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## There's a Will, But No Way--Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?

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# THERE'S A WILL, BUT NO WAY—WHATEVER HAPPENED TO THE DOCTRINE OF TESTAMENTARY FREEDOM AND WHAT CAN (SHOULD) WE DO TO RESTORE IT?

*by Irene D. Johnson\**

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## I. INTRODUCTION

Since the earliest time when people were legally able to dispose of property by will, humans have enjoyed the notion that although their earthly bodies would cease to exist, their wishes and directions, at least in respect to their earthly possessions, would be followed.<sup>1</sup> Many must have taken comfort in this expectation, especially if the intent of the testamentary plan was to protect a loved one or to promote a cherished plan for the property. Moreover, courts and lawyers would assure such planners that a testator could dispose of his property as he wished so long as his will comported with statutory

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1. Regarding the historical basis of freedom of testation in the United States, Professor Tritt has provided the following summary:

The purpose of the laws of succession is simple—in a private property system, there must be a procedure to facilitate the transfer of an individual's private property upon death. The very existence of private property thus perpetuates the need for the law of succession . . . . Embedded within this notion of private property and the orderly transfer thereof is the principle that individuals have the freedom (or right) to control the disposition of their property during life and at death. American society has long recognized the value inherent in protecting an individual's ability to acquire and transfer private property. Testamentary freedom is derived from this well-established property law right and is accordingly the governing principle underlying American succession law. Just as individuals have the right to accumulate, consume, and transfer personal property during life, individuals generally are, and should be, free to control the disposition of personal property at death. Thus, testamentary freedom can be viewed simply as one stick in the bundle of rights referred to as property rights.

Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280–81 (2010) [hereinafter Tritt I].

requirements,<sup>2</sup> adhered with public policy,<sup>3</sup> and obeyed with the dreaded Rule Against Perpetuities.<sup>4</sup>

Many have referred to the freedom of testation as “[t]he first principle of the law of wills.”<sup>5</sup> However, the freedom of testation doctrine is a thing of smoke and mirrors, lulling testators into a false sense of security about their testamentary plans when they might have been better served by searching for an alternative method that would be more likely to accomplish their posthumous goals (the question of whether such a method exists will be explored later in this article). Numerous commentators have noticed that testamentary plans that conform to social norms, such as providing for members of the decedent’s family, are likely to be upheld; while wills that seek to dispose of a testator’s property in a less conventional manner are often defeated on various grounds<sup>6</sup>—lack of perfect conformance to execution formalities,<sup>7</sup> existence of

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2. Effective wills must follow the formalities required by the testamentary laws of the state having jurisdiction over the estate of the testator; such statutes are usually referred to as the Statutes of Wills. *See, e.g.*, CONN. GEN. STAT. § 45a-250 to 252 (2010); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 to .2 (McKinney 2010). Moreover, most state statutes provide that a decedent may not effectively disinherit a surviving spouse unless the spouse has agreed to such disinheritance, often designated as elective share or forced share statutes. *See, e.g.*, N.J. STAT. ANN. § 3B:8-1 (West 2010); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2010).

3. WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON THE LAW OF WILLS* 494 (W.H. Anderson Co., 5th ed. 2005) (explaining that a condition in a will that violates public policy will not be legally effective).

4. The common law Rule Against Perpetuities, as stated by Professor Grey, is that “[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942). Some states have codified the rule. *See, e.g.*, CONN. GEN. STAT. § 45A-491 (2010). Other states have also provided for mitigation of the rule in some circumstances. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (reduction of excessive age contingency to 21 years); § 9-1.3(b) (presumption that “the creator intended the estate to be valid”); § 9-1.3(c) (presumption that when creator referred to a person’s spouse, he meant someone alive at the creation of the interest, thus eliminating the “unborn widow” problem); § 9-1.3(d) (presumption that where creator conditioned the vesting of the estate on the happening of an event such as the administration of his estate he intended that the event would occur within twenty-one years of the creation of the interest, thus eliminating the “administrative contingency” problem); § 9-1.3(e) (presumption that a female could not produce children before the age of twelve or after the age of fifty-five and that a male could not produce children before the age of fourteen, thus eliminating the “fertile octogenarian” and “precocious toddler” problems) (McKinney 2010).

5. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

6. *See* Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 429 (2001); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 572–76 (1997); Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783, 1784–85 (2009); Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 REAL PROP. PROB. & TR. J. 577, 583 (2003); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1075 (1999) [hereinafter Spitko I]; 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, 279–80 (1999) [hereinafter Spitko II]; E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1075 (1999) [hereinafter Spitko III]; Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. KAN. L. REV. 245, 246 (2010). For discussions related to the conflict between the decedent’s testamentary direction and the desire of the decedent’s surviving family members, oftentimes with the result of the decedent’s wishes being subverted, *see* Frances H. Foster, *Individualized Justice in Disputes Over Dead Bodies*, 61 VAND. L. REV.

undue influence,<sup>8</sup> and lack of capacity on the part of the testator.<sup>9</sup> Moreover, if provisions of a will in which a non-traditional estate plan is put forth are found to be ambiguous or to require construction (as seems to be more frequently the case than when “mainstream” plans are considered), courts will frequently find that the ambiguity defeats the will or that the ambiguity should be interpreted in a manner that favors the decedent’s nuclear or extended family.<sup>10</sup>

There have always been limits on the effectiveness of certain testamentary provisions. No matter what testators provide for in their wills, they cannot protect their estate from taxes<sup>11</sup> or the claims of their creditors.<sup>12</sup> Provisions in a will that amount to waste in that they do not benefit a living person, such as throwing the testator’s money into the ocean or tearing down the testator’s home for no reason other than testator’s desire that no one else live in it, are not given legal effect.<sup>13</sup> Almost all jurisdictions have statutory provisions that

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1351, 1357–61 (2008) [hereinafter Foster I], and Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 983–89 (1999).

7. Courts often find that the existence of a non-traditional testamentary plan is highly probative on the issue of undue influence. *See, e.g.*, *Bailey v. Clarke*, 561 N.E.2d 367, 368 (Ill. App. Ct. 1990) (holding a will invalid that left property to the testator’s cousin, rather than his heirs-at-law, on grounds that he did not acknowledge his will, despite marking it with an “X” while in an intensive care unit); *In re Estate of Hill*, 84 N.W.2d 457, 460 (Mich. 1957) (holding a will invalid that did not leave any property to the testator’s heirs-at-law and requiring strict compliance with the statutory requirements that the will be attached and subscribed in the presence of the testator by two or more competent witnesses); *Morris v. West*, 643 S.W.2d 204, 208 (Tex. Civ. App. 1982) (affirming a jury verdict that there was no testamentary effect to a will that left property to a former son-in law rather than his daughter because the two attesting witnesses were not in the presence of the testator when they signed his will) (discussed *infra* notes 33–41 and accompanying text).

8. *See, e.g.*, *In re Will of Moses*, 227 So. 2d 829, 834 (Miss. 1969) (affirming a finding of undue influence despite the beneficiary not being present when the will was executed); *In re Will of Kaufmann*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), *aff’d*, 205 N.E.2d 864, 866 (N.Y. 1965) (affirming a finding of undue influence on a will that favored the testator’s domestic partner over his heirs-at-law); *In re Estate of Maheras*, 897 P.2d 268, 270 (Okla. 1995) (defeating a will on the grounds of undue influence which favored a testator’s church members over her heir-at-law). *See also infra* notes 50–64 and accompanying text (discussing the doctrine of undue influence).

