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An Analysis Of The Virginia Wills Act Formalities And The Need For A Dispensing Power Statute In Virginia

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NOTES

AN ANALYSIS OF THE VIRGINIA WILLS ACT FORMALITIES AND THE NEED FOR A DISPENSING POWER STATUTE IN VIRGINIA

A farmer suffers an accident while working and his tractor crushes him. Believing he may die before help arrives, the farmer scratches a will[1] on the fender of his tractor. No one is present to act as a witness to the will. Nor does any opportunity exist for another party to exercise fraud or duress upon the farmer. If the farmer in fact dies as a result of the accident, may a court admit to probate the words that he scratched on the tractor fender and that he intended to be his will?[2]

Unless admissible as a holograph,[3] a will that the testator[4] writes and signs in the testator's own handwriting,[5] the farmer's writing would be

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1. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 33.1 (1992) [hereinafter RESTATEMENT] (defining will as donative transfer that donor does not intend to be legally operative to effect transfer of property until donor's death); 1 BOWE-PARKER: PAGE ON WILLS §§ 5.1-.19 (William J. Bowe & Douglas H. Parker eds., 1960) (describing basic nature and elements of wills); ELIZABETH HAPNER, 1 VIRGINIA PROBATE LAW ch. 3, at 1 (stating that Virginia cases define wills as legally executed written instruments that dispose of estate and take effect after testator's death); 1 T. W. HARRISON, HARRISON ON WILLS AND ADMINISTRATION § 136 (George P. Smith, Jr. ed., 1985) (stating that Virginia case law defines wills as acts by which people make disposition of their property to take effect after they die); ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 1 (1928) (defining will as ambulatory and revocable document that makes disposition of property to take effect after testator's death). Wills by definition extend to property that the testator acquires after making the will, and testators may alter wills at any time until death. HAPNER, *supra*, ch. 3, at 1.

2. *See* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 10 n.32 (1987) (referring to actual Canadian case in which farmer, trapped beneath tractor, scratched will on tractor fender); W. M. Elliott, Case and Comment, 26 CAN. B. REV. 1242, 1242 (1948) (describing but not citing actual Canadian case with these facts: *Estate of Harris*).

3. *See* Langbein, *supra* note 2, at 10 n.32 (explaining that Canadian court probated will as holograph).

4. *See* BLACK'S LAW DICTIONARY 1475 (6th ed. 1990) (defining "testator" as person who makes or has made will or person who dies leaving will); JOHN RICHIE ET AL., DECEDENTS' ESTATES AND TRUSTS 7 (7th ed. 1988) (stating that in older usage, female who made will was called "testatrix" rather than "testator"). For purposes of simplicity, in this Note I will use the term "testator" to refer to both male and female makers of wills.

5. *See* 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, §§ 20.1-.12 (describing holographs); REPPY & TOMPKINS, *supra* note 1, at 24 (stating that holographic wills are wills that testator has handwritten); Celia Wasserstein Fassberg, *Form and Formalism: A Case Study*, 31 AM. J. COMP. L. 627, 642 (1983) (stating that few states require that testators sign holographs at end or date holographs, and noting trend toward permitting more nonhandwritten material on face of holographs); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 50 (1985) (stating that holographic wills do not require attestation by witnesses); John

invalid under the wills act of every American state[6] because of a formal defect[7]—the lack of witnesses.[8] Refusal to admit the writing to probate would cause the decedent's property not otherwise disposed of to pass under the intestacy law of the governing jurisdiction[9] and could frustrate the testator's expressed intent.[10] Some legal scholars have argued that courts should excuse harmless deviations from wills act formalities[11] or that state legislatures should reform the wills acts[12] in order to avoid the harsh results

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B. Rees, Jr., *American Wills Statutes: I*, 46 VA. L. REV. 613, 634 (1960) (stating that holographs are entirely in handwriting of testator and, in states that permit holographs, are valid without attestation by witnesses); Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 162 (1988) (listing requirements for execution of holographs in all states that admit holographs to probate). The requirements for the execution of holographs in various states include the following: the will must be entirely in the handwriting of the testator and contain the testator's signature, the will must be dated, the will must be among the testator's valuable papers and effects at the time of the testator's death, and someone (or more than one person) must be able to identify the testator's handwriting for the probate court. *See* Natale, *supra*, at 162. In this Note I will use the terms "holograph" and "holographic will" interchangeably.

6. *See infra* notes 32-48 and accompanying text (describing American wills acts).

7. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) (stating that once courts find formal defect in will execution, will is invalid).

