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Tipping the Scales in Favor of Charitable Bequests: A Critique

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I. Introduction

Public policy favors testamentary bequests to charity. At least, that is the claim of numerous courts and legislative bodies. The policy favoring charitable bequests may tip the scales in deciding the proper interpretation of a will, or the merits of an undue influence, or incapacity claim. Paradoxically, courts and legislative bodies rarely discuss the source of this public policy.[1] Nor do they inquire into the policy's wisdom,[2] though they should.

In the coming years, we will see a staggering amount of money change hands as a result of death—mainly thanks to the Baby Boomers.[3] The Boomers will receive inheritances of about $8.4 trillion from their own parents.[4] In turn, the Boomers are expected to leave $30 trillion to their own heirs.[5] Death, it seems, is now an important part of many financial plans. "Many boomers . . . have been lagging behind in their

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1. *See, e.g.*, *In re* Stalp, 359 N.Y.S.2d 749, 753 (Surr. Ct. 1974) ("It requires no extended discussion of local (New York) law to establish that our public policy favors charitable giving."); *see In re* Estate of Baum, 211 A.2d 522, n.2 (1965) ("It is difficult to conceive of a Commonwealth public policy that is more fundamental or more meaningful than its frequently restated policy of encouragement to charities and charitable giving in the public interest.").

2. *See supra* note 1.

3. Baby boomers are "[m]embers of the large generation born from 1946 to 1964 . . . ." *Baby Boomers: The Gloomiest Generation*, PEW RESEARCH, (June 25, 2008), http://www.pewsocialtrends.org/2008/06/25/baby-boomers-the-gloomiest-generation/.

4. *See* METLIFE MATURE MARKET INSTITUTE, THE METLIFE STUDY OF INHERITANCE AND WEALTH TRANSFER TO BABY BOOMERS 6 (2010) [hereinafter METLIFE].

5. *See* ACCENTURE, THE "GREATER" WEALTH TRANSFER: CAPITALIZING ON THE INTERGENERATIONAL SHIFT IN WEALTH 1 (2012) [hereinafter ACCENTURE].

savings, betting on—*hoping for*—big bequests, especially since many of them suffered big losses in 2008."[6] Whether they will actually receive those bequests is an entirely different question. Some experts believe that increases in average life expectancy and the associated costs will result in many Americans outliving their savings.[7] But there is another less obvious reason why would-be heirs should not count on receiving an inheritance from their parents; charities and non-profit organizations. Heirs are not the only ones banking on their parents' deaths. Charities are also relying on the Baby Boomer wealth transfer—predicting a "golden age of philanthropy."[8] Unlike the typical heir, however, charities are in the business of soliciting gratuitous transfers, often quite aggressively. The potential for conflict between would-be heirs and charities should be obvious, yet little scholarship considers the issue.

The public policy favoring testamentary bequests to charities is well established in the law. However, that public policy can, and does, conflict with other equally well-founded public policies. When confronted with this conflict, courts are often dismissive or even hostile towards the parties seeking to challenge a testamentary bequest to a charity. I argue that the policy favoring charitable giving has gone too far and has, in some instances, undermined other important public policies. Specifically, courts and legislators have strengthened the charitable bequest policy without giving enough consideration to other, equally important public policies. This problem is not new. History shows that similar policy conflicts have arisen periodically since late antiquity, if not earlier. The parameters of the problem, however, are somewhat new. The governing law, available technologies, and familial relationships have certainly evolved since the time of late antiquity. This article examines how the public policy favoring charitable bequests conflicts with various aspects of the equally important public policies of testamentary freedom and family protection.

6. Anne Tergesen, *Counting on an Inheritance? Count Again.*, WALL ST. J., June 11, 2012, http://online.wsj.com/article/SB10001424052702303990604577370001234970954.html; *see also*, Steve Rosen, *Kids and Money: If You Plan to Leave an Inheritance, Manage Expectations*, KENTUCKY.COM, Oct. 20, 2013, http://www.kentucky.com/2013/10/20/2885759/kids-and-money-if-you-plan-to.html.

7. Tergesen, *supra* note 6.

8. Richard C. Morais, *Huge Wave in Charitable Giving Still Coming*, FORBES (Oct. 2, 2009), http://www.forbes.com/2009/10/02/estate-tax-bill-gates-boston-college-personal-finance-bc.html; *see also* Julia Love, *These Days, Colleges Urge Young Alumni to Give . . . Posthumously*, CHRON. HIGHER EDUC., July 20, 2012, at A20.

Part II considers the competing public policies of testamentary freedom, family protection, and charitable bequests, as well as the existing legal doctrines aimed at furthering these policies. Part III examines the social and legal origins of charitable bequests and the periodic attempts to balance charitable bequests with other important policy considerations. Part IV examines the role of the non-profit sector in America today. Specifically, Part IV considers the size and scope of the nonprofit industry, the legal and economic benefits the nonprofit industry enjoys, and the manner in which nonprofits solicit charitable bequests. Part V illustrates how the current law fails to strike the appropriate balance between the competing policies, as the current law is too favorable to charities and reform is needed. Part VI concludes.

II. Competing Public Policies

American law favors charitable giving, testamentary freedom, and family protection as matters of public policy. For thousands of years Western society struggled to strike the appropriate balance between these competing concerns. Today, a number of laws and doctrines promote and protect these public policy concerns.

A. *Freedom of Testation*

In every American jurisdiction, "[t]he first principle in the law of wills is freedom of testation."[9] At its core, testamentary freedom means that a "testator 'may dispose of his property as he pleases, and that [he] may indulge his prejudice against his relations and in favor of strangers, and that, if he does so, it is no objection to his will.'"[10] Looking to state statutes and centuries of jurisprudence, numerous courts have described freedom of testation as a matter of public policy.[11] A variety of laws and

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

10. Breeden v. Stone, 992 P.2d 1167, 1170 (Colo. 2000) (citing Lehman v. Lindenmeyer, 109 P.956, 959 (1909)).

11. *See, e.g.*, *In re* Estate of Feinberg, 919 N.E.2d 888, 895 (Ill. 2009) ("[O]ur statutes clearly reveal a public policy in support of testamentary freedom."); *see also* Nat'l Bank of Portland v. Snodgrass, 275 P.2d 860, 866 (Or. 1954) ("[W]e submit that taken together they reveal a long-accepted pattern of public attitude and public policy in this state respecting an almost unrestricted right to dispose of one's property on death."); Monroe v. Barclay, 17 Ohio St. 302, 316 (1867) ("[I]t is the policy of the law to secure to every one the right to dispose of his property in accordance with his individual will[]").

doctrines protect this fundamental organizing principal. For example, in order to exercise testamentary rights, the testator must (1) possess testamentary capacity at the time he executes the testament, and (2) execute the testament in compliance with the form prescribed by law.[12] Although the nuances of these requirements vary by state, the object of both is to safeguard, among other things, testamentary freedom.

Three interrelated concepts aimed at ensuring freedom of testation are important for our purposes: (1) the doctrine of undue influence; (2) the prohibition on a beneficiary of a testament from serving as a witness or assisting in the preparation of the testament; and (3) related attorney ethics rules.Undue Influence.

To ensure that the decedent's testament represents the true expression of his will, his testament may be set aside if it was procured through fraud, duress, or, most commonly, undue influence.[13] Although the undue influence doctrine and the related evidentiary issues vary from state-to-state, the essential thrust of the doctrine is to ensure freedom of testation. Undue influence invalidates a testament executed in proper form by a person possessing testamentary capacity because the "testator's free will is destroyed and, as a result, the testator does something contrary to his 'true' desires."[14] Not all influence is undue.[15] To be "undue" the influence must actually overcome the free agency of the testator.[16] The influence must have "so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor."[17] In contrast, "legitimate influence" such as "[i]nfluence obtained by kindness and affection" is not undue.[18] The line between acceptable influence and undue influence is frustratingly difficult to ascertain in some cases and has been criticized by a number of scholars.

To succeed on an undue influence claim, most jurisdictions require the presence of four factors, namely: susceptibility, opportunity, disposition, and coveted result.[19] Susceptibility refers to "a person who is susceptible of being unduly influenced by the person charged with

12. *See, e.g.*, Dean v. Jordan, 79 P.2d 331, 335 (Wash. 1938).

13. *See, e.g.*, THOMAS E. ATKINSON, WILLS at §54-61 (2d ed.) .

14. *In re* Estate of Rotax, 429 A.2d 1304, 1305 (Vt. 1981) (citation omitted).

15. *See In re* Estate of Haneberg, 14 P.3d 1088, 1096 (Kan. 2000).

16. *See In re* Estate of Maheras, 897 P.2d 268, 273-74 (Okla. 1995); EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS at §7:2 (2d ed.) [Hereinafter WILL CONTESTS].

17. LA. CIV. CODE ANN. art. 1479 (2013).

18. *See Haneberg*, 14 P.3d at 1096.

19. *See* WILL CONTESTS, *supra* note 16, at §7:2.

exercising undue influence."[20] The testator's physical and mental conditions are relevant in determining his susceptibility to influence.[21] Often, this means the testator had some diminished physical or mental capacity—yet he was not so diminished as to actually lack testamentary capacity. In practice, the line between undue influence and lack of capacity is not always clear. Facts giving rise to an undue influence claim will typically support a lack of capacity argument as well. As a result, both challenges are often brought together.[22] Opportunity refers to "the opportunity of the person charged to exercise such influence on the susceptible person to procure the improper favor."[23] Disposition means "a disposition on the part of the party charged to influence unduly such susceptible person for the purpose of procuring an improper favor either for himself or another."[24] Finally, a coveted result is "a result caused by, or the effect of, such undue influence."[25] The failure of the testator to provide for "the natural objects of the testator's bounty[]" is often evidence of a coveted result.[26]

In evaluating these factors, courts also consider whether the testator and the alleged influencer had a confidential relationship.[27] The existence of a confidential relationship makes a finding of undue influence more likely. Some jurisdictions require a confidential relationship as a threshold issue in all undue influence cases.[28] In the jurisdictions that do not explicitly require a confidential relationship as threshold issue, findings of undue influence in the absence of a confidential relationship are unusual.[29] Regardless of the specific approach taken by any individual jurisdiction, the existence or non-existence of a confidential relationship is a critical determination in all undue influence cases.

One of the more challenging aspects of undue influence cases is deciding which relationships constitute confidential relationships.

20. *In re* Estate of Christen, 239 N.W.2d 528, 531 (Wis. 1976) (citation omitted).

21. WILL CONTESTS, *supra* note 16, at §7:3.

22. *See* Jeffery G. Sherman, *Can Religious Influence Ever Be "Undue" Influence?*, 73 BROOK. L. REV. 579, 619-20 (2008).

23. *Christen*, 239 N.W.2d at 531 (citation omitted).

24. *Id*. (citation omitted).

25. *Id*. (citation omitted).

26. Sherman, *supra* note 22, at 619.

27. WILL CONTESTS, *supra* note 16, at §7:4.

28. *See, e.g.*, *In re* Estate of Haneberg, 14 P.3d 1088, 1096 (Kan. 2000); *In re* Estate of Gersbach, 960 P.2d 811, 814 (N.M. 1998).

29. WILL CONTESTS, *supra* note 16, at §7:4.

Generally, a confidential relationship is a "relationship of inequality" meaning "a relationship in which the testator reposes an exceptional degree of reliance on the integrity and loyalty of another, either because of that other person's knowledge or status or because of the testator's dependence or subservience."[30] Most jurisdictions agree that traditional fiduciary relationships—like the attorney-client relationship or the relationship between the holder of a power of attorney and the grantor[31]—may give rise to a relationship of confidence.[32] Some jurisdictions go so far as to call fiduciary relationships "confidential per se."[33] Confidential relationships, however, include more types of relationships than legally recognized fiduciary relationships. Whether a relationship constitutes a confidential relationship is a question of fact, generally requiring proof that the relationship was either (1) a reliant relationship or (2) a dominant-subservient relationship.[34] A variety of relationships may form the basis of confidential relationships if those additional facts are present. Courts have found the following relationships, when coupled with evidence of a reliant or dominant-subservient aspect, to be confidential relationships: "a close confidential friendship[,]"[35] "a clergyman-parishioner relationship,[]"[36] a caregiver relationship,[37] and a banker-customer relationship.[38]

1. Interested Parties

The second doctrine aimed at ensuring freedom of testation prohibits an interested party from serving as a witness to the will or assisting in its preparation.[39] This rule "seeks to insure that testators act free of influence from subscribing witnesses."[40] The existence of an

30. Sherman, *supra* note 22, at 624.

31. Medlock v. Mitchell, 234 S.W.3d 901, 905 (Ark. Ct. App. 2006); Blissard v. White, 515 So. 2d 1196, 1199-1200 (Miss. 1987).

32. *See* WILL CONTESTS, *supra* note 16, at § 7:4; Sherman, *supra* note 22, at 624.

33. *See, e.g.*, Kelley v. Johns, 96 S.W.3d 189, 197 (Tenn. Ct. App. 2002).

34. *See, e.g.*, Sherman, *supra* note 22, at 624-25.

35. *In re* Estate of Brevard, 213 S.W.3d 298, 304 (Tenn. Ct. App. 2006).

36. *Id*.

37. Bean v. Wilson, 661 S.E.2d 518, 519 (Ga. 2008).

38. Owens v. Mazzei, 847 A.2d 700 (Pa. Super. Ct. 2004).

39. *See, e.g.*, Triestman v. Kilgore, 838 S.W.2d 547, 547 (Tex. 1992) (per curiam) ("A competent witness to a will is one who receives no pecuniary benefit under its terms.") (citation omitted).

40. *In re* Estate of Tkachuck, 139 Cal. Rptr. 55, 58 (Ct. App. 1977); *see also In re* Estate of Johnson, 347 So. 2d 785, 787 (Fla. Dist. Ct. App. 1977) ("An obvious purpose

interested witness or the involvement of an interested person in the preparation of a testament typically supports a finding of undue influence.[41] Similarly, the involvement of interested parties tends to prove that the will was executed under suspicious circumstances. The scope and effect of the rule varies. A few states automatically purge any bequest to a subscribing witness or notary.[42] The more common approach, in contrast, allows the bequest to stand if there are additional disinterested witnesses.[43] At least two states do not invalidate the bequest, but by statute provide that the existence of an interested witness creates a presumption of undue influence.[44] Those states that do prohibit bequests to interested witnesses typically seek to strike a balance between testamentary freedom and family protection. To prevent a family member from being disinherited simply because he witnessed the will, many states will still allow the interested witness to receive an intestate or other share of property.[45] Another issue of some variation is the scope of persons subject to the rule. Some states apply their rule to both interested witnesses and the spouses of interested parties by invalidating bequests to the spouse of a witness.[46] In contrast, a number of states expressly allow bequests to charities with which a witness is associated.[47] Some states also expressly allow a creditor to serve as a witness.[48]

[of this rule], was to prevent fraud or undue influence by a witness to a will to thwart the intention of the testatrix.").

41. *See, e.g.*, CAL. PROB. CODE § 6112 (West 2013).

42. *See* LA. CIV. CODE ANN. art. 1582 (2013); R.I. GEN. LAWS ANN. § 33-6-1 (West 2013); W. VA. CODE ANN. § 41-2-1 (West 2013).

43. *See* ARK. CODE ANN. § 28-25-102 (2013); CONN. GEN. STAT. ANN. § 45a-258 (West 2013); NEB. REV. STAT. ANN. § 30-2330 (LexisNexis 2013); N.H. REV. STAT. ANN. § 551:3 (2013); N.Y. EST. POWERS & TRUSTS LAW § 3-3.2 (McKinney 1998); S.C. CODE ANN. § 62-2-504 (2013); TENN. CODE ANN. § 32-1-103 (2013); WIS. STAT. ANN. § 853.07 (West 2013); WYO. STAT. ANN. § 2-6-112 (2013).

44. *See* CAL. PROB. CODE § 6112; WASH. REV. CODE ANN. § 11.12.160 (WEST 2013).