9. *See, e.g.*, *In re Estate of Brooks*, 927 P.2d 1024, 1030 (Mont. 1996) (holding that the testator lacked capacity where the testator’s will left all property to her son and did not provide for her daughter, even though there was a reasonable basis for giving the real property to the son who had resided there with the testator); *Bajakian v. Erinakes*, 880 A.2d 843, 844 (R.I. 2005) (refusing to admit evidence that would have explained the testator’s favorable treatment of her son over her daughter, and holding that she lacked capacity based on the divergent treatment of the children). For more discussion of the issue of the defeat of wills with non-traditional or “unnatural” dispositions of property (dispositions to persons who are not the testator’s heirs at law or other close relatives) through a finding of incapacity, see also Leslie, *supra* note 6, at 243–69, and Spitzko II, *supra* note 6, at 278–87.

10. *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 258–60 (2001) [hereinafter Foster II]; Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1114–34 (1996).

11. *See generally* Mark R. Siegel, *Who Should Bear the Bite of Estate Taxes on Non-Probate Property?* 43 CREIGHTON L. REV. 747, 755 (2010); Donna Litman, *Apportionment of the Federal Estate Tax—Effect of Selective Federal Apportionment and Need for Reform*, 33 REAL PROP. PROB. & TR. J. 327, 330 (1998).

12. *See generally* Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process Is Due?*, 63 N.C. L. REV. 659, 662 (1985); Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 820 (2007).

13. *See, e.g.*, *Eyerman v. Mercantile Trust Co., N.A.*, 524 S.W.2d 210, 216 (Mo. 1975) (holding the performance of a provision in decedent’s will which required the executor to raze the decedent’s home was

preclude a testator from disinheriting his surviving spouse, unless the spouse has agreed to such disinheritance in a prenuptial or postnuptial agreement.<sup>14</sup> While testators can effectively disinherit their children in all states except Louisiana,<sup>15</sup> many states have adopted pretermitted heir statutes that, in certain circumstances, permit unmentioned children to take a share of the testator's estate.<sup>16</sup> Finally, although Mortmain statutes—statutes that limit the effectiveness of testamentary dispositions to charities based on the size of the disposition or the proximity of death to the execution of the will—have been “either repealed or declared unconstitutional” in most states,<sup>17</sup> Georgia still retains such a provision.<sup>18</sup>

In theory, after observing statutory limitations, the doctrine of testamentary freedom should allow testators to have the freedom to dispose of whatever property is left in any manner they choose. However, this is hardly the case. Courts and juries seem loathe to uphold plans that do not dispose of the leftover property to “the natural objects of the testator's bounty”<sup>19</sup>—the testator's

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invalid because such destruction would violate public policy against waste and would injure the owners of surrounding homes); *In re Matter of Pace*, 400 N.Y.S.2d 488, 492 (1977) (finding a testamentary trust provision that required the trustee to destroy certain houses and maintain the property as unused vacant lots violated the public policy against waste and the court ordered the trustee to sell the properties without restriction). For a brief discussion of an unreported Rhode Island case in which the testator's will directed that her home and personal possessions be destroyed, and the property then paved over to provide public beach access, was refused on public policy grounds, see Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, n.58, and the newspaper article cited therein, Fox Butterfield, *Recluses' Will Creates Puzzle for Rhode Island*, N.Y. TIMES, July 4, 1986, at A9.

14. According to one recent commentator:

Virtually all United States jurisdictions have abolished dower and curtesy in favor of the elective share. In the few jurisdictions that retain the doctrines, curtesy is identical to dower. Moreover, in the few states that retain the concept of dower, the elective share is also available and usually results in a greater financial award for the surviving spouse. Georgia is the only state that does not have dower/curtesy, a statutory elective share, or community property concepts.

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, 739 (2006) (footnotes omitted). For examples of modern spousal elective share statutes, see statutes cited *supra* note 2.

15. See Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 3 (1996) (discussing the issue of disinheritance of children).

16. As summarized by Professor Brashier,

States afford protection from inadvertent disinheritance through pretermitted child statutes. The protection varies significantly from state to state. Typically, to claim a part of the parent's estate the child must be born after the execution of the will and must demonstrate that the testator did not intentionally seek to disinherit his children. It seems unlikely that in executing his will a testator could forget the existence of his known children, but inadvertent omission does happen.

*Id.* at 9 (footnotes omitted).

17. See Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 54 (2008).

18. GA. CODE ANN. § 53-4-62 (West 2008). See Scalise, *supra* note 17, at 54 n.90.

19. The term “natural objects of a testator's bounty” has long been used to refer to a person's closest family members—those whom he should “naturally” wish to benefit. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 232 (W. Publ'g Co. 2d ed. 1953). Commentators have observed that “the cultural instinct [is] to restrict testamentary freedom in favor of the testator's family.” Leslie, *supra* note 6, at 270. “[A]ll things being equal, a testamentary disposition favoring family is more likely to survive a capacity, undue influence, or fraud challenge than is a disposition favoring non-family.” Spitzko II, *supra* note 6, at 280. Thus,

closest family members. One begins to wonder why he should write a will at all. After all, the default estate plan, the one in place if the decedent has not produced a legally effective will, is intestacy—a statutory plan by which the decedent's probate estate is distributed to the decedent's closest relatives.<sup>20</sup> Such intestate succession plans are arguably based on the plan that an intestate decedent would have wanted had he written a will.<sup>21</sup> While commentators and studies have taken this presumption to task, arguing that most intestacy plans do not necessarily comport with what a decedent would have wanted,<sup>22</sup> and while such plans probably are based, in part, on the desire of the state to keep the decedent's family members from becoming a burden on the state's resources, intestate succession statutes do provide a plan that makes sense in many cases. At least one commentator argues that these statutes should be amended to provide for more latitude in order to allow a court to take into consideration the

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courts are more likely to invalidate a will that disposes of a testator's property "unnaturally," to persons other than his closest family members. *See, e.g.,* Leslie, *supra* note 6, at 268–73. The term "natural objects of a testator's bounty" is also part of the standard test for testamentary capacity. *See* Spitko II, *supra* note 6, at 278–79. Professor Spitko provides the following statement of the test:

[T]he testator must . . . be capable of understanding (1) what she owns, (2) which persons are the natural objects of her bounty, (3) the estate plan that she is drafting and (4) how these first three elements relate to each other.

*Id.* It is a small step from requiring the testator to know who these people are—the "natural objects of the testator's bounty"—to requiring the testator to give property to them, or, at least, to question why the testator has not done so.

20. In her law review article, *The Parent-Child Relationship Under Intestacy Statutes*, Professor Gary provides a useful summary of intestacy law:

Intestacy statutes provide, in effect, a will by default for every person who dies with probate property and without a valid will . . . .

. . . .  
. . . .  
. . . .

The primary goal of intestacy laws is to carry out the decedent's presumed intent. The intestacy statute is often viewed as a back-up will that should provide a distributive scheme to carry out the wishes of most decedents. Of course, intestacy statutes presume an intent and do not attempt to determine a decedent's actual intent . . . .

Other goals of intestacy statutes include the continued support of the decedent's family, rewarding or compensating family members for contributions to the wealth accumulated by the decedent or to the decedent's well-being, and ease of administration of the probate system . . . . Intestacy statutes attempt to distribute a decedent's property to the decedent's "family." Doing so arguably carries out the decedent's intent . . . . The difficulty lies in the ways in which existing intestacy statutes determine who qualifies as family members.

. . . . [T]he statutes adopt rules based on formal legal relationships. To qualify as a family member, a surviving person must have been related to the decedent in one of the ways specified in the statute. With few exceptions, the person must have been married to the decedent or related to the decedent biologically or by adoption.

Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 648–54 (2002).

21. *See, e.g.,* Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 912 (1992); 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. 319, 385–86.

