed revocation would provide more evidence of the testator's intent to revoke than does a destructive act. "Effective physical revocation can be done in private—without witnesses and without evidence about the circumstances of revocation."[230] Whereas revocation by destruction provides the court

227. *See* Langbein, *supra* note 139, at 29 n.133 (suggesting that a "[p]hysical act without more must be ambiguous on . . . whether the act was . . . done by the testator" and that "virtually all the permitted modes of revocation by physical act are intrinsically more ambiguous than revocation by writing" (quoting LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON THE MAKING AND REVOCATION OF WILLS 67–68 (1981))).

228. This possibility of destruction is especially true when wills are left in the possession of the testator. Those that stand to benefit from the testator's estate passing through intestacy, namely the testator's family, are the ones who will likely find the will upon the testator's death. If these family members are disinherited by the will, they may take the opportunity to destroy the will and benefit through intestacy. *See* Dickey v. Malechi, 6 Mo. 177, 188 (1839) (stating that "[t]he relations of a testator are most likely to be . . . around and about his person and house during his last illness" and are "the persons most likely to be interested in suppressing the will"); *see, e.g.*, *In re* Washington's Estate, 56 So. 2d 545, 546–47 (Fla. 1952).

229. *See supra* Part II.A.

230. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 562 (1990); *see* Livingston W. Cleaveland, J., In re *Augur, Memorandum of Decision*, 9 YALE L.J. 259, 263 (1900) ("It is ordinary experience that wills, the legal execution of which necessarily involves more or less publicity, are frequently destroyed in secret . . . .").

with only the destroyed document or the absence of the will as evidence of the testator's intent, a written document would provide the court with a clear statement of the testator's intent. Furthermore, the attestation requirement would provide the testimony of disinterested witnesses who observed the revocation.[231] Additionally, the destruction of a will does not necessarily suggest that the testator intended revocation, as "[m]utilation can always be accidental."[232] A formal written revocation will never be executed inadvertently and, therefore, provides the court with better evidence of revocatory intent.[233]

Moreover, revocation by destruction does not satisfy the ritual function of will formalities to the same extent as does revocation by a written instrument. In the will-execution process, the requirements that the testator write out his desired testamentary scheme and sign the document in the presence of witnesses impresses upon the testator the significance of his actions.[234] Revocation by physical act does not force the testator to contemplate his actions in the same way. A testator's desire to revoke a will may be fleeting, brought about by a beneficiary's actions that on second thought would not warrant revocation.[235] Revocation by destruction allows the testator to act on these whims and to revoke a will the instant the thought enters the testator's mind. By contrast, a mandatory formal-revocation process requiring the testator to execute a written revocatory document would provide testators greater opportunity to second-guess the motivation behind their revocatory desire.

Finally, a formal revocation process would more effectively satisfy the channeling function of will formalities. A testator can attempt to destroy a will by a number of different means and to varying degrees. For example, the Uniform Probate Code authorizes revocation by "burning, tearing, canceling, obliterating, or destroying the will or any

231. *See supra* Part II.B.

232. Langbein, *supra* note 8, at 522 n.117; *see, e.g.*, Bakhaus v. Bakhause (*In re* Bakhaus' Estate), 102 N.E.2d 818, 819–20 (Ill. 1951).

233. *See* Langbein, *supra* note 139, at 29 n.133 (quoting LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON THE MAKING AND REVOCATION OF WILLS 67–68 (1981)) (suggesting that revocation by physical act is more ambiguous than a formal written revocation and provides better evidence of animus revocandi).

234. *See supra* Part II.C.

235. *See* Nicholas v. Kershner, 20 W. Va. 251, 257 (1882) (explaining that a testator can be "fickle and inconstant, and at one time . . . favor[] one or more of his children, and at other times dislike[] [them] and favor[] others").

part of it."[236] This variation in destructive techniques can result in the court having to interpret whether a particular act constitutes destructive revocation or whether destruction of only a portion of a document constitutes destruction of the entire will.[237] A requirement that all revocations be a written, signed, and witnessed document would channel all revocations into a similar form. This uniformity would allow for greater ease in judicial interpretation of revocations and would eliminate some of the uncertainty that accompanies revocation by physical act.