45. *See* ARK. CODE ANN. § 28-25-102 (2013); CONN. GEN. STAT. ANN. § 45a-258 (West 2013); LA. CIV. CODE ANN. art. 1582 (2013); MO. REV. STAT. ANN. (West 2013); NEB. REV. STAT. § 30-2330 (2013); N.Y. EST. POWERS & TRUSTS LAW § 3-3.2 (McKinney 2013); S.C. CODE ANN. § 62-2-504 (2013); TENN. CODE ANN. § 32-1-103 (2013); WASH. REV. CODE § 11.12.160 (2013); W. VA. CODE ANN. § 41-2-1 (West 2013); WIS. STAT. ANN. § 853.07 (West 2013); WYO. STAT. ANN. § 2-6-112 (2013).

46. CONN. GEN. STAT. ANN. §45a-258 (West 2013); LA. CIV. CODE ANN. art. 1582.1 (2013); N.H. REV. STAT. ANN. § 551:3 (2013); S.C. CODE ANN. § 62-2-504 (2013); W. VA. CODE ANN. § 41-2-1 (West 2013); WIS. STAT. ANN. § 853.07 (West 2013).

47. *See* CONN. GEN. STAT. ANN. § 45a-258 (West 2013).

48. *See* R. I. GEN. LAWS ANN. §33-6-2 (West 2013); W. VA. CODE ANN. §41-2-2 (West 2013).

2. Attorney Ethics Rules

The attorney ethics rules also seek to prevent an attorney from negatively affecting a client's exercise of his testamentary freedom. Model Rule 1.8(c) prevents attorneys from preparing wills in which they receive large gifts and from soliciting testamentary gifts from clients:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.[49]

The rule imposes a duty on attorneys, for the benefit of their clients and the profession, to refrain from engaging in any conduct that could raise an inference of undue influence.[50] "An attorney must be as careful to avoid the appearance of evil as he is to avoid evil itself."[51] To that end, paragraph (k) of Rule 1.8 goes further and imputes the conflict to all other lawyers in the associated firm.[52] In interpreting this rule, some states have suggested it also applies to serving as a witness to a will.[53]

Paragraph (f) of Rule 1.8 is similarly aimed at protecting the client from undue influence. Rule 1.8(f) prohibits an attorney from accepting payment for his services from someone other than his client unless "(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."[54] In the estate-planning

49. MODEL RULES. OF PROF'L CONDUCT R. 1.8 (1983).

50. *See, e.g.*, Attorney Grievance Comm'n of Maryland v. Lanocha, 896 A.2d 996, 998 (2006); State v. Eisenberg, 138 N.W.2d 235, 237 (Wis. 1965).

51. State v. Gulbankian, 196 N.W.2d 730, 732 (Wis. 1972).

52. MODEL RULES OF PROF'L CONDUCT R. 1.8 (1983).

53. *See, e.g.*, People v. Berge, 620 P.2d 23, 27 (Colo. 1980) (en banc).

54. MODEL RULES OF PROF'L CONDUCT R. 1.8. Rule 1.6 addresses the duty of the attorney to maintain the client's confidentiality. MODEL RULES OF PROF'L CONDUCT R.

context, this rule is intended to prevent undue influence.[55] When an attorney is paid by a client's testamentary-heir, the court and the public might fairly question whether the attorney's loyalty and independence have been affected.[56]

B. *Family Protection*

The public policy supporting family protection also permeates the law of wills. This policy imposes a legal and moral duty on family members to support one another financially. Familial support obligations have ancient roots and essentially recognize that families form an economic unit.[57] In the law of wills, several doctrines protect immediate family members from disinheritance by a testator.

1. Spousal Share Statutes

Perhaps the most significant family protection mechanism is the inability of a testator to fully disinherit his surviving spouse.[58] With the exceptions of most[59] of the community property jurisdictions (in which spousal protection is assured through the community property laws), and Georgia,[60] all states have elective share statutes that prevent the testator from fully disinheriting his surviving spouse.[61] In most jurisdictions

1.6.

55. *See* Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890 (N.J. 1981).

56. *Id.*; ABA Formal Ethics Op. 02-428 (2002) (Drafting will on recommendation of potential beneficiary who also is client).

57. *See* Andrew Simmonds, *Amah and Eved and the Origin of Legal Rights*, 46 SAN DIEGO L. REV. 516, 528 (2000-2001); John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1020-28 (2001).

58. *See, e.g.*, Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 781-82 (2006); Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 415-17 (2009).

59. Louisiana, a community property state, also has an elective share statute. *See* LA. CIV. CODE ANN. art. 2432 (2013).

60. GA. CODE ANN. §53-4-1 (2013) provides "A testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants."

61. *See, e.g.*, Glover, *supra* note 58, at 416-17; Kenneth Rampino, Comment, *Spousal Disinheritance in Rhode Island: Barrett v. Barrett and the (De)Evolution of the Elective Share Law*, 12 RODGER WILLIAMS U. L. REV. 420, 450 (2007).

"[t]his 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."[62] Spousal share statutes are based on two theories of marriage: the "partnership theory" and the "support theory."[63] "The partnership theory of marriage recognizes that both partners have contributed to the accumulated estate[]" and should, therefore, share in its benefits.[64] Like community property, the partnership theory of marriage recognizes that both spouses work together and should share in the "fruits of the marriage."[65] In contrast, "[t]he support theory recognizes that during their joint lives, spouses owe each other mutual duties of support, and these duties continue in some form after death in favor of the survivor, as a claim on the decedent spouse's estate."[66] If a testator fails to provide for his spouse by will, then the support theory provides the surviving spouse with a claim against his estate for financial support.[67] The support theory seeks to prevent the surviving spouse "from becoming society's ward by preventing impoverishment of the surviving spouse."[68] Approaches, of course, vary by state and may reflect one[69] or both[70] theories of marriage.

2. Homestead Statutes

In addition to elective share statutes, a number of jurisdictions have homestead statutes or constitutional provisions that protect the economic

62. Glover, *supra* note 58, at 416.

63. *See, e.g.*, *In re* Estate of Hjersted, 135 P.3d 202, 207 (Kan. Ct. App. 2006).

64. *In re* Estate of Antonopoulos, 993 P.2d 637, 642 (Kan. 1999); *accord In re* Amundson, 621 N.W.2d 882, 886 (S.D. 2001).

65. *In re* Estate of Antonopoulos, 993 P.2d at 642.

66. *Id*; *accord In re* Estate of Shipman, 832 N.W.2d 335, 342-43 (S.D. 2013).

67. *In re* Estate of Antonopoulos, 993 P.2d at 642.

68. Williams v. Williams, 517 S.E.2d 689, 691 (S.C. 1999) (citation omitted); *accord* Karsenty v. Schoukroun, 959 A.2d 1147, 1167 (Md. Ct. App. 2008) ("states responded by passing elective share statutes to protect widows from being disinherited and left with no reasonable means of financial support.") (citation omitted); *In re* Estate of Merkel, 618 P.2d 872, 876 (Mont. 1980) ("The primary purpose of the elective share statutes is to insure that the surviving spouse's needs are met, and that the spouse is not left penniless.") (citation omitted).

69. *See, e.g.*, *In re* Estate of Shipman, 832 N.W.2d 335, 342-43 (S.D. 2013) (holding that South Dakota statute is intended to satisfy spousal support duty);.*In re* Estate of Bilse, 746 A.2d 1090, 1092 (N.J. Super. Ct. 1999) (holding that the New Jersey statute is need based).

70. *See, e.g.*, *In re* Estate of Amundson, 621 N.W.2d 882, 886 (S.D. 2001) ("Two rationales underlie our elective share system: support and contribution.").

interest of the surviving spouse and/or the children of the decedent. Broadly, there are two types of homestead statutes: family home statutes and fixed sum statutes. Family home statutes protect the interest of a surviving spouse and children in the family home.

> As a matter of public policy, the purpose of [these statutes] is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors . . . .[71]

The family home statutes, therefore, recognize the significant emotional and economic interests a decedent's spouse and children have in the family home.[72] A number of the family home-type homestead statutes allow the surviving spouse and/or minor children to remain in the family home even if the testator leaves the home to some other person.[73] The property rights conferred by this right, and their duration, vary by state.[74] Homestead statutes further protect the surviving spouse and children by exempting the family home from seizure and sale by creditors.[75]

The fixed sum-type homestead statutes, in contrast, give the surviving spouse and dependent children a claim to a fixed sum of money from the decedent's estate rather than rights to real estate.[76] The sum of money is ordinarily fixed by statute and is quite modest.[77] The policy considerations behind the fixed sum statutes are similar to the family home statutes.[78] To that end, the sum of money that the surviving spouse and children receive under the applicable homestead statute is

71. Pub. Health Trust of Dade Cnty. v. Lopez, 531 So. 2d 946, 948 (Fla. 1988).

72. *In re* Estate of Bonde, 694 N.W.2d 74, 77 (Minn. Ct. App. 2005).

73. *See, e.g.*, MINN. STAT. ANN. § 524.2-402 (West 2013); N.D. CENT. CODE ANN. § 30-16-02 (West 2013); OKLA. STAT. ANN. 58 § 311 (West 2013); TEX. ESTATES CODE § 102.005 (West 2013); *see also* Snyder v. Davis, 699 So. 2d 999, 1001-02 (Fla. 1997).

74. *See supra* note 73.

75. *See, e.g.*, MINN. STAT. ANN. § 524.2-402(c) (West 2013); *Pub. Health Trust of Dade Cnty*., 531 So. 2d at 946, 947; *Snyder*, 699 So. 2d at 1001-02.

76. *See, e.g.*, MONT. CODE ANN. § 72-2-412 (2013).

77. *See, e.g.*, ALA. CODE § 43-8-110 (2013); ARIZ. REV. STAT. ANN. § 14-2402 (2013); IDAHO CODE ANN. § 15-2-402 (2013); MONT. CODE ANN. § 72-2-412; MO. ANN. STAT. § 474.290 (West 2013).

78. *See* Carter v. Coxwell, 479 So. 2d 1181, 1183 (Ala. 1985).

usually exempt from the claims of the decedent's creditors.[79]

3. Family Allowance Statutes

Family allowance statutes offer the testator's surviving spouse and minor children some additional protections. These statutes generally give the surviving spouse and minor children the right to receive a time-limited allowance for their support during the administration of the testator's estate.[80] "[T]he family allowance [is] a statutory creation designed to provide sustenance for the family during the settlement of the estate . . . ."[81] Most family allowance statutes limit the time period of the support to one year.[82] Unlike other family protection mechanisms, family allowances typically fall within the discretion of the courts.[83] In determining whether a spouse or child is entitled to an allowance, courts consider a variety of factors to determine need including age, health, previous standard of living, value of the estate, and the value of other resources available to the claimant.[84] If a court does decide to award a family allowance, the payment is typically made in priority to other debts.[85]

4. Undue Influence as Family Protection

Courts sometimes use the doctrine of undue influence to invalidate testaments that fail to provide for the testator's immediate family. Thus, undue influence operates to ensure freedom of testation and, in some instances, family protection. Professor Melanie Leslie examined a number of undue influence cases and observed:

79. *See supra* note 73.

80. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2404 (2013); CAL. PROB. CODE § 6540 (West 2013); MICH. COMP. LAWS ANN. § 700.2403 (West 2013); MO. ANN. STAT. § 474.260 (West 2013); MONT. CODE ANN. § 72-2-414 (2013); MASS. GEN. LAWS ch. 190B, § 2-404 (2012); UTAH CODE ANN. § 75-2-404 (West 2013).

81. *In re* Estate of Seymour, 671 N.W.2d 109, 113 (Mich. Ct. App. 2003) (internal quotation marks omitted); *accord* Parson v. Parson, 56 Cal. Rptr. 2d 686, 687 (Cal. Ct. App. 1996).

82. *See supra* note 77.

83. *See supra* note 77; *see also In re* Estate of Hamilton, 869 P.2d 971, 978 (Utah Ct. App. 1994); *In re* Estate of Butler, 607 P.2d 956, 959 (Ariz. 1980).

84. *In re* Estate of Hamilton, 869 P.2d at 978; MO. ANN. STAT. § 474.260 (West 2013).

85. *See* Parson, 56 Cal. Rptr. 2d at 687.

> Although the opinions studied habitually recited that a court's sole purpose is to effectuate the testator's true intentions, a closer inspection reveals that a significant number of courts employed a governing rule less concerned with divining testamentary intent than with determining whether the reason behind the disposition was justifiable in the court's view. Courts were much more likely to honor testamentary intent when the will provided for family members as opposed to non-relatives.[86]

Several aspects of the undue influence doctrine facilitate courts in protecting the testator's family. If a court invalidates a testament on undue influence grounds, then the decedent's property will generally pass under the laws of intestacy—which will benefit his surviving spouse and immediate relatives.[87] Two important aspects of the undue influence doctrine are easily seen as family protection mechanisms: the confidential relationship requirement and the coveted result/unnatural bequest requirement.

The existence of a confidential relationship between the testator and the influencer is a threshold issue in most undue influence cases.[88] Family members benefit from this requirement because courts are hesitant to find family members in a confidential relationship with each other—thus, it is less likely for a testament to be invalidated due to the influence of a close relative. Courts struggle to fit family relationships into the confidential relationship framework—particularly spousal relationships and parent-child relationships. In practice, "[c]ourts are reluctant to find a confidential relationship among spouses and blood relatives."[89] "[The] failure to find a confidential relationship in the context of the family is not because family relationships lack the characteristics of dependence and reliance—indeed it is these very characteristics that are the hallmark of the family relationship."[90] The

86. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 30 ARIZ. L. REV, 235, 243-44 (1996) (footnote omitted).

87. *See* Ray Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 611 (1997).

88. *See infra* Part II.A.1.

89. *See* Madoff, *supra* note 87 at 602.

90. *See id.* at 603.

analysis is often complicated when children or spouses stand in positions that courts often view as confidential relationships—in particular, caregivers and power of attorney holders.[91] In the spousal context, courts take a variety of approaches. At least one court explicitly held that the "relationship between a husband and wife is a confidential relationship . . . ."[92] Other courts recognize that result is harsh in light of the evidentiary function of the existence of a confidential relationship. Some courts specifically hold that the spousal relationship, although confidential in nature, does not necessarily carry the same evidentiary presumptions as other confidential relationships.[93] As one court explained:

> Although it has been said that a proper relationship between a husband and wife is often a 'fiduciary' or 'confidential' relationship, something beyond this normal spousal relationship must exist before a 'fiduciary' or 'confidential' relationship can be found for the purposes of a claim of undue influence.[94]

Courts are reluctant to find a confidential relationship even where one spouse is acting as the caregiver for the other spouse, managing his financial affairs, or involved in the preparation of his testament—all facts which would ordinarily support a finding of undue influence.[95] Parent-child relationships are equally challenging. Courts are reluctant to find

91. *See infra* Part V.B.1.

92. Medlock v. Mitchell, 234 S.W.3d 901, 905 (Ark. Ct. App. 2006).

93. *See In re* Estate of Langston v. Williams, 57 So. 3d 618, 622 (Miss. 2011)*; accord* Jacobs v. Vaillancourt, 634 So. 2d 667, 671 (Fla. Dist. Ct. App. 1994) ("The confidential relationship which exists between a husband and wife is not one which may be considered in the law governing will contests."); *see also* Keasler v. Estate of Keasler, 973 S.W.2d 213, 220 (Tenn. Ct. App. 1997) ("[T]he mere fact that one spouse exercises great influence over the affairs of life as well as home and domestic concerns is insufficient to raise a presumption of invalidity of the will.").

94. Ruestman v. Ruestman, 111 S.W. 3d 464, 479 (Mo. Ct. App. 2003)*; accord*, *In re* Estate of Baumgarten, 975 N.E.2d 651, 657 (Ill. App. Ct. 2012) ("[T]he law does not and should not presume . . . undue influence . . . because the spouse has been able throughout the marriage to have considerable influence on her spouse.") (quoting another source).