22. *See, e.g.,* Foster II, *supra* note 10, at 261–63; Spitko II, *supra* note 6, at 278–79.

particular circumstances of the decedent.<sup>23</sup> However, this writer believes that if people die intestate they should be stuck with the “one size fits most” distribution provided by current intestate succession statutes; if they wanted a different plan of distribution of their assets, they should have written a will. Courts and juries are not in a position to divine the possible intentions of the decedent who does not write and execute a will.

This writer maintains that if people desire a non-standard distribution of their property, they should write a will. If, however, the possibility of the will being admitted to probate is reduced because of the nature of the dispositions (as noted above), what is the point of writing a will? Intestacy provides a plan to give the property to the testator’s family members. A will that does not give the property to these people is more likely to fail than one favoring them, leading to intestacy. What is a testator to do if he truly wants to dispose of his property in a manner inconsistent with the social norms incorporated in intestate succession statutes?

It is the purpose of this article to examine the current problems surrounding the issue of freedom of testation, to enumerate and evaluate various suggestions that have been proposed for the elimination of these problems, and to propose this writer’s suggestion for the restoration of freedom of testation to those who wish to propound non-traditional estate plans. Part I examines, in some detail, the ways in which courts and juries have stymied the exercise of freedom of testation.<sup>24</sup> Part II is devoted to the different suggestions that commentators have put forth for the protection of the non-traditional estate plan.<sup>25</sup> Part III examines the writer’s reasons that testators might propose estate plans that do not comport with social norms and addresses the question of whether testamentary freedom should be preserved as a “favored doctrine.”<sup>26</sup> Part IV contains the writer’s own proposed solution to this problem.<sup>27</sup>

## II. FRUSTRATIONS ON THE FREEDOM OF TESTATION

As demonstrated by Professor Melanie B. Leslie, in her influential article *The Myth of Testamentary Freedom*, “many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent.”<sup>28</sup> Professor Leslie noted that “[c]ourts impose and enforce . . . [a] moral duty to family through the covert manipulation of doctrine.”<sup>29</sup> She observed:

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23. See Foster II, *supra* note 10, at 263–68.

24. See *infra* notes 28–79 and accompanying text.

25. See *infra* notes 80–111 and accompanying text.

26. See *infra* notes 112–29 and accompanying text.

27. See *infra* notes 130–38 and accompanying text.

28. Leslie, *supra* note 6, at 236.

29. *Id.*

To begin with, courts faced with an offensive will often use other doctrines ostensibly designed to ascertain whether the testator formulated testamentary intent—doctrines such as capacity, undue influence and fraud—to frustrate the testator's intent and distribute estate assets to family members. Moreover, this tendency to protect family members is evident in many cases that purport to determine only whether requisite will formalities have been met. Notwithstanding reformer's claims that courts always insist on strict compliance with will formalities, courts . . . [sic] often have accepted less than strict compliance when necessary to ensure fulfillment of a testator's moral duty. Conversely, courts are more likely to require strict compliance when a will's provisions can be viewed as a breach of that duty.<sup>30</sup>

Thus, Professor Leslie identified some of the techniques used by courts to undermine a testator's intent if his intent does not conform to the social norm of providing for the "natural objects of his bounty."<sup>31</sup> In respect of the issue of testamentary formalities, courts are more likely to find a failure to conform if the will includes a non-conventional estate plan.<sup>32</sup> For example, as Professor Leslie notes about *Morris v. West*, the court refused to admit a will in which the testator provided for his former son-in-law and did not provide for his daughter or grandson—certainly a non-traditional disposition—to probate, citing failure to comply with the statutory requirement that witnesses to the will sign the will in the presence of the testator.<sup>33</sup> The witnesses observed the testator sign the will but then moved to a different room in the law offices to sign as witnesses.<sup>34</sup> The Texas appellate court ruled that the statutory execution requirements had not been satisfied; thus, the will failed, resulting in the probate estate passing to the decedent's daughter by intestacy, even though it was very clear that the testator intended a different result.<sup>35</sup> In terms of the functions to be performed by statutory formalities, the result in *Morris* does not make sense. While one of the presumed purposes of the absent formality (witnesses signing in the presence of the testator to ensure that no fraud or forgery occurred)<sup>36</sup> was accomplished when the witnesses simply moved to another room to sign the will, the other purpose of the formalities, possibly the primary purpose, "to ensure that the testator's final, deliberate intent controls,"<sup>37</sup> surely did not happen here.

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30. *Id.* at 236–37.

31. *Id.* at 236.

32. See *Stephen v. Coleman*, 533 S.W.2d 444, 449 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (discussing the elements of testamentary capacity).

33. *Morris v. West*, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (discussed in Leslie, *supra* note 6, at 260–64).

34. *Id.* at 205–06.

35. *Id.* at 206–07.

36. Langbein, *supra* note 5, at 492–96.

37. See Leslie, *supra* note 6, at 236; Langbein, *supra* note 5, at 492–93.



In a case involving a similar defect in formalities, *Nichols v. Rowan*,<sup>38</sup> the Texas appellate court admitted the will to probate despite the fact that one of the witnesses testified that she had signed the will outside of the conscious presence of the testator.<sup>39</sup> In this case, the will disposed of the testator's property in a more conventional way: the testator, who had no spouse or issue, left the entire estate to a niece.<sup>40</sup> As Professor Leslie indicated, the testator in *Nichols* who was "ill, bedridden . . . [and] confined to a hospital for three months, would seem to require greater protection against fraud [than the able-bodied testator in *Morris*]."<sup>41</sup>

Similar distinctions have occurred in cases in which the issue was whether the testator, who was in a weakened condition, unable to sign the will without assistance, and unable to verbally communicate that the writing was his will, actually signed the will and published the will by expressing his knowledge of and satisfaction with the will as required by statute.<sup>42</sup> In a case in which the testator's will would have prevented close relatives from taking the probate property, the will was found to fail for failure to comply with testamentary formalities.<sup>43</sup> However, when a will was executed under similar conditions, and arguably with similar defects, but provided that the testator's probate property passed to the "natural objects of the testator's bounty," the will was upheld.<sup>44</sup>

Wills that reflect non-traditional plans of distribution are also more likely to be challenged on the ground of lack of capacity than those wills in which testators dispose of their property to their spouse, blood relatives, or both.<sup>45</sup> If a will gives property to the testator's heirs-at-law, those people who have standing to oppose the admission to probate of the will, there probably will not be a contest on the basis of lack of capacity unless the testator favored one heir-at-law inordinately at the expense of the other heirs-at-law. Moreover, because the dispositions are to the natural objects of the testator's bounty, a challenge on the basis of lack of capacity is unlikely since the dispositions are "natural."<sup>46</sup> On the other hand, if a testator disposed of property to people who would not be his heirs-at-law, a contest is more likely. The heirs-at-law will have standing

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38. *Nichols v. Rowan*, 422 S.W.2d 21, 22-23 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e) (discussed in Leslie, *supra* note 6, at 260-64).

39. *Id.* at 23.

40. *Id.* at 21-22.

41. Leslie, *supra* note 6, at 262.

42. Compare *In re Estate of Weaver*, 365 N.E.2d 1038, 1040-44 (Ill. App. Ct. 1977) (holding that a will that sent property to close blood relatives was valid by the testator's assisted signature, even though testator had not asked for assistance, and holding that the testator had published his will by a nod of his head) with *Bailey v. Clarke*, 561 N.E.2d 367, 369 (Ill. App. Ct. 1990) (holding a will that favored a remote cousin over the testator's closest heirs as invalid for not being effectively published despite evidence that the testator was alert and aware of the contents of the will and had nodded his head to indicate his desire to execute this will and to disinherit his sister). See also Leslie, *supra* note 6, at 266-68.