8. *See* RESTATEMENT, *supra* note 1, at stat. note (listing formal requirements of all state wills acts); 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, §§ 19.73-.142 (discussing attestation requirements in wills acts); Langbein, *supra* note 2, at 2 (stating that attestation by witnesses is essential requirement of ordinary wills); Langbein, *supra* note 7, at 490 (stating that most states require two witnesses to attest and sign wills).

9. *See* 1 HARRISON, *supra* note 1, at § 66 (noting that if testator does not mention certain property in a will, or if testator attempts to devise property by invalid will or invalid clause in will, that property passes by intestate succession); Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 322 (stating that intestate law governs property not covered by valid will); Langbein, *supra* note 7, at 499 (explaining that when will is invalid, property of testator passes by intestate succession). Of course, if the testator had executed another will which was valid, the testator's property would pass under the valid will rather than by intestacy. *See* Langbein, *supra* note 7, at 499 (noting that when will is invalid, testator's property will pass under prior valid will, if one exists). For further discussion of intestate distribution, see *infra* note 283 (explaining that intestacy statutes often do not reflect dispositive preferences of testators).

10. *See* Langbein, *supra* note 2, at 4 (explaining that courts frustrate testator's intent when they invalidate purported will due to formal defect but concede that testator intended document to be his will); John H. Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A. J. 1192, 1193 (1979) (stating that noncomplying instruments cause frustrated estate plans). For further discussion of whether formalities protect or undermine the intent of testators, see *infra* notes 280-317 and accompanying text (arguing that formalities do more to undermine than to protect intent of testators).

11. *See* RESTATEMENT, *supra* note 1, § 33.1 cmt. g (stating that law reform organizations, commentators, and legislatures in several common-law jurisdictions support use of harmless error rule to excuse innocent deviations from statutory formalities). The *Restatement* position is that courts should treat documents as valid wills despite formal defects if the testator substantially complied with the formalities and intended the document to be her will. *Id*; *see also* Langbein, *supra* note 7 (arguing throughout that courts should apply harmless error rule to excuse formal defects in execution of wills).

12. *See, e.g.*, J. Rodney Johnson, *Dispensing with Wills Act Formalities for Substantively Valid Wills*, VA. B. ASS'N J., Winter 1992, at 10, 13 (recommending that Virginia legislature pass

that flow from a failure to comply with statutory formalities of execution.[13]

The Joint Editorial Board for the *Uniform Probate Code* (*U.P.C.*), responding to this scholarship urging wills act reform, proposed revisions to the *U.P.C.* that were approved by the Commissioners on Uniform State Laws in 1990.[14] The 1990 revisions consolidated all the formal requirements for will execution in section 2-502[15] of the *U.P.C.* and created a new section 2-503 that excuses noncompliance with these formalities in some cases.[16] Section 2-503 states that when a decedent did not execute a document or a writing added upon a document in compliance with section 2-502, courts nevertheless should treat the document or writing as if the decedent had executed it in compliance with section 2-502 if the proponent of the document or writing can prove that it is a genuine expression of testamentary intent.[17] The proponent of a defective writing must establish by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will, a revocation of the decedent's will, an addition

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statute to permit courts to excuse defects in will execution); Langbein, *supra* note 2 (discussing throughout need for legislatures to adopt harmless error rule in context of wills acts); Langbein, *supra* note 10, at 1195 (explaining wisdom of harmless error rule in effect in South Australia); Melissa Webb, Note, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904, 917-19 (1983) (suggesting that Texas legislature should enact either harmless error rule to excuse formal defects, or saving clause to excuse defective attestation in cases of self-proved wills).

13. *See supra* notes 9-10 and accompanying text (explaining that invalidating genuine expressions of testamentary intent frustrates intent of testators).

14. *See* UNIFORM PROBATE CODE (U.P.C.) § 2-503 cmt. (1990) (discussing with favor Professor Langbein's articles advocating harmless error doctrine, and noting findings of foreign law reform committees supporting harmless error doctrine). The Commissioners on Uniform State Laws previously responded to arguments for wills act reform in 1969 by reducing the number of formalities required in the execution provision of the *U.P.C.* *See* U.P.C. § 2-502 (1969) (setting out reduced number of formalities); Langbein, *supra* note 2, at 5-6 (discussing 1969 *U.P.C.* reform and criticizing mere reduction of formalities as reform method).

15. U.P.C. § 2-502 (1990): This provision requires that a will be in writing, that the testator sign the will or that another person sign the will on the testator's behalf in the testator's presence and by his direction, and that at least two witnesses sign the will within a reasonable time after they observe the testator sign or acknowledge the will. *Id.* The provision also states that a will is a valid holographic will if the signature and material portions of the document are in the testator's handwriting. *Id.*

16. *See id.* § 2-503 (stating that courts should treat defective instrument as valid if testator intended instrument to be testamentary document). This section reads in full:

> Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

Id.