95. *See, e.g.*, *Ruestman*, 111 S.W.3d at 479 (finding no evidence of a confidential relationship between decedent and his wife despite wife serving as decedent's primary caretaker); *In re* Estate of Mowdy, 973 P.2d 345, 349 (Okla. Civ. App. 1998) (finding no undue influence on part of wife who was previously decedent's legal secretary where white personally typed decedent's will).

that these relationships are confidential relationships,[96] even where a child is serving in a relationship that is ordinarily classified as a confidential or fiduciary relationship.[97]

The coveted result/unnatural bequest aspect of the undue influence analysis also tends to serve a family protection function because it often makes it easier for family members to prove a case of undue influence perpetrated by a non-relative. Courts presume that testators will normally leave their property to their spouse and close blood relatives.[98] This viewpoint makes it easier for a testator's family to establish an undue influence case whenever a testator omits family in favor of a third party. Some courts essentially require a finding of some "unnatural" disposition in order to establish an undue influence claim.[99] "[T]he establishment of the fact that the testament executed would not have been executed but for such influence is generally predicated upon a consideration of whether the testament executed is unnatural in its terms of disposition of property."[100] In jurisdictions where a finding of

96. *See, e.g.*, Pyle v. Sayers, 34 S.W.3d 786, 789 (Ark. Ct. App. 2000) ("The influence of children over parents is legitimate so long as they do not extend a positive dictation and control over the mind of the testator."); Bills v. Lindsay, 909 S.W.2d 434, 440 (Tenn. Ct. App. 1993) ("A normal relationship between a mentally competent parent and an adult child is not per se a confidential relationship and it raises no presumption of invalidity of the transaction.").

97. *See, e.g.*, Eddleman v. Estate of Farmer, 740 S.W.2d 141, 142-43 (Ark. 1987) (finding no undue influence on part of daughter/caretaker of decedent who left his estate to her and no property to his other daughter); Jacobs v. Vaillancourt, 634 So. 2d 667, 671 (Fla. Dist. Ct. App. 1994) (finding no undue influence on son-in-law who prepared will for testator which substantially benefitted testator's daughter and son-in-law's wife); Carter v. Carter, 526 So. 2d 141, 143 (Fla. Dist. Ct. App. 1988) (describing sons' role in helping mother execute a will as "the acts of dutiful sons who helped their mother draw up her will and execute it" rather than "active procurement"); Estate of McCorkle v. Beason, 27 So. 3d 1180, 1186 (Miss. Ct. App. 2009) (finding no undue influence or confidential relationship between daughter and testator even though daughter held power of attorney for father, shared a bank account and safe deposit box with father, discussed will with father and then typed it for him); *In re* Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001) ("A parent-child relationship does not establish the existence of a confidential relationship nor does the fact that the proponent has a power of attorney where the decedent wanted the proponent to act as attorney-in-fact."); *In re* Estate of Jakiella, 510 A2d 815, 817 (Pa. Super. Ct. 1986) (holding that neither parent-child relationship nor child's appointment of attorney-in-fact for mother required a finding of a confidential relationship).

98. *See* Leslie, *supra* note 86, at 245-46.

99. *See, e.g.*, Baxter v. Grasso, 740 N.E.2d 1048, 1051 (Mass. App. Ct. 2001) ("It is settled law that to constitute undue influence, four factors must be satisfied: (1) [an] unnatural disposition has been made . . . .") (internal quotations omitted) (alteration in original).

100. *In re* Estate of Johnson, 340 S.W.3d 769, 783 (Tex. App. 2011) (quoting

suspicious circumstances is required to support a claim of undue influence, courts typically consider unnatural dispositions as evidence of suspicious circumstances.[101] Still, other courts consider an unnatural disposition as one of several factors that can support an undue influence claim.[102] The naturalness of a disposition is typically established if the testator, for no apparent reason, left his property to someone other than the natural objects of his bounty.[103] The testator's spouse and intestate heirs are, generally, the persons deemed to be the natural objects of his bounty.[104] Regardless of the stated evidentiary significance in a particular jurisdiction, unnatural dispositions are often dispositive in undue influence cases. In the course of her study, Professor Leslie observed that "many of the opinions dealing with contested gifts to non-relatives concentrated . . . on whether, in the court's opinion the gift to a non-relative was justifiable."[105] She further observed that:

> a significant number of courts confronted with wills that disinherited family members in favor of non-family members upheld or imposed findings of undue influence based on minimal evidence, or evidence that would be insufficient to meet the contestant's burden of proof in a case where the will's primary beneficiaries were non-relatives[.][106]

C. *Charitable Giving*

The law of wills also furthers the more general public policy favoring charitable giving.

another source); *accord* Rostanzo v. Rostanzo, 900 N.E.2d 101, 114 (Mass. App. Ct. 2009) (noting that one of the facts supporting an undue influence claim is an unnatural disposition); Ruestman v. Ruestman, 111 S.W.3d 464, 481 (Mo. Ct. App. 2003) ("An important consideration in determining whether undue influence has occurred is whether the disposition of the property was 'unnatural'.").

101. *See, e.g.*, Slusarenko v. Slusarenko, 147 P.3d 920, 930 (Or. Ct. App. 2006) ("The following factors may constitute suspicious circumstances . . . (6) an unnatural or unfair disposition of property.").

102. *See In re* Estate of Graham, 69 S.W.3d 598, 610 (Tex. App. 2001).

103. *See Ruestman*, 111 S.W.3d at 481.

104. *See id.*

105. Leslie, *supra* note 86, at 246.

106. *Id.* at 245.

1. Identification of Beneficiaries

Generally, a testament must identify the testator's beneficiaries with reasonable certainty.[107] The testator does not have to use any particular language, however, the "beneficiary must be capable of identification . . . ."[108] "If the writing is so uncertain or confused or ambiguous that the testator's intentions cannot be reasonably ascertained, it is void as a testamentary instrument."[109] This rule is often relaxed in the case of charitable bequests. Because gifts to charity are favored, "a charitable disposition in a will must be liberally construed to uphold its validity."[110] Both statutes[111] and jurisprudence recognize "the validity of charitable bequests that do not specify the charity, or even the general charitable purpose."[112] If the testator sufficiently expresses his desire that his property be used for charitable purposes, then the bequest will stand and the executor or trustee may select the particular charities that will receive property.[113]

2. Capacity to Inherit; Lapse

Courts often refuse to apply the doctrine of lapse to charitable bequests, which further advances the public policy favoring these bequests. A bequest to a person that dies or ceases to exist prior to the date of the decedent's death will lapse.[114] When a legacy lapses, it may pass to another legatee under the express terms of the will, to another person under an anti-lapse statute, or pass to the decedent's heirs in

107. *See, e.g.*, Johnson v. Johnson, 229 S.W.2d 743, 775 (Ky. Ct. App. 1950) ("The law permits one to dispose of his property by will, but the intention of the testator must be expressed with sufficient clarity to enable a court to enforce its provisions.").

108. Smoot v. McCandless, 461 S.W.2d 776, 782 (Mo. 1970).

109. *Johnson*, 229 S.W.2d at 775*; accord* Holcomb v. Newton, 226 S.W.2d 670 (Tex. App. 1950); Uloth v. Little, 73 N.E.2d 459 (Mass. 1947).

110. *In re* Estate of Clementi, 82 Cal. Rptr.3d 685, 692 (Cal. Ct. App. 2008).

111. *See e.g.* CONN. GEN. STAT. ANN. § 45a-515 (West 2013); Ga. CODE ANN. § 53-4-62 (West 2013); LA. CIV. CODE ANN. art. 1572 (2013).

112. *In re* Estate of Clementi, 82 Cal. Rptr. at 692; *accord* Marshal v. Trust Co. of Ga., 202 S.E.2d 94, 97 (Ga. 1973); *In re* Estate of Staab, 173 N.W.2d 866, 871 (Iowa 1970) ("Courts generally subscribe to the view that charitable bequests shall not be permitted to fail or lapse for lack of definiteness as to the purpose of the bequest.").

113. *In re* Estate of Clementi, 82 Cal. Rptr. at 692.

114. *See, e.g.*, *In re* Estate of Micheel, 577 N.W.2d 407, 409 (Iowa 1998); Niemann v. Zacharias, 176 N.W.2d 671, 673-74 (Neb. 1970); *In re* Estate of Haugen, 794 N.W.2d 448, 450-51 (N.D. 2011).

intestacy.[115] Charitable organizations do not "die" per se, but they do sometimes cease to exist. An existing organization may merge with another organization, may cease operations, or may fully dissolve prior to the death of the testator.[116]

When a charitable organization named in a will no longer exists on the date of a decedent's death, the doctrine of lapse should apply.[117] In practice, however, courts feel "obliged to ensure that the testator's charitable intent is enforced" notwithstanding the non-existence of the charitable beneficiary.[118] If the charitable organization no longer exists and has no successor organization, courts may invoke the doctrine of *cy près* and distribute the legacy to other charitable organizations with similar purposes.[119]

3. Conditions

Courts sometimes relieve charitable bequests from the rules governing failure of a condition. When a testator makes a bequest subject to a condition, the courts will generally enforce the condition as written. If the condition fails, is not satisfied, or is impossible, the bequest should lapse.[120] In the charitable context, however, courts are more lenient. When a testator gives property to a charity and directs its use for a particular purpose, courts will often ignore the condition or construe the condition to be merely precatory in nature.[121] In *In re Fairchild*, for example, the testator made the following bequest:

115. *See, e.g.*, *In re Estate of Haugen*, 794 N.W.2d at 451; *see also In re* Estate of Hanna, 919 So. 2d 104, 106 (Miss. Ct. App. 2005); *In re* Estate of Harper, 975 A.2d 1155, 1159 (Pa. Super. Ct. 2009).

116. *See* Crisp Area YMCA v. Nationsbank, N.A., 526 S.E.2d 63, 66 (Ga. 2000) (charitable organization that was inactive on the date of decedent's death allowed to inherit); Gustafson v. Wesley Found., 469 S.E.2d 160, 162 (Ga. 1996) (charitable organization transferred all of its assets to another organization).

117. *E.g.*, *In re* Estate of Brunzel, 51 N.Y.S. 2d 483, 484 (Surr. Ct. 1944); *In re* Estate of Flathers, 288 P. 231, 232 (Wash. 1930).

118. *Gustafson*, 469 S.E.2d at 162.

119. *See In re* Estate of Leventhal, 212 N.Y.S.2d 475, 476-77 (Surr. Ct. 1961); R.I. Assoc. for Blind v. Nugent, 206 A.2d 527, 530-31 (R.I. 1965).

120. *See In re* Estate of Hirschberg, 112 N.Y.S.2d 919, 920-21 (Surr. Ct. 1952); Bank One Trust Co. v. Resident Home Ass'n for Mentally Retarded, No. 19660, 2003 WL 21674987 (Ohio Ct. App. July 18, 2003).

121. *See In re* Will of Fairchild, 178 N.Y.S.2d 886, 888-89 (Surr. Ct. 1958); U.S. Nat'l Bank of Or. v. Rhilander, 677 P.2d 745, 745 (Or. Ct. App. 1984).

> I give a one-fiftieth part to each of the seven following named persons and corporations, absolutely, provided, in each case, that she or it survive me: . . . (2) Hopewell Society, having its place of business at Number 218 Gates Avenue, Brooklyn, New York (the said fund to be used for the benefit of the Gould Guest House now situated at Number 27 Monroe Street, Brooklyn, New York).[122]

Several legatees argued that the legacy lapsed because the Gould Guest House no longer existed and, therefore, the condition could not be fulfilled.[123] The court, however, reasoned that "[t]he parenthetical words following the absolute legacy are apparently indicative of the testator's desire that so long as the Society conducted Gould Guest House the fund was to be used for that purpose.[124] Because the Gould Guest House no longer existed, the legatee was "free to use the fund in any manner within its general charitable functions."[125] Similarly, in *Rubel v. Friend*, the testator made a charitable bequest in trust and directed that the trustees use his residuary estate to establish and maintain a convalescent home within ten years of his death.[126] The trustees failed to comply with the terms of the testament within the ten-year time frame.[127] The court determined that the failure of the trustees to meet the condition did not cause the bequest to lapse because "[e]quity considers the general charitable purpose of the testator or donor as the substance of the devise or gift . . . ."[128] A charitable bequest, in the view of the court, "will not be permitted to lapse or be defeated by the mere expiration of time or because there cannot be a literal compliance with its provision."[129] Statutes in a number of jurisdictions now expressly give courts the authority to distribute property in accordance with the testator's general charitable intent while striking problematic conditions.[130]

122. *Fairchild*, 178 N.Y.S.2d at 888.
123. *Id.* at 889.
124. *Id.*
125. *Id.* at 888.
126. Rubel v. Friend, 101 N.E.2d 445, 452 (Ill. App. Ct. 1951).
127. *Id.*
128. *Id.* at 448.
129. *Id.* at 449.
130. *See, e.g.*, DEL. CODE ANN. tit. 12 § 3541 (2013); KAN. STAT. ANN. § 59-22a01 (2013); 20 PA. CONS. STAT. § 7740.3 (2013).

III. Evolution of Charitable Bequests and Competing Public Policies

Throughout history, the law of wills has attempted to strike the appropriate balance between testamentary freedom and family protection; as soon as the law allowed charitable bequests, that balance was affected. The church—at one time the only sizeable charitable organization—repeatedly inserted itself in the dying process and the process of preparing and administering wills. Each time this occurred, the church benefitted financially at the expense of testamentary freedom, family protection, and the public image of the church. For centuries, societies have struggled to find the appropriate balance and have periodically checked the power of the church in the dying and will-making process. Today, however, the problem is not limited to religious organizations. Both religious and secular charities are aggressively seeking involvement in the testamentary process in hopes of financial benefit. History shows the need for legislative and judicial response.

A. *Evolution of the Competing Policies from Late Antiquity through the Middle Ages*

The challenging public policy questions raised by encouraging testamentary bequests to charity can be traced back to late antiquity. As the U.S. Supreme Court succinctly explained:

> Charities had their origin in the great command, to love thy neighbor as thyself. But when the Emperor Constantine permitted his subjects to bequeath their property to the church, it was soon abused; so much so, that afterwards, when it became too common to give land to religious uses, consistently with the free circulation of property, the supreme authority of every nation in Europe, where Christianity prevailed, found it necessary to limit such devises by statutes of mortmain.[131]

The Court's summation oversimplifies matters. Inheritance laws are an ancient concept. Default schemes of intestacy are found in,

131. Perin v. Carey, 65 U.S. (24 How.) 465, 498 (1860).

among other sources, the Code of Hammurabi,[132] biblical texts,[133] and the Aztec society.[134] However, the testament as we think of it today—an instrument allowing a person to direct the distribution of his property as he sees fit—appears to be a creation of Roman law.[135] Under the law of the Twelve Tables, Roman citizens enjoyed full testamentary freedom in the sense that they could dispose of the entirety of their estates at death.[136] Prior to the Twelve Tables, property passed from one male to the "next of kin in the male line."[137] The law set forth in the Twelve Tables allowed greater freedom, but it still attempted to strike a balance between freedom of testation and rules of public order:

> The absolute power of bequest, conferred on every citizen by the Twelve Tables, was a concession to the people. The transfer of property by will at this time being an event which, in a small state, might materially affect the well being of the community, was an act of legislation to which publicity was requisite.[138]

Roman law was highly formalistic. "The Roman law sought to ascertain, fix and determine the true declaration of the last will of a testator, by surrounding that declaration by such safeguards as to forbid the possibility of fraud or the perversion of the testator's intention in the solemn act of testamentation."[139] To that end, Roman testaments required a certain number of competent witnesses—none of whom could be named as an heir or related to an heir named in the testament.[140] In addition to requiring publicity and other form requirements, the law restricted the persons a testator could name as an heir or legatee.

132. *See* Robert C. Ellickson & Charles Dia Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 366-67 (1995).

133. *See generally* Calum Carmichael, *Inheritance in Biblical Sources*, 20 L. & LITERATURE 229 (2008).

134. *See* Francisco Avalos, *An Overview of the Legal System of the Aztec Empire*, 86 L. LIBR. J. 259 (1994).

135. *See* WILL CONTESTS, *supra* note 16, at §2:1.

136. *See* JOHN GEORGE PHILLIMORE, PRIVATE LAW AMONG THE ROMANS FROM THE PANDECTS 352 (1863) [hereinafter PRIVATE LAW AMONG THE ROMANS].