43. See *Bailey*, 561 N.E.2d at 368. See also *supra* note 42.

44. See *Estate of Weaver*, 365 N.E.2d at 1038. See also *supra* note 42.

45. See *supra* note 9 and accompanying text.

46. See *Spitko II*, *supra* note 6 (discussing the standard test for capacity, which includes the requirement that the testator know the natural objects of his bounty).

and will argue that the testator could not have been of "sound mind and memory" because the testator disposed of the property in an "unnatural" way.<sup>47</sup> Once the heirs-at-law raise this issue, the proponents of the will have the difficult burden of proving capacity.<sup>48</sup> A court will consider the testator's non-traditional will disposition to be probative on the issue of lack of capacity since the testator had not disposed of his property to the natural objects of his bounty.<sup>49</sup>

The problem of judicial "nullification" of non-traditional wills is even more apparent in the area of undue influence. Under the undue influence doctrine,<sup>50</sup> if a will, or a part thereof, is found to be the product of undue influence, the will, or the affected portion, will not be admitted to probate and the testator will die either wholly or partially intestate, or will die with a prior will wholly or partially in place. The purpose of this doctrine is to protect the intent of the testator because if a testator is unduly influenced then the will is not what the testator would have intended had the undue influence not occurred.<sup>51</sup> For undue influence to have occurred, the testator must be pushed to do something he would not otherwise have done.<sup>52</sup> Factors in the traditional test for undue influence include (1) whether a testator is susceptible to being unduly influenced (weak, elderly, impaired by drugs or alcohol); (2) by the person accused of having exercised influence which is undue (like a caregiver or companion); (3) whether there was an opportunity to exert undue influence; (4) whether there was actual exercise of undue influence; and (5) and whether there was a resulting benefit to the influencer.<sup>53</sup> The burden of proof is on the person alleging undue influence, i.e. the opponent of the will.<sup>54</sup> The test for undue influence is difficult to apply. Therefore, under certain circumstances, a presumption of undue influence exists, shifting the burden of proof to the proponent of the will to establish that the disposition in his favor was "freely and willingly given."<sup>55</sup> In most jurisdictions, the circumstances that establish a presumption of undue influence are (1) whether a confidential relationship existed between the alleged influencer and the testator (depending on the

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47. See *supra* note 6 and accompanying text.

48. See *supra* note 6 and accompanying text.

49. See *supra* note 6 and accompanying text.

50. According to the Restatement Third of Property, "[a] donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made." RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (2003). For a discussion on the historical development of the doctrine, see Scalise, *supra* note 17, at 43–54; Spivack, *supra* note 6, at 249–62. For a general discussion of the modern doctrine, see Madoff, *supra* note 6, at 578–92; Scalise, *supra* note 17, at 54–60; Spitko II, *supra* note 6, at 278–86; Spivack, *supra* note 6, at 262–68.

51. See *supra* note 50 and accompanying text.

52. See *supra* note 50 and accompanying text.

53. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. e (2003).

54. See *id.*

55. For a discussion of the presumption of undue influence, see Leslie, *supra* note 6, at 243–55; Madoff, *supra* note 6, at 583–92; Scalise, *supra* note 17, at 56–57; Spivack, *supra* note 6, at 263–64.

jurisdiction, such relationships as attorney-client, doctor-patient, priest-penitent, caregiver-patient, parent-child); (2) whether or not there was participation by the influencer in the production of the will (procuring an attorney, making suggestions as to dispositive provisions); and (3) whether or not there is a testamentary benefit to the alleged influencer.<sup>56</sup> In recent cases, some courts simply require “suspicious circumstances,” such as a change in an estate plan shortly before death or a new estate plan that cuts out the decedent’s family, in addition to confidential relationship and benefit.<sup>57</sup>

If a testator’s estate plan is traditional in that it disposes of the testator’s probate estate to the natural objects of the testator’s bounty it is unlikely that the plan will be challenged on the grounds of undue influence; those who would have standing to challenge the will, usually the testator’s heirs-at-law (those who would take from the estate by intestate succession, i.e. close family members), benefit by the estate plan and will not object on any ground, including undue influence, and the plan, which is traditional in form, will not raise questions about undue influence.<sup>58</sup> It is only when testators make estate plans that do not favor their closest family members that undue influence

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56. Some courts have found the presumption of undue influence where there is simply a confidential relationship and a benefit to the alleged influencer. *E.g.*, *Summit Bank v. Quake*, 631 N.E.2d 13, 15 (Ind. Ct. App. 1994) (“Where a plaintiff establishes (1) the existence of a confidential relationship and (2) that the dominant party received an advantage from a transaction between the two parties, the law imposes a presumption that the transaction resulted from the exertion of undue influence . . . .”); *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995) (“The dominant rule in Tennessee . . . is that upon the finding of . . . a confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises . . . .”). Other courts have required the additional factor of the influencer participating in the production of the will. *E.g.*, *Short v. Stephenson*, 386 S.W.2d 501, 502 (Ark. 1965) (“Where a beneficiary, under the terms of a will, procures the making of the will, there is a rebuttable presumption of undue influence . . . .”); *In re Estate of Skrtic*, 108 A.2d 750, 753 (Pa. 1954) (“[Confidential] relationship[s], together with the established fact of [a] decedent’s advanced state of physical and mental weakness at the time of the execution . . . and his inability to make articulate his wishes[, which the person in the confidential relationship communicated to the drafting lawyer] . . . , was sufficient in law to shift the burden to the proponents of proving . . . that the procurement and execution of the writing were free from the exercise of undue influence.”).

57. A comment to the Restatement Third of Property provides the following enumeration of “suspicious circumstances”:

In evaluating whether suspicious circumstances are present, all relevant factors may be considered, including: (1) the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence; (2) the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute; (3) whether the donor received independent advice from an attorney or from other competent and disinterested advisors in preparing the will or will substitute; (4) whether the will or will substitute was prepared in secrecy or in haste; (5) whether the donor’s attitude toward others had changed by reason of his or her relationship with the alleged wrongdoer; (6) whether there is a decided discrepancy between a new and previous wills or will substitutes of the donor; (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a settled intent in the disposition of his or her property; and (8) whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.

RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. h (2003).

58. See Madoff, *supra* note 6, at 602.

becomes an issue because the excluded family members, the heirs-at-law, would have standing to oppose the admission of the will to probate, and the estate plans are considered questionable simply because of their less traditional nature.<sup>59</sup> Courts have regularly found that wills that dispose of testators' property to non-family members are the product of undue influence and do not have legal effect.<sup>60</sup>

This creates a dilemma for testators who wish to dispose of their property to individuals other than their closest family members. Testators can devise and bequeath their property to their closest family members, their heirs-at-law, who would have taken anyway if they die intestate and forget about those persons, non-family members, whom they would prefer to benefit. Alternatively, they can execute a will by which they dispose of their property to those they really wish to benefit, non-family members who would not take if they die intestate, with the possibility that the will can be, and likely will be, challenged and defeated on the basis of undue influence with the result that the property will pass to the testator's heirs-at-law by intestacy.<sup>61</sup> In effect, the undue influence doctrine enables courts to "override" the testator's intent and substitute the social norm of support of family members.<sup>62</sup>

One commentator notes that the only time a court would likely give legal effect to such a non-traditional will disposition is in situations where the testators' heirs-at-law are "undeserving" in that they have abused or abandoned the testator.<sup>63</sup> In fact, another commentator proposes the abolition of the undue