The law's lack of concern with fulfilling the functions of will formalities in the revocation process is clear. Indeed, a more formal revocation process would better fulfill the protective, evidentiary, ritual, and channeling functions. Just as the law makes will execution difficult because the testator is removing his estate from intestacy and possibly distributing assets to nonfamily members,[238] the law makes the process of revoking a will simple in order to encourage testators to eliminate their self-designed distributive schemes. Once the will is revoked, the testator's estate passes through intestacy, which ensures distribution of the estate to family members. By providing this informal revocation process, the law encourages revocation and intestacy, and furthers probate's family-protection policy.

B. The Presumption of Revocation

In addition to allowing revocation of a will through the informal process of destruction, the law presumes that the testator intended revocation if the will is destroyed and found in the testator's belongings.[239] This presumption of revocation is a burden-shifting

236. UNIF. PROBATE CODE § 2-507(a)(2) (1993).

237. For example, if a testator attempts to revoke a will by burning it, the court may have to decide what degree of burning is sufficient to revoke the will by destruction. *See* Payne v. Payne, 100 S.E.2d 450, 450–52 (Ga. 1957) (finding insufficient destruction to revoke a will that had only been singed at the edges). Courts must interpret evidence of destruction by other means as well. *See In re* Estate of Sweetland, 710 N.Y.S.2d 668, 670 (App. Div. 2000) (finding no revocation of a will containing staple holes); *see also* PAGE ON WILLS, *supra* note 78, §§ 21.6–.14 (describing the multitude of destructive means a testator may use to revoke a will).

238. *See supra* Part III.A.

239. PAGE ON WILLS, *supra* note 78, § 29.140; *see* True v. Funk (*In re* Johannes' Estate), 227 P.2d 148, 151 (Kan. 1951); Bonner v. Borst (*In re* Will of Bonner), 214 N.E.2d 154, 155 (N.Y. 1966); Orgill v. Roberts (*In re* Tyler's Estate), 112 N.E.2d 668, 671 (Ohio 1953).

mechanism that requires the proponent of the will to prove that the testator did not intend revocation.[240] Not only does the law presume that the testator intended revocation when the will is found destroyed, the law also presumes that the testator destroyed the will and intended revocation when the will cannot be found at all.[241] This presumption arises only when a will that was known to be in the possession of the testator cannot be found upon the testator's death because if the testator did not have possession of the will prior to death, he could not have performed the destructive act.[242]

These presumptions set revocation and, consequently, intestacy as the default position. Rather than presuming that a will is valid and requiring proof of revocatory intent, the law presumes revocation and requires proof that the testator did not intend revocation. The traditional justification for presuming revocation is that testators commonly destroy wills with revocatory intent. Therefore, a presumption of revocation more frequently fulfills the testator's intent than would a presumption of validity.[243] However, these presumptions of revocation can also be viewed as family-protection mechanisms. By presuming the testator intended to revoke a testamentary document, probate courts increase the likelihood that the testator's estate will pass through intestacy. Without a

240. *See* Harrison v. Bird, 621 So. 2d 972, 973 (Ala. 1993).

241. Gayla D. Lee, Note, *Wills—Revocation—A Presumption of Revocation in Duplicate Will Cases*—In re Shaw, *572 P.2d 299 (Okla. 1977)*, 12 CREIGHTON L. REV. 729, 731–32 (1978); *see* Porter v. Sheffield, 208 S.W.2d 999, 1019 (Ark. 1948); Mimms v. Hunt, 458 S.W.2d 759, 760 (Ky. 1970); Goodwin v. Goodwin (*In re* Estate of Goodwin), 18 P.3d 373, 376 (Okla. Civ. App. 2000).

242. Lee, *supra* note 241, at 732.

243. *Id.* ("Because of the ambulatory character of the will, and its availability to the testator, it is reasonable to presume that the unfound will was intentionally destroyed."). PAGE ON WILLS, *supra* note 78, § 29.139 explains the presumption of revocation for lost wills:

> This presumption has been adopted as the rule which conforms most [with] the actual facts of human life. While wills are occasionally destroyed by disinherited heirs, they are much more frequently destroyed by testator[s], with the intention of revoking them. This presumption, therefore, takes the normal case as the standard, and requires affirmative evidence of the abnormal case.

Id.

PAGE ON WILLS goes on to explain the rationale for the presumption of revocation when a will is found destroyed: "The reason for this presumption is the same as that for the presumption which arises where the will cannot be found on [the] testator's death, namely that it is more reasonable to suppose that the will was destroyed or canceled by testator in his lifetime." *Id.* § 29.140.

presumption of revocation, a will contestant would have to prove invalidity of the will, and if the contestant were unable to do so, the decedent's estate would be distributed according to the terms of the will. By presuming revocatory intent on the part of the decedent, the contestant will more likely prevail and the decedent's estate will more likely be distributed to the decedent's family though intestacy.