137. JOHN GEORGE PHILLIMORE, INTRODUCTION TO THE STUDY AND HISTORY OF THE ROMAN LAW 121 (1848).

138. *Id.*

139. MOSES A. DROPSIE, ROMAN LAW OF TESTAMENTS, CODICILS, AND GIFTS IN THE EVENT OF DEATH, 2 (1892).

140. *See id.* at 80-81.

Importantly, for our purposes, Roman law required that the testator name a definite and identifiable heir who was a natural person.[141] Corporations, societies and other juridical persons could not be named as heirs or legatees.[142] Nor could the testator leave his property to "the poor" or for other general pious or charitable causes.[143] Policy concerns eventually resulted in additional restrictions on testamentary freedom that served family protection functions. For example, testators could only disinherit certain heirs—"necessarius haeres"—if there was a valid legal cause for disinherison.[144]

The spread of Christianity forever changed the law. In 313 A.D., Constantine's Edict of Milan specifically recognized the right of the church to own property as a corporation.[145] A few years later, Constantine gave Roman citizens the right to leave their estates to "'any of the most sacred and venerable Catholic churches'"[146] rather than to their own families. Very few other juridical persons or indefinite heirs could receive testamentary bequests of property. This practice was soon abused and corrupted.[147] Romans would leave all of their property to the church, to the detriment of their children, other relatives, and creditors.[148] The church became an incredibly powerful influence in the dying process.[149] This is not particularly surprising. Fear of death and the desire for immortality are universal human characteristics[150] and the church offered the promise of immortality for believers.[151]

141. *See id.* at 49.

142. *See id.*; PRIVATE LAW AMONG THE ROMANS, *supra* note 136, at 343-44.

143. *See* DROPSIE, *supra* note 139, at 126; PRIVATE LAW AMONG THE ROMANS, *supra* note 136, at 343-44.

144. PRIVATE LAW AMONG THE ROMANS, *supra* note 136, at 354.

145. *See* EDICT OF MILAN, in Lactantius, De mortibus persecutorum, ch. 48, *translated in* 4 TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY 28-30 (1897-1907), *available at* http://www.fordham.edu/halsall/source/edict-milan.html.

146. WILLIAM K. BOYD, THE ECCLESIASTICAL EDICTS OF THE THEODOSIAN CODE 82 (1905), *available at* http://openlibrary.org/books/OL6965693M/The_ecclesiastical_edicts_of_the_Theodosian_code.

147. *Id.* at 83.

148. *Id.* at 84.

149. *See id.*

150. *See, e.g.*, SHELDON SOLOMON, JEFF GREENBERG & TOM PYSZCZYNSKI, PRIDE AND PREJUDICE: FEAR OF DEATH AND SOCIAL BEHAVIOR, 9 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE NO. 6, 201 (2000).

151. *See e.g.* Nancy Murphy, *Immortality Versus Resurrection in the Christian Tradition*, 1234 ANN. N.Y. ACAD. SCI. 76, 77 (2011)

Following the fall of the Western Roman Empire and the resulting political power vacuum, the church assumed an even greater role in the testamentary process.[152] Testamentary bequests to the church became compulsory rather than simply permitted. The church combined the final confession with the act of directing the distribution of property at death.[153] In the West, the church established its own form for executing a testament in accordance with Canon law.[154] These testaments had to be executed in the presence of a priest or other religious official—but were otherwise lacking many of the formalities required by Roman law.[155] The church worked to abolish many aspects of the Roman law aimed at protecting the freedom of the testator—such as the requirement of disinterested witnesses—in order to enhance the likelihood that the church would benefit from a will.[156] "[M]any councils in France, England, and Spain made it a law for the laity, that they should not testamentate otherwise than in the presence of their priests."[157] The last testament and the last confession were both part of the same act and that act required the presence of a priest.[158] Thus, the members of the clergy were the only people capable of receiving testaments in the first place.[159] Naturally, these testaments, often delivered orally, contained significant bequests to the church. The church offered salvation and immortality, but at a literal monetary price.[160] "One needs to go but little way into the documentary history of the period from the fifth to the fifteenth centuries of our era, to find abundant examples of the way in which men bought their peace with Heaven . . . ."[161]

In 597, Pope Gregory I sent Augustus to England to help spread

152. WILL CONTESTS, *supra* note 16, at §2.1.

153. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, Book II, 318-19 (2d ed. 1898).

154. *See* DROPSIE, *supra* note 139, at 126.

155. *See id*.

156. *See id.*

157. *Id.*

158. 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, 188 (1991); James Findley, Note, *The Debate Over Nonlawyer Probate Judges: A Historical Perspective*, 61 ALA. L. REV. 1143, 1150 (2010).

159. Barbara R. Hauser, *The Tale of the Testament*, 12 PROB. & PROP. 58, 62 (1998).

160. Joseph Willard, *Illustrations of the Origin of Cy Près*, 8 HARV. L. REV. 69, 79 (1894).

161. *Id.* at 73..

Christianity.[162] Soon, "the clergy had obtained enormous power, and in a great measure controlled the government, which, from their education and knowledge, they were peculiarly qualified to administer."[163] The Roman clergy were often the only men qualified to act as lawyers "and they exercised the profession of religion and law for centuries before these vocations were severed and performed by different classes of persons."[164] The church took control of the probate system as well as the execution of testaments.[165] Testators needed the help of a priest to execute testaments. The church, in turn, was responsible for interpreting and enforcing the terms of those testaments.[166]

Feudalism and primogeniture resulted in a division of inheritance systems in England. Land transferred to the oldest son by operation of law and the church had only a limited ability to obtain land by testamentary bequest.[167] The church, however, controlled the system governing the transfer of chattels at death. Initially, the church asserted jurisdiction over wills that left chattels for religious or pious uses.[168] Because testators customarily left a third of their chattels to the church, the church essentially asserted jurisdiction over all testate estates.[169] The church eventually "asserted a right to oversee the goods of men who died without wills" as well.[170] If a man died intestate, then, in the view of the church he also died without his last confession.[171] When this occurred, it fell to the church to use the chattels of the deceased to do what it could to help his soul.[172] By the thirteenth century, ecclesiastical courts held exclusive jurisdiction over probate and similar matters.[173]

Testaments proved to be a lucrative business for the clergy from the fall of the Western Roman Empire through at least the sixteenth century.[174] The clergy "introduced the mode of disposing estates after death by testament, and as they were the only persons capable of drafting

162. *See* DROPSIE, *supra* note 139, at 2-3.
163. *See id.* at 3.
164. *See id.* at 5.
165. *See id.*
166. *See id.*
167. *See id.* at 2-5.
168. *See, e.g.*, Findley, *supra* note 158, at 1150.
169. *See, e.g.*, *id.*
170. *Id.* at 1150.
171. POLLOCK & MAITLAND, *supra* note 153, at 357.
172. *Id.*
173. *See, e.g.*, Findley, *supra* note 158, at 1150.
174. DROPSIE, *supra* note 139, at 5.

such instruments, and as they had the care of the souls of the testators . . . generous provisions were made for the church, which became greatly enriched."[175] Conflict was inevitable.

B. *Competing Policies in England*

The church acquired massive land holdings in England.[176] Although primogeniture made it difficult for the church to receive land in a testamentary bequest, feudalism actually provided the church with an even better opportunity to add to its real estate holdings. "It seems that whenever possible poor freemen preferred to grant their land to the monasteries for protection rather than to the rich landowners."[177] The church offered more agreeable terms then other feudal lords.[178] "[T]he terms of service exacted of a vassal by the Church were less burdensome and . . . the monks not only promised him protection but also assured him that they would intercede for his happiness after death."[179] The other feudal lords were unhappy with this arrangement. In their view, excessive property ownership by corporations (and churches in particular) was inherently problematic because it removed property from the stream of commerce.[180] The feudal aristocracy worried that inter vivos donations of property to juridical persons allowed people to avoid their feudal services to the detriment of the feudal lords and the nation as a whole.[181] In response, England enacted a series of "mortmain" (literally "dead hand") statutes beginning with the Magna Charta in 1215 in an effort to recalibrate the competing policy concerns.[182] The Magna Charta provided that "no land would thereafter be alienated except so as to retain the services due to the lord of the fees."[183] Those restrictions

175. *Id.*

176. HENRY P. TRAWICK, JR., TRAWICK'S REDFEARN WILLS AND ADMINISTRATION IN FLORIDA, app. A § 1:2 (2012-13 ed.).

177. *Id.*

178. *See* A. H. Oosterhoff, *The Law of Mortmain: An Historical and Comparative Review*, 27 U. TORONTO L.J. 257, 266-69 (1977).

179. TRAWICK, *supra* note 176, at app. A § 1:3.

180. *See, e.g.*, Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407, 407-09 (1992); Oosterhoff, *supra* note 178, at 265-69.

181. *See, e.g.*, Sherman, *supra* note 22, at 583-88; Oosterhoff, *supra* note 178, at 265-69; L.S. Bristowe, *The Legal Restrictions on Gifts to Charity*, 7 L. Q. REV. 262, 266-67 (1891).

182. *See, e.g.*, John R. Cunningham, *Mortmain Statutes: The Dead Hand Still Survives*, 27 IDAHO L. REV. 49, 49-50 (1990); Bristowe, *supra* note 181, at 266-67 (1891).

183. Oosterhoff, *supra* note 178, at 267.

soon proved insufficient and a new statute—the Great Charter of 1217—was enacted.[184] That act was broader in scope than the Magna Charta and provided a procedural mechanism for enforcement.[185] The 1217 act also proved somewhat ineffective and was followed by the 1279 Statute of Mortmain, which attempted to expand the scope of the prohibition.[186]

Family protection was not a major concern initially because existing laws and customs protected the family.[187] A man's land devolved to the eldest son by operation of law under primogeniture, with a life interest, or dower, over a portion of those lands going to his widow.[188] Wills dealt with a testator's chattels, but often just confirmed the default tripartite rule of chattel division.[189] If a man had both children and a wife then he could only dispose of one-third of his chattels by testament.[190] The remaining two-thirds formed the "reserve" or "legitime" belonging to the widow and children. The surviving widow received one-third, and the remaining one-third was divided between the testator's children.[191] These rules varied somewhat by region and over time—but their general thrust remained the same.[192] The testator's wife and children were entitled to a reserve or legitime that was some fraction of the testator's estate.[193] The testator could direct the remaining disposable portion of his estate to someone other than his wife and children.[194] In practice, however, that disposable portion went to the church either by custom or ecclesiastical law.[195] Testamentary freedom became virtually extinct.[196]

The early mortmain statutes were simply not aimed at protecting the

184. *See, e.g.*, Sherman, *supra* note 22, at 587.

185. *See* Oosterhoff, *supra* note 178, at 267.

186. *Id.*

187. *See* ATKINSON, *supra* note 13, at 14-15; Orrin K. McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96, 110 (1919).

188. *See* George L. Haskins, *The Development of the Common Law Dower*, 62 HARV. L. REV. 42, 53 (1948).

189. *See* Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L. REV. 337, 342 (1940).

190. *Id*. at 341.

191. *Id*.

192. *See* POLLOCK & MAITLAND, *supra* note 153, at 348-50; Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 114-15 (1943) [hereinafter Atkinson, *Brief History*].

193. *See* Dainow, *supra* note 189, at 341-44.

194. *See id.* at 341-44.

195. *See id.* at 341.

196. *Id.*

testator's family.[197] Rather, the early mortmain statutes sought to strike the proper balance between the power of the church and the interest of society as a whole.[198] The power struggle between the church and the aristocracy continued over the years.[199] In response to the 1279 Statute of Mortmain, the ecclesiastical courts adopted the civil law concept of "uses" which essentially allowed the church to obtain the enjoyment of even more land and to circumvent the mortmain statutes.[200] In the 1500s, King Henry VIII actively used the powers granted to him under the various mortmain statutes to usurp the power of the Catholic Church and its landholdings in England.[201] Parliament enacted the Statute of Uses, which invalidated the concept of uses that the church had used to its advantage in earlier years.[202] Yet, the reign of King Henry VIII and the Reformation actually coincided with a change in public attitude regarding charitable giving—particularly secular giving.[203] "[S]everal legislative enactments during this time encouraged private philanthropy, especially in the areas of education and the relief of the poor, sick, and aged."[204] These two developments were not necessarily inconsistent. The religious houses had, to some extent, served the poor and needy prior to the Reformation.[205] By encouraging private—but not necessarily religious—philanthropy, the state sought "to prevent the poor, the aged, and others from becoming a burden on the state . . . ."[206] Queen Elizabeth I continued this trend during her reign.[207] The English legal system showed an increasingly favorable attitude towards charitable secular giving in the following years and the early mortmain statutes were eventually weakened and repealed.[208] Legislation enacted in 1703 essentially repealed any remaining mortmain statutes and created a new

197. *See, e.g.*, Bristowe, *supra* note 181, at 268.

198. *Id.*

199. *See* Atkinson, *Brief History*, *supra* note 192, at 112-14.

200. TRAWICK, *supra* note 176, at app. A § 1:3 ("Under this system, the owner simply conveyed the legal title to his land to some person or corporation for the benefit of some named usee; the usee could be such owner himself. The usee then held the equitable title and could convey it . . . . Under this system of uses, wills of land could be made, as the use was not considered as land, though it was the only valuable feature of it.").

201. *See* Sherman, *supra* note 22, at 589.

202. TRAWICK, *supra* note 176, at app A § 1:3.

203. Oosterhoff, *supra* note 178, at 274.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 275.

208. *See id.*

and powerful charitable corporation called "Queen Anne's Bounty."[209] "Queen Anne's Bounty" had a decidedly religious purpose. The queen, who pressured parliament to enact the legislation, sought to rebuild and strengthen the church in the wake of the Reformation.[210] To that end, "Queen Anne's Bounty" earmarked certain tax revenue to be used to support the clergy of the Church of England.[211]

England generally moved towards a system allowing greater testamentary freedom.[212] Fraud, however, soon posed a serious threat to that freedom. Prior to enactment of the Statute of Frauds of 1677, testaments conveying real property only needed to be written;[213] they did not require the signature of the testator or witness.[214] Testaments conveying only personal property could be oral.[215] In 1666, when the Fire of London destroyed real estate records and the plague caused an inordinate number of deaths, this legislative scheme proved disastrous.[216] Real estate fraud was rampant.[217] Without the signature of the testator or disinterested witnesses, it was virtually impossible to determine whether a purported testament was the actual will of the testator.[218] The Statute of Frauds of 1677 largely remedied this problem.[219] Under the new law, testaments conveying real property had to be in writing, signed by the testator, and attested to before several disinterested witnesses.[220] Testaments conveying only personal property were subject to a less onerous form, but generally required a written instrument.[221]

While charitable giving and testamentary freedom gained popular and legal support, family protection measures lost some ground.[222] By the 1700s, England had abandoned the laws and customs reserving a

209. *See* Mary F. Radford, *The Case Against the Georgia Mortmain Statute*, 8 GA. ST. U. L. REV. 313, 321 (1992).

210. *See* Oosterhoff, *supra* note 178, at 275.

211. *See id.*; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2147 (2002).

212. *See* McMurray, *supra* note 187, at 110; Dainow, *supra* note 189, at 342.

213. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547-48 (1990).

214. *Id.*

215. *Id.*

216. *Id.* at 550-52 (1990).