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59. *See id.*

60. *See, e.g., In re Estate of Reid*, 825 So. 2d 1, 3 (Miss. 2002) (holding a will invalid on the grounds of undue influence when an elderly testator left her property to a young man whom she had adopted as an adult and whom she regarded as a son rather than to her blood relatives with whom she had little contact); *In re Will of Kaufmann*, 274 N.Y.S.2d 664, 666 (N.Y. App. Div. 1964), *aff'd*, 205 N.E.2d 864, 866 (N.Y. 1965) (holding a will that favored the testator's long-time domestic partner over his heirs-at-law as invalid on grounds of undue influence, even though it was clear that the testator desired the will and had explained to his brothers and nephews his desire to benefit his partner); *In re Estate of Maheras*, 897 P.2d 268, 271 (Okla. 1995) (holding a will that favored a testator's church members as invalid on grounds of undue influence, even though church members were very helpful to testator and testator's closest relative, her nephew, did not help her in any way); *Gaines v. Frawley*, 739 S.W.2d 950, 950 (Tex. App.—Fort Worth 1987) (holding a will invalid on grounds of undue influence where testator left her property to her "live-in" boyfriend rather than her adult children). Commentators have noted that courts and juries tend to favor a decedent's family above all others, finding almost a duty on the part of the testator to provide for family members. *See Leslie, supra* note 6, at 246 ("There is an unspoken presumption that a testator would always want to benefit family members as opposed to others . . . the court often substituted its judgment for the judgment of the testator [with] the issue bec[om]ing not whether the document represented the testator's intent, but whether the testator's intentions offended the courts' sense of justice or morality."); Scalise, *supra* note 17, at 81 ("The undue influence [doctrine serves the function] of restricting excessive impecunious gifts outside the family and protecting the natural recipients of the testator's bounty."); Spitko II, *supra* note 6, at 280 ("All things being equal, a testamentary disposition favoring family is more likely to survive a capacity, undue influence or fraud challenge than is a disposition favoring non-family.").

61. *See Madoff, supra* note 6, at 602.

62. *See supra* note 60 and accompanying text.

63. *See Leslie, supra* note 6, at 255–58.

influence doctrine because its use, in most cases, is to subvert the actual intent of the testator.<sup>64</sup>

Fraud is a related doctrine that is also employed to defeat wills that do not comport with social norms.<sup>65</sup> Of course, a will that is the product of fraud should not be admitted to probate; however, courts are more willing to find fraud in cases in which the testamentary plan is more unconventional than in cases in which the testator has disposed of his property to a close family member.<sup>66</sup> In a frequently discussed case, *In re Roblin's Estate*, an Oregon court refused to hold that the testator's daughter had fraudulently induced her father to dispose of all of his property to her by will, thereby disinheriting her brother who had been estranged from his father, even though the daughter spoke falsely about the extent of property she received from her mother's estate.<sup>67</sup> In a comparable case, *In re Estate of Bottger*, the Washington State Supreme Court upheld a will that disposed of most of the testator's property to the child with whom she had resided and from whom she had received care and attention, with her other children receiving very little of the estate property.<sup>68</sup>

The court found no undue influence or fraud, even though the children made some untrue statements to the testator.<sup>69</sup> Here, as in *Roblin*, the disposition was to one of the testator's children, and the disinheritance of the other children was apparently based on their unworthiness relative to the child who was the primary beneficiary.<sup>70</sup> In another case, *In re Estate of Rosenberg*, the Oregon State Supreme Court affirmed the trial court's revocation to probate a will that was induced, in part, by certain conduct of a beneficiary that amounted to fraud.<sup>71</sup> Here, the fraud was not an overtly false statement but rather a failure to inform the testator's cousin of the testator's illness and a failure to correct the testator's impression that the cousin had refused to come and tend to the testator.<sup>72</sup> The court found the behavior fraudulent and denied the will probate.<sup>73</sup> In this case, the will that was denied probate gave the bulk of the testator's estate to non-relatives, in this case her step-children, and the act of fraud was undertaken by the testator's step-daughter-in-law who was favored in

64. See Spivack, *supra* note 6, at 308 (discussing the compelling argument to eliminate the undue influence doctrine).

65. Professor Spitko provides the following requirements for the establishment of testamentary fraud: "(1) a misrepresentation told (2) with the intent to deceive the testator and (3) with the intent to influence the will, which misrepresentation (4) does deceive the testator and (5) does influence the will." Spitko II, *supra* note 6, at 279.

66. See *In re Roblin's Estate*, 311 P.2d 459, 461 (Or. 1957).

67. See *id.*

68. See *In re Estate of Bottger*, 129 P.2d 518, 523 (Wash. 1942).

69. See *id.*

70. See Spitko II, *supra* note 6, at 279 (listing the requirements for the establishment of testamentary fraud).

71. See *In re Estate of Rosenberg v. Struve*, 246 P.2d 858, 865 (Or. 1952).

72. *Id.* at 865-67.

73. *Id.* at 869-70.

the will.<sup>74</sup> Because the will was denied probate, the testator died intestate and the cousin, her heir-at-law and closest family member, benefitted instead.<sup>75</sup>

Looking at these cases and doctrines, one begins to wonder whether it is even necessary to produce a will. If the will does not closely comport with the results of intestate succession, or at a minimum makes dispositions to deserving heirs-at-law, someone is likely to contest the will, resulting in the invalidation of the will.

Another way in which courts manipulate doctrines to accommodate social norms is by construing wills and resolving ambiguities so the will benefits the decedent's close family members over less traditional beneficiaries.<sup>76</sup> According to Professor Frances Foster, problems exist in judicial interpretation and construction of wills because rather than admitting evidence of what testators actually meant by words used in their wills, courts determine testamentary intent solely from the "everyday and ordinary" meaning of those words.<sup>77</sup> When confronted with gaps in wills, courts once again ignore the actual intent of the testator.<sup>78</sup> Instead of considering what that specific testator would have wanted under the circumstances they failed to anticipate, courts address gaps "on the basis of a presumed intent that bears no necessary relationship to the individual case at hand."<sup>79</sup>

Again, the testator with the non-traditional plan, one not favoring the testator's closest family members, is forced into the model of social tradition.

### III. PROTECTING A NON-TRADITIONAL ESTATE PLAN

Various commentators have made suggestions as to how one might resolve some of these problems that result in limitations on the freedom of testation. Some of these ideas also relate to other concerns in the area of testation.

Some jurisdictions deal with concerns about imperfect executions by reducing the number of requirements for execution.<sup>80</sup> Other jurisdictions approach this problem by adopting the most recent version of the Uniform Probate Code, or by placing similar provisions in their statutes,<sup>81</sup> which provides for a power in the court to dispense with certain formalities and still admit the will to probate "if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document to constitute . . .

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74. *Id.* at 859–63.

75. *Id.* at 862.

76. *See* Foster II, *supra* note 10, at 248.

77. *See id.* at 248–49.

78. *See id.* at 259.

79. *See id.*

80. According to Professor Leslie, "formalities have been simplified to increase the chances that testators will successfully comply with them." Leslie, *supra* note 6, at 236 (discussing the Uniform Probate Code).

81. *See, e.g.*, HAW. REV. STAT. § 560:2-503 (West 1999); MICH. COMP. LAWS § 700.3503 HAW. REV. STAT. ANN. § 560:2-503 (West 1999); MICH. COMP. LAWS § 700.3503 (Michie 2001); UTAH CODE ANN. § 75-2-503 (West Supp. 2003).

the decedent's will."<sup>82</sup> Other states use a judicially created substantial compliance doctrine that permits a court to admit a will to probate if it can be established that the will expresses the testator's intent and sufficient formalities have been completed to assure the court that the purposes for which the formalities have been created have been accomplished.<sup>83</sup> As the New Jersey Supreme Court stated in *In re Alleged Will of Ranney*:

Compliance with statutory formalities is important not because of the inherent value that those formalities possess, but because of the purposes they serve . . . . It would be ironic to insist on literal compliance with statutory formalities when that insistence would invalidate a will that is the deliberate and voluntary act of the testator. Such a result would frustrate rather than further the purposes of the formalities.<sup>84</sup>

While these changes and doctrines can be used to save wills that might otherwise be invalidated because of some failure to completely adhere to the requirements for due execution, adoption of these modernizing changes would not prevent a court from using statutory noncompliance as a reason to defeat a will that might reflect a non-traditional testamentary plan. A dispensing power or a substantial compliance doctrine would need to be applied on a case-by-case basis, and a court could always find that the particular non-conforming will was not entitled to the application of the particular savings doctrine.