The presumption's role in family protection becomes clearer when one considers the possible consequences of leaving a will in the possession of the testator. First, when a validly executed will is left in the testator's possession, lawyers instruct the client to keep the will in a safe place, such as a safe deposit box or on file with the clerk of the probate court.[244] However, sometimes a testator "take[s] too seriously the lawyer's advice on safeguarding the will, with the result that the will cannot be located after death."[245] In addition to overzealously protecting the will, "[t]he testator . . . may [simply] misplace his will through carelessness, forgetfulness, or neglect."[246] Second, the testator may not take adequate measures to protect the will, and the will may be destroyed accidently.[247] Finally, destruction of the will may be intentional but not constitute a revocatory act, as "wills are occasionally destroyed by disinherited heirs."[248] In all of these contexts, the testator did not intend revocation of the lost or destroyed will, yet the presumption of revocation may make it difficult for the proponent of the will to prove the will's validity and prevent the decedent's estate from passing through intestacy.

"Where the presumption arises . . . the proponent of the will has the burden of overcoming it."[249] However, "[o]vercoming the presumption of revocation . . . is not a simple matter."[250] The articulated burden of

244. *See* Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 124–25 (1984); *see also* DUKEMINIER ET AL., *supra* note 6, at 218.

245. DUKEMINIER ET AL., *supra* note 6, at 218–19.

246. John E. Walsh, Jr., Comment, *Lost Wills and the Register of Wills*, 111 U. PA. L. REV. 450, 452 (1963).

247. *See id.*; Langbein, *supra* note 8, at 522 n.117.

248. PAGE ON WILLS, *supra* note 78, § 29.139; *see* Johnston, *supra* note 244, at 124 ("If, for example, a will was kept in a desk at home, someone who would stand to gain by intestacy might locate the will and mutilate or destroy it during the testator's last illness or immediately after death.").

249. Daul v. Goff, 754 So. 2d 847, 848 (Fla. Dist. Ct. App. 2000).

250. Julie Leonard Smith, Note, *Allowing the Probate of Duplicate Wills: Overcoming the Presumption of Revocation and Conflicts with the Statute of Wills*, 9 CONN. PROB. L.J.

proof necessary to rebut the presumption of revocation varies from state to state, but generally it is "greater than a mere preponderance [of the evidence]."[251] For instance, in California a will proponent may rebut the presumption of revocation by providing "substantial evidence" that the testator did not intend revocation.[252] A will proponent can satisfy this burden by showing "that [the] testator 'at all times referred to his will as being in existence and at no time made any indication of a desire to revoke or destroy it.'"[253] Similarly, in Iowa, a will proponent must present "clear, satisfactory and convincing evidence" to rebut the presumption.[254] Additional states require various other standards of evidence that are greater than a mere preponderance of the evidence to overcome the presumption.[255] Regardless of the words used to describe the burden of proof necessary to rebut the presumption of revocation, a will proponent must overcome a substantial obstacle to persuade the court to admit the will to probate and to prevent the decedent's estate from passing through intestacy.

The difficulty a will proponent faces is illustrated by the high evidentiary burdens present in cases where revocation may be least likely. Even when an intestate beneficiary had strong incentive and ample opportunity to destroy a will, most courts require more than "[t]he mere fact that a contestant had an opportunity to destroy the will" to "overcome the presumption that it was destroyed by the testator with the intent to revoke."[256] For example, an Illinois court refused to find the

87, 88 (1994).

251. PAGE ON WILLS, *supra* note 78, § 29.139.

252. Wilson v. Caskey (*In re* Estate of Obernolte), 153 Cal. Rptr. 798, 801 (Ct. App. 1979).

253. Citizens Nat'l Trust & Sav. Bank of L.A. v. Blank (*In re* Estate of Hoffman), 290 P.2d 669, 673 (Cal. Dist. Ct. App. 1955).

254. Iowa Wesleyan Coll. v. Jackson, 86 N.W.2d 126, 129 (Iowa 1957).

255. *See In re* Estate of Tallant v. Tallant, 644 So. 2d 1189, 1190 (Miss. 1994) (requiring "clear and convincing" evidence); *In re* Dalbey's Estate, 192 A. 129, 130 (Pa. 1937) (requiring "positive, clear, and satisfactory evidence").