217. *Id.*

218. *See id.*

219. *See id.*

220. *Id.*

221. *Id.*

222. *See* McMurray, *supra* note 187, at 110; Dainow, *supra* note 189, at 342.

portion of the testator's property for his wife and children.[223] It is not entirely clear why England abolished these family protection mechanisms.[224] Certainly, women and children remained dependent on their husbands and fathers for support and protection. The major continental legal systems all retained some portion of a testator's estate for his wife and children—making the English abandonment of that approach even more unusual.[225]

The popularity of the church and clergy eventually waned again and England decided to recalibrate the competing public policies.[226] Just a few years after its enactment, "Queen Anne's Bounty" was harshly criticized as upsetting the recently restored balance of power between the church and the state.[227] In the absence of any limiting statute or custom, people grew concerned that testators would make improvident charitable bequests from their deathbeds to the church.[228] Amid this renewed anti-clergy sentiment, the English Parliament enacted the so-called Modern Law of Mortmain in 1736 (the "Mortmain Act").[229] The Mortmain Act took a different approach from the earlier mortmain statutes by explicitly prohibiting testamentary bequests of land to charities, as well as nullifying inter vivos transfers of land to charities when made within twelve months of the donor's death.[230] Any nullified or prohibited transfer simply reverted to the donor's heirs.[231] The motivations behind the Mortmain Act are somewhat unclear. Some legislative history suggests that the Mortmain Act was aimed at preventing property from being removed from commerce.[232] The express language of the Mortmain Act explained that its purpose was to prevent testators from making improvident death bed transfers of property to charities to the detriment of their own families.[233] However, "[i]t is probable that the anti-clerical feeling was the most important, though unstated, reason for

223. McMurray, *supra* note 187, at 110.

224. *See* Dainow, *supra* note 189, at 342-44.

225. *See* McMurray, *supra* note 187, at 110-11.

226. *See* Oosterhoff, *supra* note 178 at 280; Sherman, *supra* note 22, at 595.

227. Bristowe, *supra* note 181, at 268.

228. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES at 273; Sherman, *supra* note 22, at 595; Bristowe, *supra* note 181, at 268.

229. Sherman, *supra* note 22, at 595; Bristowe, *supra* note 181, at 268.

230. *See* Sherman, *supra* note 22, at 597.

231. *See id.*

232. *See* Oosterhoff, *supra* note 179, at 278; Bristowe, *supra* note 181 at 268

233. Oosterhoff, *supra* note 178, at 281.

the act."[234] In any event, English law sought to find the appropriate balance between freedom of testation, family protection, and charitable bequests.

Similar experiences with the church unfolded elsewhere in Western Europe.[235] Over time however, most countries, including England, repealed their mortmain statutes.[236] In England, repeal occurred first in a piecemeal fashion in the early 1900s.[237] By the 1950s, when England re-examined its mortmain statutes in a more comprehensive manner, the mortmain laws had so many exceptions that they mainly served to complicate law.[238] In Parliament's view, mortmain statutes were no longer needed or well suited for protecting testamentary freedom and family protection. Rather, by this era "the influence of the clergy had been greatly undermined" and other existing laws could protect against overreaching by the church.[239]

C. *Mortmain in the United States*

Early American jurisdictions greatly valued testamentary freedom as the fundamental principle of wills.[240] This policy continues today. In recent years, American courts have described the freedom of testation as a "fundamental concept"[241] and a "specifically expressed constitutional property right."[242] The American colonies did not, however, import the English mortmain statutes. "[T]he English mortmain statutes were never thought to be in force in this country unless they had been legislatively adopted."[243] Many American jurisdictions did enact their own mortmain statutes. A few states apparently shared the traditional concern that excessive property ownership by religious organizations took property

234. *Id.* at 280.

235. *Id.* at 271.

236. *Id*. at 271-72, 291-92.

237. *See id.* at 291.

238. *Id.* at 293.

239. Oosterhoff, *supra* note 178, at 295.

240. *See* Jeffery M. Alden, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation*, 18 STAN. L. REV. 1119, 1120 (1966); Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 194-98 (2012); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 149-50 (2008)..

241. Breeden v. Stone, 992 P.2d 1167, 1170 (2000).

242. Shriners Hosps. for Crippled Children v. Zrillic, 563 So. 2d 64, 68. (Fla. 1990).

243. Osnes v. Morris, 298 S.E.2d 803, 810 (W. Va. 1982); *accord* Perin v. Carey, 65 U.S. 465 (1860).

out of commerce. These states enacted laws restricting the amount of property that a religious group or charity could own.[244] The more common concern, however, was protecting testators and their families from overreaching by religious groups.[245] To that end, some statutes sought to balance the competing interests of family protection and freedom of testation. As Justice Story explained, the purpose of these statutes was:

> to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check an unfortunate propensity (which is sometimes found to exist under a bigoted fanaticism), the desire to acquire fame as a religious devotee and benefactor at the expense of all the natural claims of blood, and parental duty.[246]

The American statutes took a variety of approaches. One approach simply invalidated all testamentary bequests to charity if made within a certain period before death.[247] Others placed a limit on the amount of property a testator could leave to a charity in his will, particularly if he was survived by a wife or children.[248] Some states used a combination of the two approaches.[249] The mortmain statutes eventually proved unworkable. Percentage limitation mortmain statutes posed valuation problems, particularly when the testator owned property in more than one state.[250] Some statutes were easily circumvented through careful

244. Kristine S. Knaplund, *Charity for the "Death Tax": The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 722-23 (2009). These states included Iowa, Mississippi, Missouri, Virginia, Illinois, New York, Pennsylvania, and Oklahoma.

245. *See, e.g.*, *In re* Estate of French, 365 A.2d 621, 622 (D.C. 1976) ("Mortmain statutes in general are intended to protect a donor's family from disinheritance due to charitable gifts made either without proper deliberation or as a result of undue influence on the part of the beneficiaries."); *In re* Estate of Kinyon, 615 P.2d 174, 175 (Mont. 1980) ("[T]he purpose was two-fold, namely to prevent overreaching by charities and to protect the interests of relatives.").

246. Stephenson v. Short, 92 N.Y. 433, 444 (1883) (citing another source).

247. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS §9.7 cmt. b (2003).

248. *Id.*

249. *Id.*

250. *See* Sherman, *supra* note 22, at 605-08. *See generally* G. Stanley Joslin, *Conflicts of Laws Problems Raised by "Modern Mortmain Acts,"* 60 DICK. L. REV. 7 (1955).

drafting.[251] Moreover, Americans did not necessarily object to *all* testamentary bequests to charity.[252] Indeed, testamentary freedom remained a valued principle, as did charitable giving.[253] Americans were concerned, however, that dependent family members be protected from disinheritance and that testators be protected from overreaching or undue influence on the part of charities.[254] The problem with the mortmain statutes was that, while aimed at both of these concerns, they were both over and under-inclusive. The statutes were over-inclusive because they voided "many intentional bequests by testators who were not impermissibly influenced or who [did] not have immediate family members in need of protection."[255] The statutes were also under-inclusive because they did not "affect many charitable gifts made without proper deliberation," nor did they "void legacies to persons who are in an equal position with religious persons to influence a testator."[256] In response to mounting dissatisfaction with mortmain statutes, some states repealed their statutes voluntarily. In other states, courts held the statutes unconstitutional on a number of grounds, including the equal protection[257] and due process clauses of state and federal constitutions[258] and state constitutional property guarantees.[259] A few lower courts held mortmain statutes unconstitutional on First Amendment grounds,[260] but higher courts generally declined to address that issue.[261] By 1975 mortmain statutes remained in only eleven states.[262] In 1998 the last remaining mortmain statute—Georgia's—was repealed.[263]

The mortmain statutes "were repealed because they were

251. *See* Sherman, *supra* note 22, at 605-08.

252. *See* Shriners Hosps. for Crippled Children v. Zrillic, 563 So. 2d 64, 69-70. (Fla. 1990).

253. *Id.*; *see also* Carter, *supra* note 240 at 180, 194-98.

254. *See Zrillic*, 563 So. 2d at 69.

255. *Id* at 70 (quoting another source).

256. *Id.* (quoting another source).

257. *See* Shriners' Hospital for Crippled Children v. Hester, 492 N.E.2d 153, 157 (Ohio 1986); *Zrillic*, 563 So. 2d at 69.

258. *See* Sherman, *supra* note 22, at 609.

259. *Zrillic*, 563 So. 2d at 69.

260. *See* Cunningham, *supra* note 182, at 75-76.

261. *See, e.g.*, *Hester*, 492 N.E.2d at 157 ("Based upon this holding we decline to address Shriners' challenge . . . under the Free Exercise Clauses of the Ohio and United States Constitutions.").

262. Cunningham, *supra* note 182, at 51; Sherman, *supra* note 22, at 582.

263. *See* Sherman, *supra* note 22, at 582; 2 DANIEL F. HINKEL, GEORGIA REAL ESTATE LAW & PROCEDURE §16-33.1 (6th ed.).

unworkable, not because they were unnecessary."[264] Yet the mortmain statutes were not replaced with any particular legislation better tailored to address the problem. Rather, it seems states were confident that the existing law of undue influence provided adequate safeguards.[265] The doctrine of undue influence had emerged in both England and the United States by the early 1800s.[266] Initially, the doctrine was rather narrow and required proof of coercion or fraud.[267] Over time, courts liberalized the doctrine and expanded its scope.[268] By the time states began to abandon their mortmain laws, the law of undue influence was firmly established and increasingly robust. Many states assumed that the law of undue influence could sufficiently protect testators and their families. That has not been the case.

IV. The Non-Profit Sector Today

"Americans have long been, and continue to be, a famously charitable people."[269] Charity plays an important—but complicated—role in this country. Beginning in the colonial period, charities provided important services that the government was unable or unwilling to provide.[270] The charitable sector today is a mix of secular and religious organizations. When considered as a whole, however, the sector does bear some resemblance in terms of size, power, and benefits to the church of the past.

A. *Size and Scope of the Non-Profit Sector*

264. Sherman, *supra* note 22, at 582.

265. *Id*.

266. WILL CONTESTS, *supra* note 16, at § 2:8.

267. *See* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. KAN. L. REV. 245, 262 (2010).

268. *Id*.

269. Rob Reich & Christopher Wimer, *Charitable Giving and the Great Recession*, STAN. CENTER ON POVERTY AND INEQUALITY (Oct. 2012), *available at* https://www.stanford.edu/group/recessiontrends/cgibin/web/sites/all/themes/barron/pdf/CharitableGiving_fact_sheet.pdf.

270. *See* Barbara Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL'Y 555, 558 (1998); Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1422-23 (1984); Irving G. Wyllie, *The Search for an American Law of Charity, 1776-1844*, 46 MISS. VALLEY HIST. REV. 203, 204-05 (1959).

The vast majority of Americans—anywhere from sixty-four[271] to ninety-five percent[272]—donate money to charity each year. Since at least 1956, total charitable giving in the United States has been equal to about two percent of total GDP,[273] which is significantly higher than giving in any other country.[274] In 2011, private charitable giving totaled an estimated $298.42 billion in the United States, which was actually a slight decrease from prior years.[275]

In 2010, there were an estimated 2.3 million nonprofit organizations operating in the United States.[276] These organizations include religious organizations, hospitals, educational organizations, colleges and universities, and organizations promoting arts, culture and humanities.[277] In 2010, these organizations collectively accounted for 9.2% of all wages and salaries paid in the U.S.[278] Among those organizations required to file a financial return with the IRS, nonprofits reported $2.06 trillion in revenues and $4.49 trillion in assets for the 2010 tax year.[279] In 2012, the nonprofit sector's share of the national GDP was 5.5%.[280]

B. *Legal and Economic Benefits Enjoyed by the Non-Profit Sector*

Charities enjoy a remarkably privileged position in American law. Legislation enacted at all levels of government confers considerable

271. CHARITIES AID FOUNDATION, WORLD GIVING INDEX 2011, 15 (2011), *available at* http://www.cafamerica.org/dnn/Portals/0/World%20Giving%20Index%202011/World%20Giving%20Index%20main%20report%20for%20download.pdf.

272. Eduardo Porter, *Charity's Role in America and its Limits*, N.Y. TIMES, Nov. 14, 2012, at B1.

273. GIVING USA, THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2011, EXECUTIVE SUMMARY 21 (Center on Philanthropy at Indiana University 2012) [hereinafter GIVING USA].

274. *See* CHARITABLE AID FOUNDATION, INTERNATIONAL COMPARISONS OF CHARITABLE GIVING 2 (Nov. 2006), *available at* https://www.cafonline.org/PDF/International%20Comparisons%20of%20Charitable%20Giving.pdf.

275. *Id.*

276. Amy S. Blackwood et al., *The Nonprofit Sector in Brief: Public Charities, Giving, and Volunteering 2012*, URBAN INSTITUTE (2010), *available at* http://www.urban.org/UploadedPDF/412674-The-Nonprofit-Sector-in-Brief.pdf.

277. *Id.*

278. *Id.*

279. Blackwood, *supra* note 276.

280. *Quick Facts About Nonprofits*, NATIONAL CENTER FOR CHARITABLE STATISTICS (2012), *available at* http://nccs.urban.org/statistics/quickfacts.cfm.

benefits on nonprofit organizations, benefits that often come at the expense of taxpayers.[281] Perhaps the best-known legal and economic benefits afforded to charities are found in the tax arena. At the federal level, qualifying nonprofit organizations are exempt from the income tax.[282] Donors to nonprofit organizations receive their own tax benefits, including income tax deductions[283] and gift and estate tax exemptions.[284] Nonprofits with employees receive additional benefits. In addition to the tax-deferred retirement and pension plans available to for-profit organizations, nonprofit organizations have more options in the form of 403(b) plans and section 457 plans.[285] Nonprofits are exempt from federal unemployment payroll taxes and some religious organizations may opt out of the social security system.[286] Nonprofit organizations are also exempt from various federal excise taxes and are entitled to reduced postage rates.[287] At the state level, religious and charitable organizations receive additional benefits in the form of exemptions from property taxes and sales and use taxes.[288]

Tax benefits, however, are not the only legal and economic benefits afforded to nonprofit organizations by legislation. A number of antitrust laws and regulations that apply to for-profit organizations do not apply to nonprofits. "Schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit" are exempt from the Robinson-Patman Act (prohibiting price discrimination) in some instances.[289] Most nonprofits are exempt from the Federal Trade Commission Act, which prohibits "unfair methods of competition in commerce, and unfair or deceptive practices in commerce."[290] Nonprofit organizations are entitled to a few, but significant, exceptions from federal securities laws and copyright laws.[291] Nonprofit organizations

281. *See, e.g.*, Michael A. Pagano, *How Nonprofits Can End Up Becoming a Drain on City Budgets*, ATLANTIC (Nov. 12, 2012), *available at* http://www.theatlanticcities.com/jobs-and-economy/2012/11/how-nonprofits-can-end-becoming-drain-city-budgets/3798/.

282. *See* 26 U.S.C. § 501 (2012); Bucholtz, *supra* note 270, at 560-61.

283. *See* 26 U.S.C.§ 170(c) (2012).

284. *Id.* §§ 2055, 2522.

285. Bazil Facchina et al., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85, 98-99 (1993).

286. *Id.* at 99-103.

287. *Id.* at 103, 112-14.

288. *Id.*

289. *Id.* at 105-06.

290. *Id.* at 106.

291. *Id.* at 107-11.

cannot be placed in an involuntary bankruptcy proceeding.[292] In the labor and employment context, some nonprofit organizations are exempt from the National Labor Relations Act and, in some instances, religious organizations are exempt from anti-discrimination and civil rights laws..[293] Nonprofit organizations are exempt from a variety of criminal laws including federal conflict of interest crimes under 18 U.S.C. § 207, federal anti-bribery laws, and gambling related criminal law exemptions.[294] Many of these federal benefits have state level equivalents.[295]

C. *Policy Justifications for Legal and Economic Benefits Afforded to Charities*

Without question, nonprofits are favored as a matter of public policy. A good deal of scholarship has considered this public policy in the economic and tax policy context. Scholars point out that the multitude of tax benefits conferred on nonprofit organizations and their donors amounts to a subsidy or government expenditure for the benefit of these organizations.[296] Several popular explanations justify the charitable subsidy. The traditional justification is that "subsidizing charities is 'good' because of the benefits they provide."[297] Specifically, "charities relieve the government of burdens it would otherwise have to bear, such as poverty relief."[298] Charities "counter[] governmental power and enhance[] pluralism," "offer[] alternative viewpoints in arts and culture" and "provide[] creative and diverse solutions to society's problems . . . ."[299] A newer, and increasingly popular justification contends that, "subsidizing charities is necessary to help them provide good or services that would otherwise be under-produced due to various market and governmental failures."[300] The nonprofit sector—and the

292. *Id.* at 112.