17. *Id.*

to or alteration of the will, or a revival of the decedent's formerly revoked will.[18]

A state legislature enacting a provision like section 2-503 would be granting broad authority to the state courts[19] to admit to probate documents that technically are defective as wills.[20] Although the formalities of execution required by the wills act would not change,[21] the courts would be free to excuse noncompliance with those formalities if the proponent of a document could prove by clear and convincing evidence that the testator intended the document to be the testator's will.[22] Statutes like section 2-503 are called dispensing power statutes because the statutes empower courts to dispense with the wills act formalities in order to give effect to a testator's proven intent.[23]

Although no state yet has adopted legislation based on section 2-503,[24] the 1992 Legislative Committee on Wills, Trusts, and Estates of the Virginia Bar Association (V.B.A.) favored the adoption of a dispensing power statute by the Virginia General Assembly.[25] In the General Assembly's 1993 session,

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18. *Id.*

19. *See infra* notes 365-80 and accompanying text (explaining ramifications of giving probate courts broad discretion).

20. *See infra* notes 148-66 and accompanying text (discussing dispensing power provisions).

21. *See* U.P.C. art. 2, pt. 5, general cmt. (stating that drafters of 1990 *U.P.C.* retained formalities of execution that pre-1990 *U.P.C.* required); Langbein, *supra* note 2, at 23 (stating that South Australia dispensing power statute did not change statutory requirements for will execution, but instead excused noncompliance with these requirements in some cases); 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: Part II*, 43 FLA. L. REV. 599, 717 (1991) (stating that 1990 *U.P.C.* retains existing standard for due execution and then invites courts to disregard that standard).

22. *See* U.P.C. § 2-503 (1990) (excusing noncompliance with formalities of execution when proponent of defective document proves decedent intended document as testamentary instrument). *But cf.* Miller, *supra* note 21, at 693-704 (arguing that scope of *U.P.C.* § 2-503 is unclear and that § 2-503 may require courts to examine more than simply genuineness of purported will when deciding whether to excuse formal defects). For a discussion of dispensing power in general and § 2-503, see *infra* notes 148-66 and accompanying text.

23. *See* Johnson, *supra* note 12, at 13 (explaining that dispensing power theory set out in *U.P.C.* allows courts to validate documents intended to be wills even if required formalities are entirely absent).

24. *See* RESTATEMENT, *supra* note 1, at stat. note (listing wills act statutes for all 50 states); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 568 (1990) (stating that no American state yet has adopted dispensing power or substantial compliance legislation, which would allow courts to excuse defects in execution). For a discussion of the substantial compliance doctrine and dispensing power provisions, see *infra* notes 120-66 and accompanying text.

25. Telephone interview with J. Rodney Johnson, Professor of Law at T.C. Williams School of Law and member of Virginia Bar Association (V.B.A.) Legislative Committee on Wills, Trusts, and Estates (Feb. 11, 1993). The Executive Committee of the V.B.A. makes the final decision as to which of the proposed laws the V.B.A. will advocate each year. *Id.* While the Legislative Committee on Wills, Trusts, and Estates recommended that the V.B.A. should sponsor a bill in 1993 adding a dispensing power provision to the Virginia wills act, the V.B.A. Council of the Wills, Trusts, and Estates Section decided not to further the Legislative Committee's recommen-

Delegate Clinton Miller introduced a bill modeled closely on the language of *U.P.C.* section 2-503.[26] Because the bill never reached a vote in the House of Delegates,[27] Virginia still does not have a dispensing power statute.[28]

This Note first will examine the various statutory and common-law approaches to the execution of wills and place current Virginia law in this legal context.[29] Next, this Note will discuss some of the key scholarly arguments supporting and criticizing the dispensing power concept and section 2-503, especially as these arguments relate to Virginia's legal system.[30] Finally, this Note will argue and conclude that Virginia should enact a dispensing power provision.[31]

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dation to the Executive Committee of the V.B.A. *Id.* The Council did not forward the recommendation because the Council determined that the V.B.A. already was sponsoring as many laws in the area of trusts and estates as the V.B.A. could advocate adequately in 1993. Telephone interview with Linda F. Rigsby, former chairperson of the Wills, Trusts, and Estates Section of the V.B.A. (Feb. 19, 1993).