Different phrases have been used by the courts to describe the character of proof necessary to overcome the legal presumption of revocation in cases of this kind, such expressions as 'conclusive proof', 'the clearest and most stringent proof', and other combinations of words having similar meaning. We feel that these various phrases reach the same point, which is for the evidence to be sufficient to overcome the presumption it must be clear and convincing leading to the conclusion that the will was not revoked.

Sutherland v. Sutherland, 66 S.E.2d 537, 539 (Va. 1951).

256. Peters v. Melville (*In re* Estate of Travers), 589 P.2d 1314, 1315 (Ariz. Ct. App. 1978); *see* Daul v. Goff, 754 So. 2d 847, 848 (Fla. Dist. Ct. App. 2000); Moos v. Moos (*In re* Moos' Estate), 110 N.E.2d 194, 197 (Ill. 1953) ("[I]t will not be presumed that a

presumption rebutted in a case where the will was found by the decedent's niece, who was also the sole intestate heir.[257] Not only would the niece have received an additional $10,000 by the decedent dying intestate, but she also had ample opportunity to destroy the will, as she found both the decedent's body and will and was the only person living with the decedent at the time of his death.[258] Despite the niece's motive and opportunity to destroy the will, the court did not find sufficient evidence to overcome the presumption of revocation.[259]

In sum, the law presumes that a testator revoked a will if the will was destroyed or lost, despite the possibility that a will could be destroyed or lost for reasons other than revocation. Though a proponent of a lost or destroyed will may overcome the presumption, rebuttal is difficult because courts set high evidentiary standards. All of this works together to promote probate's family-protection policy by making revocation more likely and by increasing the chances that the testator's estate will pass to family members through intestacy. Indeed, the Supreme Court of Illinois has openly acknowledged its preference for intestacy and the role the presumption of revocation plays in facilitating intestate distribution when the court stated that because "a will . . . permits a person to dispose of his property contrary to the way the [intestacy] law prescribes, . . . the presumption against the validity of a will which has been mutilated should not be lightly set aside."[260]

lost will has been destroyed by any other person, without the knowledge of or authority of the testator, even though such person may have had the motive and the opportunity . . . .").

257. Taylor v. Cummings (*In re* Estate of Riner), 207 N.E.2d 487, 488–90 (Ill. App. Ct. 1965).

258. *Id.* at 488–89. Another example of a court finding that the presumption was not rebutted is a case where the decedent's step-granddaughter received a greater portion of the estate by the deletion of another beneficiary from the will. The presumption was not rebutted even though the step-granddaughter had access to the safe deposit box containing the will. *In re* Hildebrand's Estate, 76 A.2d 202, 204 (Pa. 1950). Courts have found the presumption or revocation rebutted in extreme circumstances. For instance, the Supreme Court of Florida found the presumption rebutted in a case where two disinherited brothers ransacked their mother's room in search of will. After the incident, other family members could not find the decedent's will, but the court was satisfied that the testator did not intend a revocation. *In re* Washington's Estate, 56 So. 2d 545, 546 (Fla. 1952).

259. *Taylor*, 207 N.E.2d at 490.

260. Bakhaus v. Bakhaus (*In re* Bakhaus' Estate), 102 N.E.2d 818, 822 (Ill. 1951).

C. Partial Revocation by Physical Act

Though most states allow a testator to partially revoke a will,[261] in several states partial revocation by a physical act is prohibited.[262] This prohibition of partial revocation is explained as an attempt to prevent fraud, as the person who may perform the revocatory act may also benefit from partial revocation.[263] A second rationale is that "canceling a gift to one person necessarily results in someone else taking the gift, and this 'new gift'—like all bequests—can be made only by an attested writing."[264] These two explanations are not the only plausible rationales for the prohibition of partial revocation by a physical act. Probate's family-protection policy may provide an additional explanation.

Perhaps states prohibit a testator from partially revoking a will because, unlike full revocation, partial revocation is not completely backstopped by intestacy. When a testator completely revokes a will, the decedent's estate will pass through intestacy if he does not execute a subsequent will.[265] However, if a testator only partially revokes a will, the remaining provisions of the will are still valid. As a result, the decedent's estate will not necessarily pass through intestacy but will be distributed according to the remaining terms of the will. If a will contains no residuary clause, which disposes of all of the decedent's estate that is not specifically or generally devised,[266] the assets disposed of by the revoked provisions will pass through intestacy. However, this is an unlikely occurrence because most testators have a residuary clause.[267] If the will does contain a residuary clause, the assets covered

261. *See* Frederic S. Schwartz, *Models of Will Revocation*, 39 REAL PROP. PROB. & TR. J. 135, 149–50 (2004); *see, e.g.*, IOWA CODE ANN. § 633.284 (West 1992); KY. REV. STAT. ANN. § 394.080 (LexisNexis 1999); R.I. GEN. LAWS § 33-5-10 (1995); WIS. STAT. ANN. § 853.11 (West 2002).