In terms of the issue of the use of the undue influence doctrine to defeat unpopular wills, Professor Madoff has suggested that the doctrine be reworked:

[R]ather than furthering freedom of testation, the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families. . . . Rather than resulting from a *misapplication* of the doctrine . . . the *correct* application of the doctrine imposes a preference for the biological family over non-family members. The doctrine does not act to protect the intent of the testator, but rather to protect the testator's biological family from disinheritance.<sup>85</sup>

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82. UNIF. PROBATE CODE § 2-503 (amended 2008).

83. See, e.g., *Hanel v. Springle*, 372 S.W.2d 822, 824 (Ark. 1963) (using "substantial compliance" to save a will with the possible defect that the testator had not requested that the witnesses sign his will); *Estate of Black*, 641 P.2d 754, 756–57 (Cal. 1982) (using "substantial compliance" to admit a holographic will to probate, despite the fact that the writing included some printed material, and ruling that the printed material was surplusage); *Estate of Perkins*, 504 P.2d 564, 568 (Kan. 1972) (using "substantial compliance" to save a will with the "trifling defect" that one of the witnesses, who was in the room at the time of execution, did not actually see the testator sign the will); *In re Alleged Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) (New Jersey Supreme Court remanded for a determination of whether there was "substantial compliance" with the Wills Act even though the witnesses did not sign the will but did sign self-proving affidavits that were attached to the will).

84. See *Ranney*, 589 A.2d at 1344.

85. Madoff, *supra* note 6, at 576–77.

Professor Madoff believes that, if the doctrine is to continue to be of any value, dispositions to caregivers and others who might be in a confidential relationship with testators should be treated as dispositions to the natural objects of the testator's bounty.<sup>86</sup> Otherwise, such dispositions in the will, which are often the testator's most important and strongly intended dispositions, may continue to raise the specter of undue influence and be defeated on that basis.<sup>87</sup>

A more recent commentator, Professor Carla Spivack, has gone further by proposing the abolishment of the undue influence doctrine:

The unsatisfactory doctrine of undue influence challenges us to decide what we, as a society, care about. If we care about protecting families, let legislatures institute forced heirship. If we value testamentary freedom over protecting families, let courts give it effect. If we care about the elderly, let us institute measures that will protect them more effectively than a doctrine that acts only after a testator's death. Whatever our social priorities, the conclusion is clear: the doctrine of undue influence must be abandoned.<sup>88</sup>

Professor Spivack makes an excellent point. Why should so many estates be held up and so much money be expended on a doctrine that, in most cases, simply leads to an intestate distribution? As Professor Spivack notes, there are other ways to accomplish the social goals that might be implicit in many undue influence decisions.<sup>89</sup> Professor Madoff also suggests that if it were possible to limit the undue influence doctrine to those situations in which a testator is genuinely pushed into a disposition that he would not otherwise have made as opposed to its current use as a means by which disappointed heirs-at-law can

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86. Professor Madoff identifies a difficulty with the way courts determine whether a disposition is "natural" and, therefore, not to be scrutinized as is an "unnatural" disposition:

[A] critical question in the undue influence inquiry is what makes a disposition "natural." One might be tempted to posit that the determination of a "natural" disposition for a testator would involve a detailed factual inquiry into that person's life and his or her subjective feelings. Instead, what one frequently finds in the case law is a surprisingly straightforward and objective response to the question of what constitutes a "natural" disposition: a "natural" disposition is one which provides for a testator's heirs at law . . . . The status of the beneficiary, rather than the quality of the beneficiary's relationship to the testator, determines what is a natural disposition for purposes of the undue influence analysis. In determining status, courts have generally relied on the intestacy statutes as a model for naturalness . . . . [C]onnections through affinity are generally considered only if the blood relatives have behaved in such a way as to fall from their preferred status.

Madoff, *supra* note 6, at 590–91. Professor Madoff then urges courts to stop considering dispositions to persons outside the testator's family who were in confidential relationships with the testator to be "unnatural": "If the mythical version [of the undue influence doctrine] which protects freedom of testation beyond the doctrines of fraud and duress is to become reality, then the confidential relationship/natural bequest dichotomy must be abandoned." *Id.* at 629. For a discussion of the expression "natural objects of the testator's bounty," see ATKINSON, *supra* note 19.

87. See Madoff, *supra* note 6, at 592.

88. See Spivack, *supra* note 6, at 246.

89. See *id.* at 262–86 (discussing alternate ways to address the issue of social norms).



overcome a testator's genuine testamentary intent, the doctrine would still have some merit.<sup>90</sup>

In regards to the general issue of a testator's intent, commentators have debated the merits of a family protection statute, which would permit certain individuals, such as close family members, to force a share of a testator's estate, as a way of protecting the testator's close family members from disinheritance and providing support for those who depended on the testator.<sup>91</sup> Such a statute might operate somewhat like a spousal elective share provision, with the family member being entitled to make a claim to a share of the decedent's property.<sup>92</sup> Such statutory provisions are in place in such diverse jurisdictions as the People's Republic of China (PRC), Australia, New Zealand, Great Britain, and Canada.<sup>93</sup> While these provisions vary markedly in scope and procedure (for example, the PRC allows anyone who cannot work and was dependent on the testator, whether related to the testator or not, to claim a share of the testator's estate, while the other jurisdictions limit such claims to certain family members), they all provide that the testator's plan will be followed as to his property not necessary to satisfy these claims.<sup>94</sup> Thus, if providing for dependents or close family members is an important social goal, it could be accomplished by the adoption of such forced share statutes. This would certainly be preferable to the current situation in which courts evidence hostility toward testamentary plans that do not comport with such social norms.

Opinions have been mixed as to the desirability of the imposition of such statutory forced shares.<sup>95</sup> Almost twenty-five years ago, Professor Mary Ann Glendon made a compelling argument against such statutes, indicting them on the ground, among others, that statutes that provided for protection of the testator's dependents, close family members, or both, required that courts exercise some discretion in evaluating claims.<sup>96</sup> Professor Glendon maintains that this statutory discretion will lead to excessive litigation, depletion of estates, and statutory and judicial intrusion on freedom of testation.<sup>97</sup> Ironically, as noted above, the current use of doctrines intended to protect the

90. See Madoff, *supra* note 6, at 625–29 (analyzing the “Family Rights Model” in conjunction with placing certain limitations on the doctrine of undue influence).

91. See, e.g., Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 32–35; Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1254–58 [hereinafter Foster III]; Spivack, *supra* note 6, at 305.

92. See Foster III, *supra* note 91, at 1254–56.

93. For discussion of the family protection statutes of the People's Republic of China, see Foster III, *supra* note 91. For discussion of the family protection statutes of Great Britain, see Helene S. Shapo, “A Tale of Two Systems”: *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 720–27 (1993). For discussion of several of these systems, see Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 121–33 (1994).

94. See Foster III, *supra* note 91, at 1254–56.

95. Compare Langbein, *supra* note 5, with Mary Ann Glendon, *Agenda for the Twenty-First Century: Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1174 (1986).