26. *See* H.D. 2160, Va. Gen. Ass., Reg. Sess. (1993) (setting out proposed dispensing power statute for consideration of General Assembly). Delegate Clinton Miller offered bill number 2160 on January 26, 1993. *Id.* The proposed bill reads in full:

> Be it enacted by the General Assembly of Virginia:
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> 1. That the Code of Virginia is amended by adding a section numbered 64.1-49.1 as follows:
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> § 64.1-49.1. Writings intended as wills, etc.—Although a document or writing added upon a document was not executed in compliance with § 64.1-49, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.
>
> The remedy granted by this section is available only in inter partes proceedings in circuit court, brought under the appropriate provisions of this title, that are filed within two years from the decedent's date of death.
>
> The provisions of this section shall apply to all documents and writings of decedents dying after June 30, 1993, regardless of when such documents or writings came into existence.

Id.

27. Telephone interview with J. Rodney Johnson, *supra* note 25. The bill never reached a vote in the House of Delegates because the Committee for the Courts of Justice did not report out the bill by the deadline for such action. *Id.*

28. *See infra* notes 222-51 and accompanying text (discussing how strictly Virginia courts require testators to adhere to formalities of execution).

29. *See infra* notes 32-279 and accompanying text (surveying current law of wills execution and discussing relevant Virginia statutes, cases, and rules of probate procedure).

30. *See infra* notes 280-380 and accompanying text (discussing scholarly responses to dispensing power concept).

31. *See infra* notes 381-402 and accompanying text (recommending that Virginia adopt dispensing power statute). This Note will focus on dispensing power provisions and will discuss the substantial compliance doctrine for purposes of comparison. This Note will not discuss the many other possible methods for reforming the law concerning formalities of execution. Reform methods beyond the scope of this Note include the following: reducing the number of required

I. THE LEGAL CONTEXT

A. The Statutory Requirements for Execution

Every state has a wills act: a statute or statutes authorizing and regulating the making of wills.[32] According to the case law of most states, individuals have the power to make wills only because the legislature has granted them that power.[33] Therefore, states are free to limit probate[34] to those instruments complying with certain formalities.[35]

Each wills act lists some required formalities of execution,[36] which vary from state to state.[37] Commonly required formalities include a writing (rather

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formalities in the wills acts, *see, e.g.*, Lindgren, *supra* note 24 (arguing throughout that legislatures should eliminate attestation requirements for execution of wills); requiring testators to register wills, *see* Lydia A. Clougherty, Note, *An Analysis of the National Advisory Committee On Uniform State Laws' Recommendation to Modify the Wills Act Formalities*, 10 PROB. L.J. 283, 298 (1991) (suggesting creation of registry of wills); completely unifying the law of probate and nonprobate transfers, *see* Miller, *supra* note 21, at 720 (proposing total unification of law of donative transfers); and using antemortem probate, *see* Philip Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 521 (1948) (noting need for further study of antemortem probate).

32. *See* RESTATEMENT, *supra* note 1, at stat. note (citing wills acts of all states); 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, § 19.4 (stating that every state has statute governing execution of wills).

33. *See, e.g.*, United States v. Perkins, 163 U.S. 625, 629 (1896) (stating that states may regulate manner in which property may pass by will); Fullam v. Brock, 155 S.E.2d 737, 739 (N.C. 1967) (stating that statutes confer and regulate right to make wills); *In re* Miller's Estate, 117 N.E.2d 598, 604 (Ohio 1954) (stating that statutes grant and limit right to dispose of property by will); 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, § 19.4 (noting that legislatures have power to regulate making of wills and validity of wills); REPPY & TOMPKINS, *supra* note 1, at 47-48 (noting that right to testamentary disposition is statutory right but always has existed in United States); Verner F. Chaffin, *Execution, Revocation, and Revalidation of Wills : A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297, 298 (1977) (stating that states create right to execute, revoke, and revalidate wills); Fellows et al., *supra* note 9, at 333 (stating that U.S. Constitution does not protect right of succession and noting that Wisconsin disagrees). *But see In re* Estate of Beale, 113 N.W.2d 380, 383 (Wis. 1962) (holding that power of legislature to circumscribe will-making power is limited and power of individuals to make wills is natural right); Nunnemacher v. State, 108 N.W. 627, 628-30 (Wis. 1906) (same).

34. *See* BLACK'S LAW DICTIONARY 1202 (6th ed. 1990) (defining probate). Probate is the civil procedure by which courts determine whether a will is valid or invalid; in current usage this term has been expanded to refer generally to the legal process wherein the estate of a decedent is administered. *Id.* For purposes of this Note, "probate" will denote the process by which courts declare wills valid or invalid.