293. *Id.* at 116-17.

294. *Id.* at 117-29.

295. *Id.*

296. *See, e.g.*, Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 609-13 (2011) [hereinafter Fleischer, *Equality of Opportunity*].

297. Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 183 (2008) [hereinafter Fleischer, *Generous to a Fault?*].

298. Fleischer, *Equality of Opportunity*, *supra* note 296, at 610.

299. Fleischer, *Generous to a Fault?*, *supra* note 297, at 183.

300. Fleischer, *Equality of Opportunity*, *supra* note 296, at 611.

subsidies it receives—has been both applauded and criticized in recent years for a variety of reasons.[301] Although these critiques are obviously important, they fail to consider the wisdom of this public policy in the context of the individual testator.

D. *Non-Profits & Testamentary Bequests*

Testamentary bequests play an important role in the financial plans of non-profit organizations.[302] Many nonprofit organizations are looking, in part, to the Baby Boomer wealth transfer as an important source of funding.[303] In their view "[t]he downturn is not going to keep people from dying, and it is not going to keep a wealth transfer from occurring."[304] Bequest giving already accounts for an important source of funding in the non-profit sector. It is estimated that testamentary bequests account for about 8% of total annual charitable giving.[305] In 2011, that 8% amounted approximately $24.41 million.[306]

At 8%, testamentary bequests represent a small, yet significant, portion of overall yearly giving. That figure is actually more impressive than it might seem at first glance. Approximately 2.5 million people died in the U.S. in 2011.[307] Of those 2.5 million, approximately forty-six percent died without significant financial assets rendering them unable to

301. *See generally*, Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990); Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873 (1997); Bucholtz, *supra* note 270, at 555.; Fleischer, *Equality of Opportunity*, *supra* note 296, at 601; Fleischer, *Generous to a Fault?*, *supra* note 298, at 165; Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437 (2005); Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51 (2012); Shannon Weeks McCormack, *Taking the Good With the Bad: Recognizing the Negative Externalities Created by Charities and Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977 (2010).

302. *See e.g.* Bartholomew A. Seymour, III, *How to Market Planned Giving to Donors*, 22 NONPROFIT WORLD, No. 6 at 7 (2004).

303. *See* Howard Husock, *The Fiscal Cliff Deal: Charity Takes a Hit*, FORBES, (Jan. 3, 2013), *available at* http://www.forbes.com/sites/howardhusock/2013/01/03/the-fiscal-cliff-deal-charity-takes-a-hit/.

304. Morais, *supra* note 8 (quoting another source).

305. GIVING USA, *supra* note 273, at 8.

306. *Id.*

307. Donna L. Hoyert & Jiaquan Xu, *Deaths: Preliminary Data for 2011*, 61 NAT'L VITAL STAT. REP. No. 6, at 2 (Oct. 10, 2012) *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf.

leave a bequest to anyone.[308] Presumably then, the $24.41 million in charitable bequests came in the form of a small number of rather large bequests to charity. Indeed, there is a significant gap between the number of Americans who donate to charity during life and the number of Americans who give money at death.[309] Although most Americans donate to charity during life, only eight percent of Americans name charities in their estate plans.[310] Interestingly, that eight percent figure is comparable to findings in the United Kingdom[311] and Australia.[312] In the view of charities and planned giving professionals, that eight percent figure translates into a "giving channel" with "untapped potential" to "yield additional gifts."[313] The nonprofit sector is expending considerable resources studying donors in order to "add to the body of knowledge about how fund raisers can enhance the number of bequests given to charitable organizations."[314]

1. How Charities Solicit Testamentary and Other Gifts: The Planned Giving Campaign

The typical planned giving campaign involves three key steps. First, the charity collects data on its existing inter vivos donors. Second, the charity analyzes that data to identify the most likely charitable bequest donors—or "prospects."[315] Third, the charity directs a

308. James M. Poterba et al., *Were They Prepared for Retirement? Financial Status at Advanced Ages in the HRS and Ahead Cohorts*, 40 (NBER Working Papers NO. 17824, 2012).

309. *See* Emily Krauser, *Demographics and Motivations of Potential and Actual Donors*, CENTER ON PHILANTHROPY IND. U., 14 (Mar. 2007) *available at* http://www.campbellcompany.com/Portals/22807/docs/Bequest%20Donors%20Full%20Report%20with%20Exec%20Summary.pdf.

310. *Id*.

311. John Micklewright et al., *Charitable Bequests and Wealth at Death* 13 (Inst. For Study of Lab., Discussion Paper No. 7014, 2012) (estimating that "6 per cent of deaths in Britain in 2007 resulted in a charitable bequest.").

312. Diana Olsberg & Mark Winters, *Ageing in Place: Intergenerational and Intrafamilial Housing Transfers and Shifts in Later Life* 76 (Austl. Hous. & Urb. Res. Inst., Final Rep. No. 88, 2005) (Of the 96.2% of respondents reporting having made a will, 7.1% reported making bequests to a charity, church or institution.).

313. *See* Krauser, *supra* note 309, at 11.

314. *Id*.

315. *See* Lawrence Henze, *How The Right Marketing Strategies Can Enhance Your Planned Giving Program*, BLACKBAUD (Apr. 2011), https://www.blackbaud.com/files/resources/downloads/WhitePaper_TargetAnalytics_PlannedGiving.pdf ("If you have done the data mining, and you know the best individuals

multifaceted marketing campaign at those donors. Each step in this process is sophisticated, aggressive, backed in actual research, and largely exempt from legal regulation.

a. *Data Collection*

The first step in any planned giving campaign is to identify potential testamentary donors. Charities are able to collect, utilize, and share this data on their current donors, clients, alumni, members, and potential donors with little governmental regulation. The privacy laws and regulations that protect consumer information in the for-profit context do not usually apply to nonprofit organizations.[316] Nonprofit fundraisers are free to engage in practices—like telephone solicitations—that are prohibited in the commercial context.[317] Charities, particularly the large ones, collect all sorts of information about their donors and potential donors. Once an organization has some very basic information about a person in their database—like a name and address—they can conduct formal research—either in house or with the help of a research company—to add to that information.

Suppose I decide to donate ten dollars to a charity using the link on its website. In order to pay by credit card, the charity will require me to provide my full name, billing address, and phone number.[318] Many nonprofits will require additional information such as an e-mail address. Knowing only my name and address, a researcher can discover all sorts of information about me, often for free. If the charity wanted to determine whether I was a likely charitable bequest donor, then the charity might want to know my age, marital status, number and ages of children (if any), education, religious affiliation, income, and net worth.[319] The salaries of state and federal employees are often public information. For other potential donors, income and net worth may be approximated. Several pieces of data can indicate wealth: an expensive home, other real estate holdings like vacation homes, a high paying occupation, owning a luxury car, owning a boat, having an expensive

most likely to make charitable bequests . . . you may effectively target the annual reports and newsletters.").

316. *See generally* Ely R. Levy & Norman I. Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy,* 15 STAN. L. & POL'Y REV. 519 (2004).

317. *See id*.

318. *See*, e.g., AMERICAN RED CROSS, www.redcross.org (last visited Mar. 7, 2014).

319. *See supra* note 315 and accompanying text.

hobby, frequent travel, and inherited wealth.[320] Knowing just my name and address, the charity can quickly uncover most of this information. By visiting anybirthday.com the researcher can input my name, city, and state and determine my age. The researcher can use my name and address to search the local property records to see if I own my house, its value, and if I have a mortgage. The property record might also reveal my marital status. Knowing only my name and address, the researcher can quickly discover whether I have made any political contributions since 1980.[321] If so, the researcher will also learn the dates, amounts, and recipients of the contribution, as well as my occupation.[322]

Facebook, Twitter, Linked In, and other social media sites are a goldmine of information.[323] Depending on my privacy settings, the researcher may be able to determine my marital status, sexual orientation, race, whether I have children, their approximate ages, my education, employer, hobbies, interests, recent illnesses, recent travel, and a myriad of additional information. All of the information just described can be obtained for free, online, with just a few minutes worth of research. Already the researcher has obtained the data necessary to see whether I meet a number of the demographic markers of a likely charitable bequest donor.[324] Of course, the researcher could do a little more work and discover even more information about me relevant to charitable bequests. For example, the researcher may be able to determine my actual salary, my pattern of charitable giving to other organizations, my social and professional affiliations, and my private business holdings.

b. *Analyzing the Data*

A growing body of research identifies the characteristics of living donors who make charitable bequests and explains the factors that motivate those bequests. Most lifetime donors do not leave money to charity at death.[325] One study found that 90.6% of donors who gave at

320. *See The Donor Cultivation System* 2, PUB. BROAD. MAJOR GIVING INITIATIVE, http://majorgivingnow.org/downloads/pdf/cultivation_system.pdf.

321. *See, e.g.*, POLITICAL MONEY LINE, http://www.politicalmoneyline.com (last visited Mar. 10, 2014).

322. *Id.*

323. *See* Somini Sengupta, *Staying Private on the New Facebook*, N.Y. TIMES (Feb. 7, 2013), at B1.

324. *See* POLITICAL MONEY LINE, *supra* note 321.

325. Russell N. James, III, *Health, Wealth, and Charitable Estate Planning: A*

least $500 to a charity during life, did not leave any money to charity at death.[326] The decision to donate money during life apparently involves a different decision-making process than the decision to leave money at death. A recent functional MRI study revealed that deciding to leave a charitable bequest involved a different brain region than the decision to donate money or time during life.[327] Researchers are working to identify the differences in that decision making process in order to convert lifetime donors into bequest donors. Studies consistently show that family makeup is strongly related to whether a person will leave a charitable bequest. Testators who are married or who have children or grandchildren are generally less likely to make charitable bequests.[328] However, parents appear more likely to leave charitable bequests when their children have higher incomes of their own.[329] Although it appears that "no other indicator is a [*sic*] strong as childlessness," other demographic factors are important.[330] The likelihood of making a charitable bequest increases with education level, with graduate degree holders being the most likely to leave a charitable bequest.[331] Being solicited by a charity for a bequest gift is positively associated with making a bequest gift.[332] Other characteristics positively associated with making a charitable bequest include: volunteering for the charity, attending religious services, higher socioeconomic status, income, and previous cancer diagnosis.[333]

c. *Marketing Campaign*

Once the nonprofit identifies a pool of likely bequest donor

Longitudinal Examination of Testamentary Charitable Giving Plans, 38 NONPROFIT & VOLUNTARY SECTOR Q. 1026, 1032 (2009).

326. *Id*.

327. Russell N. James, III & Michael W. O'Boyle, *Charitable Estate Planning as Visualized Autobiography: An fMRI Study of Its Neural Correlates*, NONPROFIT & VOLUNTARY SECTOR Q. (Oct. 22, 2012), http://nvs.sagepub.com/content/early/2012/10/17/0899764012463121.

328. *See, e.g.*, James, *supra* note 325, at 1039 ("[T]he presence of children or grandchildren . . . was the most dominant factor in predicted charitable testamentary planning across all analyses.").

329. *Id.* at 1027.

330. *Id*. at 1039.

331. *See* James, *supra* note 325, at 1031; Krauser, *supra* note 309, at 26.

332. *Profile of a Bequest Giver*, STELTER DONOR INSIGHT REP. 3-4 (2008), http://www.stelter.com/research-whitepapers/DIR-ProfileBequest.pdf.

333. James, *supra* note 325, at 1030-34.

prospects, it will deploy a multifaceted marketing campaign soliciting a charitable bequest. Marketing can help create desires that previously did not exist.[334] The marketing campaign starts early; years before research suggests the prospect is likely to actually make the gift.[335] Marketing campaigns often start with a variety of direct mailings, including post cards, newsletters, annual reports, and magazines.[336] The direct mail is sent to a large group of potential donors with the knowledge that most of them will not actually respond to the direct mail.[337] Rather, the direct mail campaign is intended to influence the prospects so that, "the ground is softer for the next promotion."[338] Post cards have the benefit of being inexpensive to produce and mail. They also have higher readership rates than other forms of direct mail.[339] Newsletters and magazines will generally include some "compelling donor stories that tug at the heartstrings of [the] audience . . . ."[340]

Research suggests that one barrier to charitable bequests is people do not believe they are wealthy enough to make those gifts.[341] To overcome that barrier, newsletters and magazines will include personalized stories about existing donors that are financially situated similarly to the prospect.[342] The goal of these personal accounts is to "simply and effectively bring home the message to prospects through sharing living examples of people 'just like them' who were able to make personally-significant planned gifts."[343] The personal accounts have the

334. *See* Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853, 889 (2002) (book review).

335. Seymour, *supra* note 302, at 7; Phyllis Freedman & Kathy Ward, *Applying the Art & Science of Direct Marketing to Planned Giving* (2010), http://www.smart-giving.com/plannedgivingblogger/wp-content/uploads/2010/06/Applying-the-Art-Science-of-Direct-Marketing-to-Planned-Giving.pdf; *see* Katherine Swank & Michael Quevli, *Prospect Research for Planned Gifts*, BLACKBAUD (2011), https://www.blackbaud.com/files/resources/downloads/WhitePaper_ProspectResearchforPlannedGifts.pdf.

336. *See* Henze, *supra* note 315.; Viken Mikaelian, *Planned Giving Marketing Secrets Revealed*, VIRTUAL GIVING (2013), http://plannedgiving.com/blog/wp-content/uploads/2007/05/pgsecrets.pdf.

337. *See* Gary Pforzheimer, *Planned Giving Marketing: Benchmarking and Beyond*, PG CALC. INC., 13 (2008), http://www.pgcalc.com/pdf/Outline1150.pdf.

338. *Id*.

339. *See, e.g.*, Mikaelian, *supra* note 336.

340. Pforzheimer, *supra* note 337, at 13.

341. *See* Henze, *supra* note 315, at 4.

342. *Id.* at 4.

343. *Id.* at 4; *see also* Pforzheimer, supra note 337, at 9-10. For examples of these stories, see, *e.g.*, Paul C. Lauterbur, *Honoring Nobel Laureate Paul Lauterbur*, 14 SIGMA XI TODAY 1, 95 (2005).

added benefit of convincing prospects that bequest giving is a social norm and is expected of them.[344] "Studies show that people help more when they are exposed to role models who help, presumably because the model provides information about the social norms for and the consequences of helping."[345] The marketing campaign will also include events, e-mail, and a website.[346] Once the ground is thoroughly "softened" the nonprofit will follow up with phone calls and personal visits.[347] During the first visit the nonprofit's representative will simply thank a prospect for a recent annual gift and try to find out more information about the prospect.[348] The representative will then follow up with the prospect with meetings and phone calls and will eventually begin to broach the issue of a bequest gift.[349]

Another perceived barrier to charitable bequests is convincing current inter vivos donors to execute a will. A number of polls and studies estimate that anywhere from fifty to sixty-five percent of Americans do not have a will.[350] Many people delay writing wills because of the cost[351] and discomfort discussing death.[352] Savvy nonprofits overcome this barrier by offering free estate planning

344. *See* Neeli Bendapudi et al., *Enhancing Helping Behavior: An Integrative Framework for Promotion Planning*, 69 AM. J. MARKETING 33, 43 (1996).

345. *Id.* (citations omitted).

346. Pforzheimer, *supra* note 337, at 13-14.

347. *Id*. at 18.

348. LAWRENCE HENZE & KATHERINE SWANK, CREATING A LEGACY: BUILDING A PLANNED GIVING PROGRAM FROM THE GROUND UP 40-43 (2008).

349. *Id.*

350. *See, e.g.*, Ashlea Ebeling, *Americans Lack Basic Estate Plans*, FORBES, March 1, 2010, *available at* http://www.forbes.com/2010/03/01/estate-tax-living-will-schiavo-personal-finance-no-estate-plans.html?boxes=Homepagechannels (finding only 35% of survey respondents had a will); Jenny Greenhough, *57% of Adults Don't Have a Will—Are You One of Them?*, ROCKET LAWYER, March 31, 2011, *available at* http://blog.rocketlawyer.com/2011-wills-estate-planning-survey-95235; Gary Langer, *Poll: Americans Not Planning for the Future*, ABC NEWS, AUG. 26, 2012, *available at* http://abcnews.go.com/Business/story?id=86992&page=1#.UVNwHaWRjzI (finding fewer than 50% of respondents had a will).