96. See Glendon, *supra* note 95.

97. See *id.* at 1194–97.

freedom of testation to surreptitiously achieve what these statutes require, has eroded that freedom more than would such statutory limitations.<sup>98</sup> Moreover, if testators are aware of limitations on their freedom of testation, they will be more likely to try to conform their wills to such requirements, thus avoiding litigation and preserving some measure of autonomy. Finally, recent articles examining the functioning of such statutory plans have shown that these statutes do not lead to the dreaded excessive litigation.<sup>99</sup>

Professor E. Gary Spitko makes another proposal for the preservation of testamentary freedom for those testators who want non-traditional estate plans in several recent articles including *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*.<sup>100</sup> Professor Spitko proposes that testators be entitled to provide in their wills for arbitration of disputes regarding their wills, where the testator selects one of the arbitrators who, presumably, is informed of the testator's testamentary goals and the context of those goals.<sup>101</sup> The advantage of this proposal is that there would be someone to speak for the will and for the testator after the testator's death. Ante-mortem probate, presently offered in three U.S. jurisdictions, would not achieve the same measure of protection of the testator's plan.<sup>102</sup> According to Professor Spitko, "a will that the court declares valid in an ante-mortem probate proceeding may still be the subject of a post-mortem will challenge . . . [because an] ante-mortem probate proceeding can not adjudicate an allegation of fraud or undue influence that does not occur until after the ante-mortem probate proceeding."<sup>103</sup> This writer's proposal, discussed below, is in some ways similar to Professor Spitko's arbitration proposal.<sup>104</sup>

Another suggestion to help testators achieve non-traditional testamentary plans is to permit, by statute, the designation of heirs.<sup>105</sup> Such a procedure, which is currently available in two states,<sup>106</sup> would allow testators to select their heirs—to the extent that such selection does not interfere with a surviving spouse's right to share in a decedent's estate. In this way, testators can destroy

98. See *supra* notes 28–79 and accompanying text.

99. See sources cited *supra* note 93.

100. See Spitko II, *supra* note 6, at 294–96. See also Spitko I, *supra* note 6, at 1074; Spitko III, *supra* note 6, at 1075–76.

101. See Spitko II, *supra* note 6, at 294–97.

102. E.g., ARK. CODE ANN. § 28-40-201 to -203 (Michie 1987); N.D. CENT. CODE ANN. § 30.1-08.1-01 to -04 (West 1996); OHIO REV. CODE ANN. § 2107.081–085 (Banks-Baldwin 1994). See e.g., George S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 90 (1979) (discussing ante-mortem probate). See also John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 70 (1978); Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 135 (1990); Spitko II, *supra* note 6, at 290–94.

103. See Spitko II, *supra* note 6, at 293.

104. See *infra* notes 105–06 and accompanying text.

105. See Massey, *supra* note 6, at 583.

106. See ARK. CODE ANN. § 28-8-102 (1987); OHIO REV. CODE ANN. § 2105.15 (West 2001).

the standing of their close blood relatives to oppose a will that does not comport with their expectations. For example, by designating a same-sex domestic partner as a sole heir, a testator could then assure that their partner would receive the property because no one else would have standing to oppose will dispositions in favor of their partner.

Other commentators have suggested the use of non-probate transfers for those testators desiring a non-traditional property disposition.<sup>107</sup> In theory, revocable *inter vivos* trusts can be attacked for reasons of undue influence, fraud, or lack of capacity.<sup>108</sup> As a practical matter, however, these trusts are difficult to oppose since unlike a will, a trust agreement is a private document,<sup>109</sup> so contestants would not know the terms of the trust and its “establishment is unlikely to be known to potential challengers.”<sup>110</sup> Moreover, according to a recent commentator, because the trust “transactions occur over time . . . , declaring them invalid and unwinding those past transactions becomes . . . difficult.”<sup>111</sup> However, because the writer of this article wishes to focus on the doctrine of testamentary freedom, she will not further address the efficacy of accomplishing non-traditional testamentary goals through non-probate methods.

#### IV. WHY GO AGAINST SOCIAL NORMS?

As has been observed by many commentators, the nature of the relational units in which individuals live has changed dramatically in recent years.<sup>112</sup> While at one time most people lived in the traditional family model of two parents of different sexes and one or more children born to the parents, the modern family is not necessarily so configured.<sup>113</sup> A single person is now the head of many households, while others include same-sex partners as family heads.<sup>114</sup> Moreover, today, a family unit may include adopted children, foster

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107. See Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409, 412 (2010). See also Massey, *supra* note 6, at 587–88; Spitko I, *supra* note 6, at 1083–85.

108. See Massey, *supra* note 6, at 587–88.

109. For an extensive discussion of the issue of privacy of *inter vivos* trusts as compared to court-regulated devices such as wills and testamentary trusts, see Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 565 (2008); Massey, *supra* note 6, at 587.

110. See Massey, *supra* note 6, at 587.

111. See *id.*

112. See, e.g., Foster II, *supra* note 10, at 258–60; Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 4 (2000); Hirsch, *supra* note 10; Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 532–40 (2001). According to Professor Gary, “family structure in the United States has changed dramatically . . . [; s]tep families, blended families, unmarried heterosexual and gay and lesbian cohabitants with or without children—many persons now live in families that no longer fit the Cleaver family norm.” See Gary, at 4.

113. See authorities cited *supra* note 112.

114. See authorities cited *supra* note 112.

children, and/or step-children as well as children born into the family.<sup>115</sup> People are undertaking to increase their families by utilization of modern biological technology: sperm donation, egg donation, surrogacy, posthumous conception, and the like.<sup>116</sup> Some family units include several generations of relatives or relatives of remote kinship living together.<sup>117</sup> Other groups consist of individuals who are not related to one another by marriage, by blood, or by adoption.<sup>118</sup>

In short, people are structuring their family units in many non-traditional ways. Estate law, however, has not changed in response to these new and diverse living arrangements.<sup>119</sup> Intestate succession statutes send a decedent's property to a spouse and children, or if there is no spouse or children, then to blood relatives.<sup>120</sup> A domestic partner will not take under this method in a state that does not recognize same-sex marriages.<sup>121</sup> Nor would the child of the domestic partner inherit, even though the child had been raised by the decedent, unless the decedent had adopted the child, which sometimes is not a possibility under state law.<sup>122</sup> Thus, if a testator wishes to provide for a partner or non-adopted child at their death, they would have to execute a will that specifically provides for these family members. However, the problem for testators is that their heirs-at-law, who probably are not included in such a will and who might not approve of the lifestyle chosen by the testator, will most likely challenge the

115. See authorities cited *supra* note 112.

116. See Lee-ford Tritt, *Sperms and Estate: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 368–72 (2009).

117. See authorities cited *supra* note 112.

118. See authorities cited *supra* note 112.

119. According to Professor Gary:

Intestacy statutes have, since the first adoption of such statutes in this country, given a decedent's property to those family members closest to the decedent. Early statutes focused on bloodline, whereas revisions . . . in many states increased the share going to a surviving spouse. Current statutes create a hierarchy of intestate takers based on proximity to the decedent . . . . [S]tatutes do not take into consideration whether the decedent had an ongoing relationship with the heir or even knew the heir . . . . [While s]ome areas of the law address these new families . . . , [l]egislatures have been reluctant to expand the definition of family for purposes of intestacy.

Gary, *supra* note 112, at 2–4.

120. See authorities cited *supra* note 112.

121. A student commentator provides the following about the Uniform Probate Code:

Family structure, composition, and ideology have changed dramatically in the past fifty years; blended families, single-parent families, and families headed by unmarried adults permeate the American cultural landscape. The UPC recognizes and accepts the prevalence of multiple marriages and blended families in contemporary society. However, the UPC's conspicuous omission of committed, unmarried partners from its default succession scheme frustrates its self-proclaimed goal of honoring donative intent.

Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 211–12 (2004).