35. *See supra* note 33 (describing power of state legislatures to regulate execution of wills).

36. *See* RESTATEMENT, *supra* note 1, at stat. note (listing requirements of execution for every state); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 345-47 (1979) (providing brief survey of formalities that various states require). For an excellent older survey of the requirements of execution in state wills acts, see Rees, *supra* note 5, at 614-34.

37. *See* Langbein, *supra* note 2, at 2 (explaining that required formalities vary by jurisdiction). One basic cause of the variation among states as to what formalities the states require is that the state wills acts did not all come from the same source. Many states based their wills acts on the English Statute of Frauds, 1677, 29 Car. II, ch. 3, § 5 (Eng.); other states modeled their wills acts on the English Wills Act of 1837, 7 Will. 4 & 1 Vict., ch. 26, § 9 (Eng.); and the Louisiana

than an oral statement), the testator's signature, publication,[38] and attestation by witnesses.[39] Some states recognize holographs[40] or nuncupative (oral) wills[41] and set out different execution requirements for these will types.[42]

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wills act reflects Louisiana's civil law heritage. *See* 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, § 19.2 (stating that Statute of Frauds and Wills Act of 1837 are basic sources of American wills acts and noting that only Louisiana wills act significantly adds to requirements of these English statutes); RICHIE ET AL., *supra* note 4, at 192 (stating that Louisiana has wills based on civil law as well as ordinary attested wills); Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 418-19 (1987) (discussing Statute of Frauds and Wills Act of 1837 as bases for much law of wills in United States); Chaffin, *supra* note 33, at 299-300 (stating that wills acts of all states except Louisiana are based on English Statute of Frauds or Wills Act of 1837); Lindgren, *supra* note 24, at 547-48, 550 (noting that Statute of Frauds and Wills Act of 1837 are two principle sources of American wills acts, and comparing formalities required by Statute of Frauds and Wills Act in chart form); Natale, *supra* note 5, at 159 n.6 (explaining that attestation requirements in statutes based on English Statute of Frauds tend to differ from requirements in statutes based on English Wills Act of 1837).

38. *See* BLACK'S LAW DICTIONARY 1228 (6th ed. 1990) (defining "publication" as formal declaration or other communication made by testator to witnesses that testator intends to give document effect as testator's will).

39. *See* RESTATEMENT, *supra* note 1, at stat. note (listing requirements in all states); 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, § 19.4 (stating that chief formalities required by American wills acts are writing, testator's signature, attestation and subscription by competent witnesses, and publication).

40. *See supra* note 5 (defining holographs and requirements for execution of holographs).

41. *See* 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, §§ 20.13-.30 (discussing nuncupative wills); Chaffin, *supra* note 33, at 326-30 (discussing characteristics, purposes, and disadvantages of oral wills); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 15 (1941) (stating that nuncupative wills are limited and rare).

42. *See* Rees, *supra* note 5, at 636-46 (explaining that some states do not recognize nuncupative wills as valid wills, other states allow only soldiers and sailors to make nuncupative wills, and some states have adopted limitations on nuncupative wills set out in English Statute of Frauds of 1677). *See generally* Natale, *supra* note 5 (describing and evaluating holographic will statutes in United States).

The following statutes allow holographic wills: ALASKA STAT. § 13.11.160 (1985); ARIZ. REV. STAT. ANN. § 14-2503 (1975); ARK. CODE ANN. § 28-25-104 (Michie 1987); CAL. PROB. CODE § 6111 (West 1991); COLO. REV. STAT. § 15-11-503 (1987); IDAHO CODE § 15-2-503 (1979); KY. REV. STAT. ANN. § 394.040 (Michie/Bobbs-Merril 1984); LA. CIV. CODE ANN. arts. 1588-89 (West 1987) and LA. CODE CIV. PROC. ANN. art. 2883 (West Supp. 1990); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (West 1981); MD. CODE ANN., EST. & TRUSTS § 4-103 (1974); MICH. COMP. LAWS ANN. § 700.123 (West 1980); MISS. CODE ANN. §§ 91-5-1, 91-7-10 (Supp. 1990); MONT. CODE ANN. § 72-2-303 (1989); NEB. REV. STAT. § 30-2328 (1989); NEV. REV. STAT. § 133.090 (1987); N.J. STAT. ANN. § 3B:3-3 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 1981); N.C. GEN. STAT. § 31-3.4 (1984); N.D. CENT. CODE § 30.1-08-03 (1976); OKLA. STAT. tit. 84, § 54 (1981); S.D. CODIFIED LAWS ANN. § 29-2-8 (1984); TENN. CODE ANN. § 32-1-105 (1984); TEX. PROB. CODE ANN. §§ 60, 84 (West 1980); UTAH CODE ANN. § 75-2-503 (1978); VA. CODE ANN. § 64.1-49 (Michie 1987); W. VA. CODE § 41-1-3 (1982); WYO. STAT. § 2-6-113 (1980). In addition, case law in Alabama and Washington indicates that these two states sometimes will recognize holographic wills of nonresidents. *See* Black v. Seals, 474 So. 2d 696, 697-98 (Ala. 1985) (allowing for holographic wills of nonresidents); *In re* Wegley's Estate, 399 P.2d 326, 327 (Wash. 1965) (holding that holographic will valid in testator's domicile is valid in Washington).