262. DUKEMINIER ET AL., *supra* note 6, at 258; *see, e.g.*, IND. CODE ANN. § 29-1-5-6 (LexisNexis Supp. 2008).

263. DUKEMINIER ET AL., *supra* note 6, at 258.

264. *Id.*

265. *See supra* Part IV.

266. BLACK'S LAW DICTIONARY 483 (8th ed. 2004). A specific devise is "[a] devise that passes a particular piece of property" and a general devise is "[a] devise . . . of a specific amount of money or quantity of property, that is payable from the estate's general assets." *Id.* at 483–84.

267. *See* Park Lake Presbyterian Church v. Estate of Henry, 106 So. 2d 215, 222 (Fla. Dist. Ct. App. 1958) ("While there are few absolutes in this area, we can notice judicially, if we need, that contemporary wills more often than not use the residuary clause to carry out the most important provisions."); *In re* Fetter's Estate, 30 A.2d 647, 650 (Pa. Super.

by the revoked provisions will not pass through intestacy but will be distributed to the residual beneficiary.[268]

Therefore, states may be reluctant to allow partial revocation by physical act because the assets disposed of by the revoked provisions will not likely pass through intestacy. Absent the benefit of additional property passing through intestacy to the decedent's family, the law may consider the possibility of fraud a sufficient justification to prohibit partial revocation by destruction. Complete revocation by physical act invites the same threat of fraud. However, the law weighs this threat with the benefit of distributing assets to the decedent's family and ultimately values the promotion of probate's family-protection policy.

CONCLUSION

In recent years, scholars have strongly criticized will formalities and their tendency to frustrate testamentary intent. This criticism has initiated changes both in the nature of the required will formalities and in the method by which courts judge compliance with the formal requirements. Absent from the scholarly debate, however, is the role these formal requirements play in probate's overarching family-protection policy. As this article argues, the formal execution process serves a family-protection policy by making the exercise of testamentary power difficult, by encouraging testators to develop a family tailored estate plan, by aiding in the efficient administration of the probate estate, and by helping the testator cope with the stress that accompanies contemplation of one's mortality. However, while the law forces testators to navigate the formal execution process to create a will, testators may easily revoke a will through the informal process of revocation by physical act.

Ct. 1943) (reporting that a "residuary clause . . . is present in most wills"); Brown v. Brown, 74 S.E. 135, 136 (S.C. 1912) (describing the residuary clause as "that most common feature" of wills).

268. *See Brown*, 74 S.E. at 136 ("The increase of the residuary estate which may result from the obliteration is not a new testamentary disposition, but a mere incidental consequence resulting from the exercise of the power conferred on the testator by the statute."); Wills—*Partial Revocation and Interpretation of Remaining Language*, 103 U. PA. L. REV. 988, 988–89 (1955) (explaining that the general rule that prohibits a partial revocation that results in an increase of gift "is subject to the exception of increases in the residue or increases in the shares of residuary legatees resulting from the striking of one or more residuary legatees which are upheld on the rationale that the residue is the 'catch-all' for all undisposed property") (footnotes omitted).

This discrepancy is ostensibly paradoxical. Indeed, the incongruence between the formal execution process and the informal revocation process has garnered criticism from the scholarly legal community. However, when viewed in connection with probate's family-protection policy, the rationale for allowing testators to informally revoke their wills becomes clear. The law makes it difficult to exercise testamentary power out of concern that testators may not provide for their family through their wills. Likewise, the law provides testators a relatively easy revocation process because without a will the estate passes to the decedent's family through intestacy. In sum, one of probate's primary concerns is family protection. Both the formal execution process and the informal revocation process are among many probate mechanisms designed to further this family-protection policy.

Perhaps probate should not be concerned with family protection. Perhaps the importance of testamentary freedom outweighs the family-protection function of will formalities. In either case, the informalization of the will-execution process may be justified. However, before more state legislatures reduce the complexity of will formation by eliminating various formal requirements and before courts universally heed the call for the abandonment of strict compliance, the role of the formal execution process in furthering probate's family-protection policy should be considered.