351. *See* Christine Dugas, *Times Change Wills, Yet Many Americans Don't Have One*, USA TODAY, Apr. 30, 2012, *available at* http://usatoday30.usatoday.com/money/perfi/basics/story/2012-04-27/preparing-a-will/54632436/1; Carole Fleck, *Many Boomers Don't Have Wills, Poll Finds*, AARP BLOG, May 1, 2012, *available at* http://blog.aarp.org/2012/05/01/many-boomers-dont-have-wills-poll-finds/.

352. *See* Adrian Sargeant & Jen Shang, *Identification, Death and Bequest Giving*, REP. ON FUNDRAISING AND PHILANTHROPY 5-6 (Sept. 2008).

seminars and estate planning services to their donors and volunteers.[353] Consumer research suggests that we are highly motivated when offered something for free.[354] Moreover, nonprofits seek to offer these services at key milestones when potential donors are most likely to write or re-write a will: "births, marriages, retirements, [and] family members' deaths."[355]

V. Inadequate Restraints on Charitable Giving and Possible Solutions

The existing rules aimed at ensuring testamentary freedom and family protection are poorly suited for protecting testators and their families from the overreaching of charities. The few laws and reported decisions touching on the issue demonstrate a fundamental misunderstanding of how nonprofits today solicit testamentary bequests. They also illustrate how this misunderstanding has not only led to an imbalance, but also, to the potential exploitation of testators and their families by the nonprofit sector. The problem is evident in several contexts.

A. *Interested Parties*

The rule prohibiting an interested party from serving as a witness to a will or participating in its drafting serves an important function. By prohibiting bequests to witnesses, the rule seeks to "preserve the integrity of the process of will executions by removing the possibility that attesting witnesses who receive a disposition under the will might give false testimony in support of the will to protect their legacies."[356] The requirement seeks "to prevent fraud or undue influence by a witness to a

353. *See, e.g.*, *Estate Planning Seminar Offered in Norman*, THE JOURNAL RECORD, May 20, 2008; Joyce Gannon, *Planned Giving Gets New Life: For Some, Recession Changes Approach to Charitable Donations*, PITTSBURG POST-GAZETTE, Dec. 24, 2009; *Homecoming Activities Begin at WVSU*, CHARLESTON GAZETTE, Oct. 3, 2013; Love, *supra* note 8, at A20.

354. *See, e.g.*, *Something Doesn't Add Up*, THE ECONOMIST, June 30, 2012, *available at* http://www.economist.com/node/21557801; Farnoosh Torabi, *Pricing Psychology: 7 Sneaky Retail Tricks*, CBS NEWS, April 29, 2011, *available at* http://www.cbsnews.com/8301-505144_162-41541822/pricing-psychology-7-sneaky-retail-tricks/.

355. Love, *supra* note 8, at A20.

356. *In re* Estate of Morea, 645 N.Y.S.2d 1022, 1022-23 (Sur. Ct. 1996).

will to thwart the intention of the [testator]."[357] For thousands of years this rule has sought to maintain the integrity of the testamentary process. In an effort to procure more property for itself, the church successfully eroded this requirement during the Middle Ages.[358] Abuse was rampant and the public lost confidence in the church and the sanctity of the testamentary process. Over time, the law again prohibited interested parties from serving as witnesses to wills or participating in their drafting. In recent years, however, the strength of this rule has again waned. "[T]he Uniform Probate Code [UPC] scrapped the requirement that witnesses be disinterested in the will."[359] According to the UPC's official comment, "[t]he requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses."[360] The comment further explains that, "attorneys will continue to use disinterested witnesses in the execution of wills."[361] This view, which a number of respected scholars share, is misplaced. When interested parties are intimately involved in the testamentary process, it casts a cloud over the legitimacy of the entire process and undermines public confidences. The ability of an heir to bring an undue influence claim does absolutely nothing to remedy that harm. If anything, increased litigation over testaments exacerbates that harm. Undue influence claims are notoriously difficult to prove—particularly where the primary witnesses to the testamentary process have an incentive to give self-serving testimony. Undue influence cases are expensive and can rip a family apart in the process. The UPC's faith that attorneys will exercise good judgment in selecting witnesses is sadly misplaced.[362] Moreover, the UPC seems to presuppose that the influencer has a malicious intent to defraud the testator and will take steps to cover his tracks. That is not necessarily true—particularly in the

357. *In re* Estate of Johnson, 347 So. 2d 785, 787 (Fla. Dist. Ct. App. 1977); *accord In re* Estate of Small, 346 F. Supp. 600, 600-01 (D.D.C. 1972) ("The evident purpose was to give maximum effect to wills and at the same time to eliminate any financial incentive which might taint the necessary objectivity of the attesting witness.").

358. *See supra* Part III.

359. Lindgren, *supra* note 213, at 561.

360. Unif. Probate Code § 2-505 cmt (1969).

361. *Id.*

362. *See, e.g.*, *Small*, 346 F. Supp. at 601; Herman v. Kogan, 487 So. 2d 48, 48 (Fla. Dist. Ct. App. 1986); *In re* Estate of Meskimen, 235 N.E.2d 619, 624 (Ill. 1968); Berndtson v. Heuberger, 173 N.E.2d 460, 461 (Ill. 1961); *In re* Estate of Schroeder, 441 N.W.2d 527, 533 (Minn. Ct. App. 1989); Burke v. Kehr, 876 S.W.2d 718, 720 (Mo. Ct. App. 1994); *In re* Estate of Carano, 868 P. 2d 699, 702 (Okla. 1994).

case of charitable bequests.[363] When the representative of a charity improperly procures a bequest for a charity, does that necessarily make him a bad actor? More likely, he is either doing his job as part of the organization's fundraising team or he is genuinely interested in the success of the charity. Undoubtedly, many, if not most, members of the clergy in the MiddleAges were similarly motivated and they did not attempt to conceal their involvement in the testamentary process. Their intimate involvement in the testamentary process, however, harmed testators, testators' families, and the church and undermined public confidence in the entire process.

Today, the scope of the problem varies by jurisdiction. A number of states continue to require disinterested witnesses and scriveners. Courts, however, often decline to apply those laws in the context of charitable bequest.

1. Refusal of Courts to Apply the Existing Disinterested Witness Rule to Charities

A number of jurisdictions continue to expressly prohibit an interested party from serving as a witness. These jurisdictions, by statute, impose a variety of penalties—the thrust of which is to typically deny a bequest made to a witness. In practice, courts tend to interpret the statutes as requiring a direct pecuniary benefit to the witness.[364] Relying on the direct pecuniary interest requirement, some courts have refused to apply these statutes in the charitable bequest context. Courts essentially draw a dividing line between the charitable organization itself and its members and representatives reasoning that a witness' membership in the charitable organization does not void a bequest to that charity "because the member's interest is too indirect to be a disqualifying interest . . . ."[365] In some cases, this approach makes sense. For example, *In re Will of Potter* involved a charitable bequest to the town of

363. It appears that courts also share this unfounded view. *See, e.g.*, *In re* Estate of Hamm, 262 N.W.2d 201, 206-07 (S.D. 1979) ("[I]f Baldwin were the blackguard that the contestants paint him he would have deleted all reference to the Home and assured himself of the trusteeship with all of the increments and fees attended thereto.").

364. *See, e.g.*, *In re* Estate of Wolfner, 188 N.E.2d 712, 714 (Ill. 1963) ("The interest which disqualifies a witness must be such an interest in the will that a pecuniary gain or loss will come to him directly as the immediate result of is provisions."); Triestman v. Kilgore, 838 S.W.2d 547, 547 (Tex. 1992) ("A competent witness to a will is one who receives no pecuniary benefit under its terms.").

365. *In re* Estate of Tkachuk, 139 Cal. Rptr. 55, 58 (Dist. Ct. App. 1977).

Pawlet for upkeep of roads and bridges.[366] All three witnesses to the will were residents of the town and taxpayers, and, therefore, would all benefit from the charitable bequest.[367] If the court had strictly applied the disinterested witness requirement, then, presumably, no one in the town could serve as a witness—an obviously absurd result. Rather, the court reasoned that "[n]o one of the witnesses to this will had a fixed, certain, and vested pecuniary interest in the will, and so no one of them was incompetent because of that interest."[368]

Courts consistently refuse to apply the applicable statute even where the witnesses' interest in the charitable bequest is more direct and the witnesses have an obvious interest in the outcome of the will. *Estate of Tkachuk* illustrates this point.[369] In that case the decedent wrote a will leaving the bulk of his property to the church.[370] At the decedent's request, Reverend Myczka typed the decedent's will, accompanied the decedent to a notary's office, and signed as a witness to the will.[371] Reverend Myczka was employed by the church and served as an officer, treasurer, and member of the executive committee.[372] The decedent's brother later challenged the bequest to the church under an existing statute that invalidated bequests to subscribing witnesses.[373] The court conceded that the Reverend Myczka was not an entirely disinterested witness in light of his position as an officer of the church.[374] However, the court upheld the bequest to the church reasoning that the language of the statute "does not void gifts to a beneficiary where one of the subscribing witnesses, who is not a beneficiary, is interested in the bequest."[375] The court construed the language of the applicable statute narrowly and reasoned that the bequest in question was to the church, not Reverend Myczka.[376]

Some courts go further and uphold the testament even when the

366. *In re* Will of Potter, 95 A. 646, 647 (Vt. 1915).

367. *Id.*

368. *Id.*

369. *In re* Estate of Tkachuk, 139 Cal. Rptr. 55 (Cal. Ct. App. 1977); *accord In re* Estate of Jordan, 519 S.W.2d 902 (Tex. Ct. App. 1975); *In re* Estate of Giacomini, 603 P.2d 218 (Kan. Ct. App. 1979).

370. *In re* Estate of Tkachuk, 139 Cal. Rptr. at 56.

371. *Id.*

372. *Id.*

373. *Id.* at 56-57.

374. *Id.* at 56.

375. *Id.* at 56-57.

376. *Id.* at 57.

witness does receive a direct pecuniary benefit. In these cases, the courts reason that the pecuniary benefit involved is not the type of benefit envisioned by the statute. *Estate of Giacomini* illustrates this approach.[377] Robert Davis, an attorney prepared the decedent's will, which left the bulk of her estate to several charitable beneficiaries.[378] Mr. Davis, who was also a subscribing witness to the will, stood to receive a number of pecuniary benefits.[379] The will named Mr. Davis as executor, without bond, and gave him the power to employ his own law firm and to pay the firm without prior court approval.[380] Further, Mr. Davis held positions with two of the charitable beneficiaries—serving as a member of the board of trustees of one organization, and on the fund-raising advisory council of the other.[381] Yet, the court held that Mr. Davis did not stand to benefit from the will and could therefore serve as a witness without any consequences.[382] In reaching its conclusion, the court reasoned that his appointment as executor was not the type of pecuniary interest that would disqualify him as a witness because it only entitled him to be compensated for labor he would perform in a fiduciary capacity.[383]

Courts should construe these statutes more broadly and jurisdictions that have adopted the UPC approach should reconsider. In a case like that of Reverend Myczka, the court should not draw a distinction between the charity's representative and the charity itself. Because a charity can *only* act through its representatives, that distinction is nonsensical. When a charity's representative is intimately involved in the drafting and execution of a testament, it casts doubt on the integrity of the entire process. Voiding bequests under such circumstances serves as a meaningful deterrent and can help avoid the harm associated with subsequent undue influence litigation. The direct pecuniary interest requirement, as illustrated in *Giacomini*, should likewise be interpreted more broadly. The fact that Mr. Davis was an attorney and that his sizeable pecuniary interest in the estate and its administration required him to perform services does not remove the taint of the impropriety of his actions. Indeed, those very facts tend to undermine public confidence

377. *In re* Estate of Giacomini, 603 P.2d 218 (Kan. Ct. App. 1979); *accord* LA. CIV. CODE ANN. arts. 1581-83 (2013).

378. *In re* Estate of Giacomini, 603 P.2d at 219.

379. *Id.*

380. *Id.*

381. *Id.*

382. *See id.*

383. *See id*., at 220.

in the legal profession as a whole.[384]

2. Rules Requiring Disinterested Scrivener Inapplicable

Most jurisdictions have no affirmative law prohibiting a party who prepares a will from benefitting under its terms. The UPC is silent on the issue and many jurisdictions simply consider a benefit received by the drafter as a factor in an undue influence analysis. This presents the exact same set of problems as allowing interested witnesses. The few states that do address the issue by statute fail to adequately address interested scriveners in the charitable context. For example, Kansas invalidates any "provision in a will, written or prepared for another person, that gives the writer or preparer or the writer's or preparer's parent, children, issue, sibling, or spouse any devise or bequest . . . ."[385] The statute is simply inapplicable in the charitable context. California goes somewhat further and imposes a presumption of fraud or undue influence with respect to bequests to the party who drafted the will or otherwise has a fiduciary or business relationship with the testator.[386] Although the scope of the California prohibition is broad, nonprofit organizations are specifically excluded.[387] In enacting the statutory exception benefiting non-profits, the legislature acknowledged the need to protect testators from the undue influence of fiduciaries.[388] The legislature decided to exempt nonprofit organizations from the scope of the prohibition in order to encourage charitable bequests and "ensure that particular recipients of transfers are not disqualified as beneficiaries simply because they drafted the language of the transferring instrument."[389] This approach ignores the well-documented history of overreaching by the church in drafting testamentary instruments.

In most jurisdictions, the only rule discouraging scriveners from preparing testaments in their own favor are the ethical rules governing the legal profession. While these professional responsibility rules are

384. *See, e.g.*, Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 83-88 (1984).

385. KAN. STAT. ANN. § 59-605 (2013).

386. CAL. PROB. CODE §21380 (2014).

387. CAL. PROB. CODE §21382 (2014).

388. Laura J. Fowler, *Administration of Estates; Prohibition of Transfers of Property—Exception*, 26 PAC. L. J. 272, 275 (1994) (this article refers to CAL. PROB. CODE § 21350, which has since been repealed and replaced with new lesgilation, CAL. PROB. CODE §§ 21380, 21382) .

389. *Id.*

well founded, they are wholly insufficient. Model Rule of Professional Conduct 1.8(c) prevents a lawyer from soliciting a bequest for himself or his family and from preparing an instrument where he receives a bequest.[390] Every jurisdiction has some comparable prohibition. Rule 1.8 is aimed, at(among other things) protecting testators from undue influence.[391] The rule does not adequately protect testators from overreaching.[392] In many jurisdictions, the rules of professional conduct do not have the force of law.[393] In those jurisdictions, a violation of Rule 1.8 will not render a testamentary bequest invalid and may not result in significant disciplinary action against the attorney.[394] Even if a violation of Rule 1.8 does not invalidate a bequest, most jurisdictions would consider the violation as evidence supporting an undue influence claim.[395] However, courts resist that approach in the charitable context and will apply the pecuniary interest analysis to determine that the attorney did not benefit from the charitable bequest.[396] Moreover, the rules of professional responsibility do not apply to non-lawyers. In a case like *Tkachuk* where the party drafting the will is not a lawyer, the drafting party is not bound by the rules of professional responsibility and cannot be punished for their violation. With the availability of will drafting software, virtually anyone can draft a valid testament without the assistance of an attorney.[397]

B. *Refusal of Courts to Apply Undue Influence in the Charitable Context*

Undue influence *could* provide a meaningful remedy from overreaching by charities and their representatives *if* courts were willing

390. *See* MODEL R. PROF'L CONDUCT R. 1.8 (1983)..

391. *Id.*

392. *See* Johnston, *supra* note 384, at 83-84.

393. Louisiana appears to be an exception to this view. *See* Succession of Parham, 755 So. 2d 265, 270 (La. Ct. App. 1999) ("The Louisiana Rules of Professional Conduct . . . have the force and effect of substantive law.").