122. Four states bar second parent adoptions by gay men and lesbians who are the domestic partners of the child's biological parent. See ARK. CODE ANN. § 9-8-304 (2009) (prohibiting adoption by individuals who are cohabiting but not married, whether in same-sex or opposite-sex couples); FLA. STAT. § 63.042 (2008) (barring homosexuals from adoption); MISS. CODE ANN. § 93-17-3 (2008) (prohibiting adoption by same-sex couples); UTAH CODE ANN. § 78B-6-117 (2008) (prohibiting adoption by individuals who are cohabiting but not married, whether in same-sex or opposite-sex couples).

will. Because the will is considered non-traditional, in that it disposes of the testator's property to persons who are not related by blood or marriage, it is more likely to be defeated because of the doctrines addressed above.<sup>123</sup>

Even if intestate statutes remain the same, benefitting only the testator's spouse and closest blood relatives, some relief could be had for testators who write non-traditional wills if the definition of "the natural objects of [the testator's] bounty" changed to include persons with whom the testator shared their life, even if those persons are not related to them by blood or marriage.<sup>124</sup> Heirs-at-law would still have the standing to contest a will that disposed of property to someone in a non-traditional family setting, but they would be less likely to be successful because the testator's dispositions would be considered "natural."<sup>125</sup> Testators should be able to share their bounty with those with whom they have shared their life.

What if testators wish to dispose of their property to someone who is not related to them by blood or affinity, and with whom they never shared a family life? What if testators will be survived by some heirs-at-law, but they are only remotely related to the testator and the testator has not had any contact or dealings with them? Moreover, what if a testator has not formed family-type relationships with anyone? Testators may wish to leave their property to friends or to strangers whom they selected on the basis of need. While these people may not fit within any traditional, or even a more liberal, definition of natural objects of the testator's bounty, most would argue that testators should be able to effectively accomplish their testamentary plan, especially since they had no spouse or children who were dependent on them.<sup>126</sup> Here, however, testators' heirs-at-law will have a good chance of defeating the wills and a good chance of overcoming the testator's freedom of testation.<sup>127</sup> If freedom of testation is a concept that is to be preserved, then testators should be able to accomplish their testamentary wishes without having to worry about challenges to their wills by people who are virtual strangers to them but who happen to be related to them by blood.

One also wonders about the less sympathetic testators who decide to disinherit their children in favor of worthy or unworthy strangers. If the doctrine of freedom of testation means what it says, testators should be able to accomplish such a goal by their will.<sup>128</sup> Protecting freedom of testation should be important if it is desirable to avoid imposing social norms on a testamentary plan, even if this is accomplished indirectly by the manipulation of doctrines. If courts do not preserve freedom of testation in cases of non-traditional wills, then the U.S. would be imposing on testators the requirements that their wills

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123. See *supra* Part II.

124. See *supra* text accompanying notes 76–79.

125. See Leslie, *supra* note 6, at 267–73.

126. See Madoff, *supra* note 6, at 607.

127. See Leslie, *supra* note 6, at 269.

128. See *id.* at 235.

comport to social norms. From there, one could argue that the right to dispose of property by will has little real meaning; the will that a court will most likely uphold is the one that comes the closest to intestate succession, but if a court deems an heir unworthy, he need not be left any property. If it is desirable to preserve testamentary freedom, some changes need to be made and some plan must be proposed by which testators who are of sound mind and memory and who are not subject to fraud or undue influence can insure that their testamentary plan will be carried out. As noted above, legislation should address concerns about the support of surviving family members directly, rather than indirectly by manipulation of doctrines.<sup>129</sup>

## V. A PROPOSED SOLUTION

If the right to dispose of one's property at death by a will is going to have any real meaning, then it seems that freedom of testation must be protected. As noted above, the person who wishes to leave property to his closest relatives can do so with little difficulty.<sup>130</sup> Even if he does not write a will, the default position of the law is intestacy, which would send the decedent's probate property to those relatives.<sup>131</sup> Freedom of testation becomes more important in cases in which testators desire a different distribution, one not contemplated by the stated norm of the "natural objects of [their] bounty."<sup>132</sup> In such cases, testators should be able to expect that their wishes will be carried out so long as they have adequately provided for any surviving spouse.

This article proposes a system by which testators, who wish to have their testamentary plan given legal effect and who expect that there might be some opposition to the admission of the will to probate, could appoint a person (and a successor or successors who would perform if the designated person is unable to perform) who would, in effect, be a legal representative of the will. This "will guardian" would speak for the testator and for the will. Unlike the current system in which, if a will is contested, the proponents of the will are those who would benefit if the will were admitted to probate,<sup>133</sup> the "will guardian" would not be an interested party but rather someone selected by the testator to represent the will in legal proceedings. The will guardian would have been present at the execution of the will (but not a witness) and would have been made aware, by the testator, of the testator's goals and desires for his testamentary plan. Moreover, the testator would have informed the will guardian of any special relevant circumstances, such as the testator's reason for

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129. See *supra* notes 84–94 and accompanying text.

130. See *supra* notes 58–62 and accompanying text.

131. See Spitko I, *supra* note 6, at 1064.

132. See ATKINSON, *supra* note 19.

133. See, e.g., N.J. STAT. ANN. § 3B:8-1 (West 2011); N.Y. EST. POWERS & TRUSTS § 5-1.1-A (McKinney 2010) (stating that a decedent may not effectively disinherit a surviving spouse, unless that spouse agreed to such an inheritance). See also ATKINSON, *supra* note 19.

making a particular disposition. The will guardian would also be able to verify that the testator was of sound mind and memory at the execution of the will. To the extent that the will guardian represents the will and the testator's wishes, this plan is analogous to Professor Spitko's arbitration proposal.<sup>134</sup> Here, however, the will would not be submitted for arbitration.<sup>135</sup> Instead, a judge or jury would decide whether to admit the will to probate.<sup>136</sup> The testimony of the will guardian would be highly probative on the issues raised in any will contest.

Of course, if the doctrine of freedom of testation worked as it should, a testator would not need a will guardian to speak for the testator and the will.<sup>137</sup> The will would speak for itself. However, testators who wish to implement a non-traditional estate plan would be well-advised to try to protect their plan by seeking a will guardian. Based on current commentator, judge, and jury attitudes toward such estate plans, without the aid of someone designated to speak for the testator and the will, the will might not be admitted to probate.<sup>138</sup>

## VI. CONCLUSION

Given current judge and jury attitudes towards testators who wish to implement non-traditional estate plans, there is substantial risk that disappointed heirs-at-law, who would have standing to oppose the will, will be successful in defeating their will. Even if testators believe that they have followed the statute of wills with regard to testamentary formalities, as has been noted above, courts and juries might find the formalities to be lacking.<sup>139</sup> Moreover, the will might be defeated on the basis of lack of capacity, undue influence, or fraud.<sup>140</sup> As noted by Professor Spivack, the legislature and the judiciary should decide what society values and implement those values rather than undermining the freedom of testation doctrine for non-traditional estate plans.<sup>141</sup> At present, adopting the system that this writer proposes would provide some relief for the non-traditional estate plan that does not comport with social norms.

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134. See Spitko I, *supra* note 6, at 1064; Spitko II, *supra* note 6, at 294–97; Spitko III, *supra* note 6. See also *supra* notes 100–04 and accompanying text.

135. Cf. Spitko II, *supra* note 6, at 294–95 (discussing how arbitration works as a substitute for the typical probate of a will).

136. Cf. *id.*

137. Compare Tritt I, *supra* note 1, with Foster I, *supra* note 6, at 1351.

138. See Foster II, *supra* note 10, at 248–50 (suggesting that courts bend the law in favor of familiar inheritance rather than the testator's actual intent).

139. See *supra* note 7 and notes 31–41 and accompanying text.

140. See *supra* notes 42 to 64 and accompanying text.

141. See Spivack, *supra* note 6, at 246.