The following statutes allow nuncupative wills of some kind: ALASKA STAT. § 13.11.158 (1985); D.C. CODE ANN. § 18-107 (1989); GA. CODE ANN. §§ 53-2-47 to 53-2-50 (Michie 1982); IND. CODE § 29-1-5-4 (West 1979); KAN. STAT. ANN. §§ 59-608, 59-619 (1983); LA. CIV. CODE

Currently, no state wills act expressly permits any deviation from the formalities of execution.[43]

A statute setting out formalities of execution typically applies to more than just the creation of wills.[44] Most states require that when a testator revokes a will or revives a previously revoked will in writing, the testator must execute the writing with the same formalities that state law requires for the execution of wills.[45] Testators also must execute codicils[46] and alterations to wills with full statutory formality in order for the codicils and alterations to be valid.[47] In sum, the wills acts require that testators execute with full formality almost any writing that directly affects the substance or validity of a will.[48]

Statutes requiring formalities of execution have several purposes.[49] The required formalities, especially the requirement of attestation by witnesses,

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ANN. art. 1578 (West 1987); MASS. GEN. LAWS ANN. ch. 191, § 6 (West 1990); MISS. CODE ANN. §§ 91-5-15, 91-5-21 (1972); MO. ANN. STAT. § 474.340 (Vernon 1956); NEV. REV. STAT. § 133.100 (1987); N.H. REV. STAT. ANN. §§ 551:15, 551:16 (1974); N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 1981); N.C. GEN. STAT. §31-3.5 (1984); OHIO REV. CODE ANN. § 2107.60 (Baldwin 1987); OKLA. STAT. tit. 84, § 46 (1981); R.I. GEN. LAWS § 33-5-6 (1984): S.D. CODIFIED LAWS ANN. § 29-2-9 (1984); TENN. CODE ANN. § 32-1-106 (1984); TEX. PROB. CODE ANN. §§ 64, 65 (West 1980); VT. STAT. ANN. tit. 14, § 6 (1989); VA. CODE ANN. § 64.1-53 (Michie 1987); WASH. REV. CODE ANN. § 11.12.025 (West 1987) ; W. VA. CODE § 41-1-5 (1982).

43. *See supra* note 24 (noting that no state has adopted dispensing power or substantial compliance approach as part of wills act).

44. *See infra* notes 45-47 and accompanying text (discussing how formalities of execution apply to written revocations and revivals of wills, alterations of wills, and codicils).

45. *See* Chaffin, *supra* note 33, at 299 (noting that testator must follow formalities that wills act requires for execution of will in order to revoke will in writing); Johnson, *supra* note 12, at 13 (stating that Virginia law provides for revocation of wills by writing which testator executes in accordance with formalities for execution of wills); John B. Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 873-74, 890 (1960) (explaining that states tend to require same formalities for revoking and reviving wills in writing as for making wills).

46. *See* BLACK'S LAW DICTIONARY 258 (6th ed. 1990) (defining "codicil"). A codicil is a supplement or addition to a will which may modify, explain, add to, subtract from, qualify, alter, restrain or revoke provisions in an existing will. *Id.*

47. *See* 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, § 19.4 (stating that required formalities for execution of wills apply equally to execution of codicils unless statute specifies otherwise); HAPNER, *supra* note 1, ch. 4, at 4 (stating that alterations made to will before its execution are part of will); Miller, *supra* note 21, at 674 (stating that state wills acts generally require testators to execute additions to and alterations of wills with wills act formality).