394. *See* Sandford v. Probate Appeal, Nos. CV-05-4005186-S, CV-05-4005187-S, 2008 WL 544439 (Conn. Super. Ct. Feb. 5, 2008); *In re* Will of Cromwell, 552 N.Y.S.2d 480, 482 (Sur. Ct. 1989); *In re* Estate of Pedrick, 482 A.2d 215, 218 (Pa. 1984); *In re* Bloch, 625 A.2d 57, 58 (Pa. Super. Ct. 1993).

395. *See* Kirschbaum v. Dillon, 567 N.E.2d 1291, 1302 (Ohio 1991).

396. *See* Knowlton v. Schultz, 902 N.E.2d 548 (Ohio Ct. App. 2008).

397. *See, e.g.*, *In re* Estate of Brevard, 213 S.W.3d 298 (Tenn. Ct. App. 2006) (pastor used computer software to prepare testament benefitting himself). *See generally* Wendy S. Geoffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, ESTATE PLANNING (Apr. 2011).

to apply the law in the charitable context. Yet, courts consistently refuse to afford facts indicating undue influence appropriate evidentiary weight when a charity and its representatives are involved. The problem is evident at nearly every stage of the undue influence analysis.

1. Confidential Relationship

The existence of a confidential relationship is a threshold issue in most undue influence cases. Courts have repeatedly found reliant-type confidential relationships where one person relies on another to select an attorney and provide financial guidance.[398] A nonprofit whose representatives provide estate planning and similar financial services to donors should be held to that same standard.

In furthering their planned giving campaigns, nonprofits routinely solicit their prospects to execute wills.[399] A popular solicitation technique involves explaining the tax and economic benefits available to charitable bequest donors.[400] Indeed, "the deductibility ofcharitablebequests enhances the attractiveness of leaving a portion of one'sestatetocharity."[401] Many planned giving officers themselves hold advanced degrees in law and accounting. When the nonprofits are successful it is hardly surprising that the prospect may ask the nonprofit's representative to suggest what attorney he should visit. The representative will gladly do so, taking advantage of the special trust and confidence the donor has bestowed upon it, and will even foot the bill for the expense. Some nonprofits address attorney recommendation situations proactively by retaining attorneys ahead of time so that they may offer estate-planning services to their prospects free of charge. The relationship bears all the hallmarks of a confidential relationship, yet courts are hesitant to find a confidential relationship in a charitable bequest setting. In the view of some courts, "it is not improper for charitable organizations to offer estate planning advice, including plans for charitable donations."[402]

I disagree. History amply illustrates the impropriety of the representatives of a charitable organization taking over the testamentary

398. *See* Harris v. Jourdan, 180 P.3d 119, 132 (Or. Ct. App. 2008).

399. *See supra* Part IV.

400. *See supra* Part IV.

401. B. Douglas Bernheim. *Does the Estate Tax Raise Revenue?*, 1 TAX POLICY & ECONOMY, 113, 116 (1987), *available at* http://www.nber.org/chapters/c10931.pdf.

402. Estate of Davis v. Cook, 9 S.W.3d 288, 293-94 (Tex. Ct. App. 1999).

process. When the representative of a charitable organization successfully solicits a testator to write a will naming the organization as a beneficiary, helps the testator select an attorney, and foots the bill for the services a confidential relationship exists and the courts should recognize this simple and obvious fact. The refusal or courts to find a confidential relationship in the charitable context is especially troubling because the existence of a confidential relationship is a threshold issue in many jurisdictions. Even in those jurisdictions that do not expressly require a finding of a confidential relationship, the existence of a confidential relationship strongly supports a finding of the other required elements of an undue influence claim.

In *Campbell*, the testator, Mrs. Campbell, developed a close friendship with Mr. Upchurch, a university's planning giving officer.[403] Mrs. Campbell sought Mr. Upchurch's advice on arranging her long-term financial and physical care. After moving to property adjacent to the university, Mrs. Campbell asked Mr. Upchurch to recommend an attorney to help prepare her estate planning documents and to make an appointment for her. Mr. Upchurch not only located an attorney—the university's general counsel—he attended the meetings with Ms. Campbell and corresponded with the attorney regarding Mrs. Campbell's plans. Mr. Upchurch even arranged for the university to pay the attorney's bill. Mrs. Campbell obviously had a relationship of trust and confidence with Mr. Upchurch. However, the court was unwilling to rule that Mr. Upchurch and, in turn, the university, had a confidential relationship with Mrs. Campbell at the relevant time.

In re Estate of Brevard presents a less sophisticated charity representative than *Campbell*, but is equally troubling.[404] The testator, Ms. Brevard, allegedly asked Pastor Barlowe to help her prepare a testament.[405] Pastor Barlowe and Ms. Brevard were friends, and she often attended his church.[406] Pastor Barlowe purchased will drafting software and prepared Ms. Brevard's testament for her.[407] The testament named Pastor Barlowe as executor and his church as contingent beneficiary.[408] Ms. Brevard's relatives challenged her will on the

403. *In re* Will of Campbell, 573 S.E.2d 550 (N.C. Ct. App. 2002).
404. *In re* Estate of Brevard, 213 S.W.3d 298 (Tenn. Ct. App. 2006).
405. *Id.* at 300.
406. *Id.*
407. *Id.*
408. *Id.* at 301.

grounds of undue influence.[409] On appeal, one issue before the court was whether Pastor Barlow had a confidential relationship with Ms. Brevard.[410] The court conceded that had Pastor Barlow been an actual attorney, he and Ms. Brevard would have had a confidential relationship, as a matter of law, when he prepared her will.[411] However, the court was unwilling to extend that rule to a person engaged in the unauthorized practice of law.[412] In the attorney-client context, "heightened scrutiny exists because attorneys' superior knowledge of the law is assumed to give them an unfair advantage when conducting business transactions with clients."[413] However, the concern in the case of Pastor Barlow was different in the view of the court. "The danger inherent in the unauthorized practice of law is not that the unauthorized practitioner will use superior legal knowledge to take advantage of a 'client,' but that the 'client' will be harmed by the unauthorized practitioner's lack of knowledge."[414] The court's analysis completely misses the point. The appropriate inquiry is whether a confidential relationship exists. Where a non-attorney seeks to act as an attorney, he should be held to the same legal standard as an attorney.

2. Susceptibility, Opportunity, Disposition, and Coveted Result

In addition to the existence of a confidential relationship, a finding of undue influence typically requires evidence of susceptibility, opportunity, disposition, and a coveted result. A successful planned giving campaign bears the hallmarks of each of these factors, but courts often refuse to give this fact sufficient evidentiary weight.

a. *Susceptibility*

In determining susceptibility, the court asks whether the testator was susceptible to the influence of the alleged influencer.[415] The testator's personal qualities are relevant.[416] Illness,[417] incapacity,[418] old age,[419]

409. *Id.*
410. *Id.* at 303.
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*
415. *See, e.g.*, *In re* Estate of Dejmal, 289 N.W.2d 813, 821 (Wis. 1980).
416. *See, e.g.*, *In re* Estate of Bandurski , 281 A.2d 621, 623 (Del. Ch.1971);

social isolation, declining mental abilities[420] and similar factors all indicate of susceptibility.[421] This vulnerable population is exactly the population targeted by nonprofit organizations for bequests because they are the most likely to make those bequests. Planned giving campaigns are actually designed to make potential donors more susceptible to the suggestions of the nonprofit and its representatives. Direct mailings and other early contacts with potential donors help cultivate desires and soften the ground long before the non-profit's representative makes personal contact. Once a non-profit's representative actually contacts the testator personally, the testator is more likely to be receptive to the representative's suggestions.

Courts, however, are hesitant to recognize this susceptibility to influence in the charitable context. In *In re Estate of Osborn*, the decedent left the bulk of her estate to the local Catholic Diocese.[422] The decedent's sister brought an unsuccessful undue influence challenge.[423] She alleged, among other things, that the testator was "dependent upon the Clergy as her means of social outlet."[424] The court saw nothing unusual about the elderly testator's relationship with and reliance on the church as her means of social outlet.[425]

VI. Opportunity

Opportunity is, perhaps, the easiest factor to establish in undue influence cases. Opportunity simply requires evidence that the alleged influencer had the opportunity to exercise undue influence. Opportunity generally requires that the alleged influencer spent a meaningful amount of time alone with the testator.[426] A confidential or familial relationship

Boehm v. Allen, 506 N.W.2d 781, 784 (Iowa Ct. App. 1993); *In re* Estate of Borsch, 353 N.W.2d 346, 349 (S.D. 1984).

417. *Borsch*, 353 N.W.2d at 349.

418. *Bandurski*, 281 A.2d at 624.

419. *Borsch*, 353 N.W.2d at 350.

420. *Id*.

421. *Id.*

422. *In re* Estate of Osborn, 470 N.E.2d 1114, 1116 (Ill. App. Ct. 1984).

423. *Id.*

424. *Id.*

425. *Id.* at 1117.

426. *See, e.g.*, *In re* Estate of Schroeder, 441 N.W.2d 527, 532 (Minn. Ct. App. 1989) ("Leslie Schroeder had an opportunity to exercise undue influence because he was the decedent's husband, her attorney, and he drafted her will."); *In re* Sechrest, 537 S.E.2d 511, 516 (N.C. Ct. App. 2000) ("The evidence is further undisputed that prior to

tends to support a finding of opportunity. Involvement in the preparation of the testament also suggests opportunity. Yet, courts are hesitant to recognize the existence of opportunity in the charitable context. For example, in *Herman v. Kogan*, the court found no opportunity to overreach on the part of the attorney or charity where (1) the charity's attorney prepared the will; (2) the attorney was also the regional president of the charity; (3) all of the witnesses to the testament were officers of the charity; (4) the executors named in the will were officers of the corporation; (5) the will was deposited at the offices of the corporation; and (6) the attorney apparently did not charge a fee for his services.[427] Despite this overwhelming evidence, the court found the uninformative, largely irrelevant, and obviously self-serving testimony of the attorney and other officers of the charity sufficiently compelling to dispel any presumption of overreaching or undue influence.

VII. Disposition

Disposition requires a finding that the alleged influencer had "a disposition to influence unduly for the purpose of procuring an improper favor . . . ."[428] "'Disposition' means something more than a mere desire to obtain a share of another's estate."[429] Rather, disposition "implies a willingness to do something wrong or unfair, and grasping or overreaching characteristics."[430] Courts are hesitant to view the actions of charities and representatives as rising to this level. In *Estate of Davis v. Cook*, the decedent left her nearly two million dolars residuary estate to Schreiner College, the school attended by her long deceased son.[431] Schreiner's development officer began to visit Mrs. Davis in 1994. At the time, she was ninety-eight-years old, "lonely, isolated, and plagued with physical infirmities."[432] Schreiner's development officer offered estate-planning advice to Mrs. Davis. Schreiner also "made pleas to [Mrs. Davis] which involved flattery, appeals to patriotism and self-worth, glorification of the memory of her deceased son, and the allure of

Harold's death, Mowery had little contact with the testatrix and, thus, had virtually no opportunity to exert his will over hers.").

427. Herman v. Kogan, 487 So.2d 48 (Fla. Dist. Ct. App. 1986).

428. *In re* Estate of Schaefer, 241 N.W. 382, 385 (Wis. 1932); *accord In re* Estate of Stenerson, 348 N.W.2d 141, 143 (N.D. 1984).

429. *In re* Estate of Brehmer, 164 N.W.2d 318, 322 (Wis. 1969).

430. *Id.*

431. *In re* Estate of Davis, 9 S.W.3d 288 (Tex. App. 1999).

432. *Id.* at 293.

membership in the Schreiner Oaks Society, an honorary society for Schreiner contributors."[433] The court, however, sustained summary judgment upholding the will finding that less than "a scintilla of probative evidence" gave rise to a genuine issue of material fact.[434]

VIII. Coveted Result

The coveted result element asks "whether [the alleged influencer] has, for no apparent reason, been favored in the will to the exclusion of a natural object of the testator's bounty."[435] Courts typically define 'natural objects of one's bounty based upon the particular circumstances surrounding a case.[436] "[O]rdinarily, all things being equal, the natural objects of a testator's bounty are those who unless a will exists will inherit his property."[437] When a testator has no spouse or children, collateral relatives fall squarely within this description because they are the testator's likely heirs in intestacy. When collateral heirs challenge a bequest made to a charity, however, courts are quick to dismiss the idea that a collateral heir might be the natural object of the testator's bounty. In *Estate of Davis v. Cook*, for example, the decedent left her nearly $2 million residual estate to charity to the exclusion of collateral relatives.[438] In considering the naturalness of the bequest the court explained that "excluding collateral heirs in favor of charities is not unnatural."[439] The opinion fails to discuss whether the testator and her collateral relatives had a close relationship despite the obvious relevance of such an inquiry. *In re Campbell*[440] is similar. The testator gave the bulk of her estate to a college rather than her siblings, nieces and nephews.[441] The testator had provided for her family under several prior wills and enjoyed a close relationship with her family.[442] Despite those facts, the court concluded that her relatives were not the "direct sort of 'natural objects of her

433. *Id.* at 294.

434. *Id.*

435. *In re* Estate of Dejmal, 289 N.W.2d 813, 821 (Wis. 1980).

436. *See, e.g.*, Norris v. Bristow, 219 S.W.2d 367, 370 (Mo. 1949); L. S. Tellier, *Instructions, in Will Contest, Defining Natural Objects of Testator's Bounty*, 11 A.L.R.2d 731, § 1 (1950).

437. Norris, 219 S.W.2d at 370.

438. *In re* Estate of Davis, 9 S.W.3d 288 (Tex. App. 1999).

439. *Id.* at 294.

440. *In re* Will of Campbell, 573 S.E 2d 550 (N.C. Ct. App. 2002).

441. *Id*.

442. *Id.*

bounty,'" the testator's "interest in charity was evident . . . ."[443] and the university demonstrated the transaction was "open, fair, and honest."[444] Some courts go further and expressly declare charities to be the natural objects of a testator's bounty. In *Estate of Overton*, the court explained that the testator's gratitude to the hospital for the positive outcome from cataract surgery "made the Minnesota Medical Foundation a natural object of her bounty . . . ."[445]

Courts also refuse to recognize the benefits that actually inure to the benefit of the attorney, executor, or planned giving officer. *Burke v. Kehr* is typical.[446] Mr. Kehr, the decedent's attorney, drafted and witnessed her will. The will appointed Mr. Kehr as her independent personal representative and, in that capacity, gave him the authority to distribute the residue of her estate to whatever charitable organizations he selected. Yet, the court held that there "was no evidence on the existence of a substantial benefit to Kehr . . . ."[447] In the court's view, the significant compensation Kehr would receive as personal representative was immaterial because these were "fees for services."[448] "Such earned fees do not constitute the type of substantial economic benefit which gives rise to a presumption of undue influence."[449]

IX. Conclusion

Throughout the history of the law of wills, society struggled to strike the appropriate balance between freedom of testation, protection of families from disinheritance and charitable giving. Intertwined in that balance was realization that religious organizations possessed the ability to frustrate both freedom of testation and family protection. Restrains on charitable bequests existed in our law for many years. However, in recent years virtually all restraint is gone. Charitable giving certainly serves a societal good. However, courts and legislatures should reconsider the deference afforded charitable bequests in the law order to ensure the appropriate balance is maintained. Especially in light of a potential "golden age of philanthropy" considered to be a product of an

443. *Id.* at 564.
444. *Id.*at 559.
445. *In re* Estate of Overton, 417 N.W.2d 653, 657 (Minn. 1988).
446. Burke v. Kehr, 876 S.W.2d 718 (Mo. Ct. App. 1994).
447. *Id.* at 722.
448. *Id.*
449. *Id.*

anticipated generational transfer of wealth, it is particularly important the safeguards afforded to ensuring testamentary freedom and family security, particularly by the doctrine of undue influence and the interested witness rule, begin to shield testators from overreaching charities within the context of charitable testamentary bequests. The competing public policies ensuring and providing for testamentary freedom, family protection and charitable giving should begin to operate in a way that they provide a checks and balances for one another and curb the imbalance toward charitable giving which may help to prevent the mass exploitation of this anticipated generational transfer of wealth by the nonprofit sector.