48. *See supra* notes 45-47 and accompanying text (explaining that formalities of execution often apply to execution of codicils, alterations to wills, and writings that revoke wills). Although I do not propose to discuss them in this Note, a few exceptions exist to the general rule that testators must execute all documents that affect the substance of a will with full formality. Contracts to make wills, writings incorporated into wills through the doctrine of incorporation by reference, and pourover trusts are all writings that may lack formal execution but have an effect on the meaning or effect of will provisions. *See* 2 BOWE-PARKER: PAGE ON WILLS, *supra* note 1, §§ 19.17-.33 (discussing doctrine of incorporation by reference); 1 HARRISON, *supra* note 1, §§ 94, 140(6) (stating that courts may enforce in equity contracts to make wills and that testators may incorporate nontestamentary writings into wills by reference); Rees, *supra* note 5, at 650-51 (describing requirements for incorporation by reference and pourover trusts).

49. *See* Gulliver & Tilson, *supra* note 41, at 5-15 (discussing purposes of formalities for will execution).

protect the testator from mistake, fraud, and undue influence.[50] The formalities also serve a cautionary or "ritual" function because the execution ceremony impresses upon testators the seriousness and importance of making a testamentary disposition.[51] Formalities provide courts with reliable evidence that the purported will is genuine.[52] The signature and attestation requirements and the handwriting requirement in the case of a holograph[53] are especially important formalities from an evidentiary standpoint.[54]

Formalities also serve a "channeling" function.[55] The statute describing proper execution for wills provides a legal framework upon which testators can model their actions.[56] The existence of this framework tends to make testamentary documents more uniform, which eases the administrative burden on the probate courts.[57] The existence of statutory guidelines also allows testators who comply with the wills acts to have some assurance that their documents will be valid.[58]

The wills act formalities were important historically to provide evidence of land conveyances[59] and to serve certain sociological functions.[60] These

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50. *See* Langbein, *supra* note 7, at 496-97 (noting that attestation requirements serve protective function and noting decreased importance of protective function today); Howard M. McCue III & Melinda M. Kleehamer, *When Almost is Good Enough: South Australia Excuses Technical Failure to Comply with Wills Act Formalities—Could it Happen Here?*, TR. & EST., May 1989, at 47, 47 (stating that formalities of execution generally serve purpose of protecting testators, courts, and intended beneficiaries of estates against fraud); Clougherty, *supra* note 31, at 285 (stating that formalities protect testators from mistakes); Gulliver & Tilson, *supra* note 41, at 9-13 (discussing protective function of formalities).

51. *See* Gulliver & Tilson, *supra* note 41, at 5-6 (calling cautionary function of formalities "ritual function"); Langbein, *supra* note 7, at 494-95 (discussing cautionary function of formalities); Clougherty, *supra* note 31, at 284 (explaining that formalities promote clear planning by testators in face of psychological pressures). Because making a will is often a traumatic event, testators may need the formalities to help them avoid distractions and plan wisely. *See* Beyer, *supra* note 37, at 419-20 (discussing psychological vulnerability of testators); Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 377 (1969) (stating that estate planning is traumatic to testators); Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME LAW. 345, 347, 355-62 (1969) (stating that clients are confronted with idea of personal mortality during will preparation interviews and that clients may deny personal mortality or evade subject of death).

52. *See* Gulliver & Tilson, *supra* note 41, at 6-9 (discussing evidentiary function of formalities).

53. *See supra* note 5 (discussing requirements for execution of holographs).

54. *See* Langbein, *supra* note 7, at 493 (stating that signature, attestation, and handwriting requirements serve evidentiary function).

55. *See id.* at 493-94 (discussing "channeling" function).

56. *See id.* at 494 (stating that wills act provides model for testators).

57. *See id.* (stating that formalities promote uniformity in content and form of wills and ease administration of wills).

58. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1698 (1976) (explaining that formalities increase predictability in judicial processes by reducing judicial discretion); Langbein, *supra* note 7, at 494 (stating that testators who model wills on wills act normally are assured of wills' validity); Clougherty, *supra* note 31, at 285 (arguing that formalities increase predictability of probate process and restrain judicial arbitrariness).

59. Nelson & Starck, *supra* note 36, at 336-37 (explaining that writing requirement for wills

historical purposes for the formalities have little importance today.[61] One scholar has argued that the wills act formalities also serve to limit the discretion of probate courts,[62] which states traditionally have treated as inferior tribunals.[63]

B. Construing the Statutory Formalities

The statutory language is only the tip of a legal iceberg, for courts have created a large body of common law interpreting and applying the statutory requirements for will execution.[64] Courts grapple with the many terms contained in the wills acts, such as "witness"[65] and "subscribe,"[66] that become ambiguous in light of the peculiar facts of specific cases.[67] When courts construe the requirements of the wills acts, the courts are deciding exactly what testators must do to execute wills properly.

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entered English law because legislators intended writing to serve as evidence of conveyances). The original Statute of Wills in England, 1540, 32 Hen. 8, ch.1, permitted testators to devise land in writing. Nelson & Starck, *supra* note 36, at 334-35. Testators at that time were free to dispose of personal property by oral wills. *Id.* at 336. The reason for this distinction in the requirements for disposing of real and personal property was that legislators intended the writing to serve as evidence of land transfers, as do modern recording systems for deeds. *Id.* at 336-37; *see* Lindgren, *supra* note 24, at 551 (explaining that states today have effective systems for recording deeds).

60. *See* Fassberg, *supra* note 5, at 628-30 (stating that formalism historically has had great social significance). Fassberg argues that formalism was important in ancient societies because the central feature of ancient societies was "the group." *Id.* at 629. Rigid legal forms embodied the certainty that society and group membership provided to individuals. *Id.* at 630.

61. *See id.* at 637-38 (stating that formalism is neither necessary nor helpful in modern society); Nelson & Starck, *supra* note 36, at 337 (noting that recording statutes, not modern wills acts, provide evidence of conveyances today).

62. *See* Mann, *supra* note 5, at 63-68 (explaining that wills act formalities limit discretion of probate courts and promote control over probate courts by appellate courts).

63. *See id.* at 62 (stating that probate courts in most states traditionally had limited jurisdiction and inferior status); Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 982, 988-92 (1944) (explaining that probate courts in America customarily have had lower status than other trial level courts, and noting that rules of probate procedure indicate that people making rules did not trust probate court judgments).

64. *See* Langbein, *supra* note 7, at 489 (stating that courts reach different conclusions on issue of what acts constitute compliance with what formalities).

65. *See In re* Estate of McGurrin, 743 P.2d 994, 997-99 (Idaho Ct. App.) (discussing meaning of term "witnessed" in Idaho wills act), *appeal denied*, 746 P.2d 85 (Idaho 1987). In *McGurrin*, the testator signed the contested will in a hospital room. *Id.* at 995. The testator's secretary took the will home and had her mother and sister sign it. *Id.* The secretary then returned the will to the testator in the hospital. *Id.* The testator called the mother and sister on the telephone and thanked them for witnessing the will. *Id.* When the executor offered this will for probate, a friend of the testator challenged the will on the grounds that the witnesses had not attested the will properly under state law. *Id.* at 996. While the challenger argued that witnesses must observe the testator sign or acknowledge the will, the proponents argued that witnesses do not have to be in the presence of the testator to witness a will. *Id.* at 997. The court held that in order to validly witness a will, the witnesses must observe the testator sign or acknowledge the will. *Id.* at 999.

66. *See infra* notes 72-80 and accompanying text (describing case in which court construed meaning of term "subscribe" in wills act).

67. *See infra* notes 72-94 and accompanying text (discussing cases in which courts had to determine meaning of signing and witnessing requirements in wills act).

Courts vary greatly in their methods of interpreting the wills acts. Some courts insist that the words of the wills act mean no more than their plain meanings or dictionary definitions.[68] Other courts are willing to give the terms in the wills act a broader or different interpretation than the terms' plain meanings.[69] Depending on the facts of individual cases, any constructional approach may rescue a will from technical challenges.[70] As long as the execution of a purported will satisfies the wills act requirements as interpreted by the court examining the will, that will is not formally defective. Unfortunately, courts sometimes construe the required formalities in such a way as to make genuine expressions of testamentary intent technically deficient and therefore vulnerable to challenges on the grounds of errors in execution.[71]

Gardner v. Balboni[72] is an example of a case in which the court's construction of a wills act requirement defused a formal challenge to a purported will that expressed the genuine intent of the testator. The *Gardner* case involved a will contest in which the plaintiffs contended that the testator had not "subscribed" the will as state law required.[73] The plaintiffs argued that the term "subscribe" in the Connecticut wills act meant to sign at the end of the will and that the end of the will was the execution clause.[74] The testator in *Gardner* had not signed the will immediately beneath the execution clause but instead had signed under a self-proving affidavit that followed the attestation clause.[75]

The *Gardner* court held that the will was valid.[76] In interpreting the subscription requirement, the *Gardner* court looked at the plain meaning of the statutory language. Quoting *Black's Law Dictionary*, the *Gardner* court stated that "subscribe" literally means to write underneath, not to write at the end.[77] Despite the intervening affidavit, the testator's signature was underneath all the will provisions.[78]

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68. *See infra* notes 72-80 and accompanying text (discussing case in which court focused on plain meaning of language in construing wills act).

69. *See* Chaffin, *supra* note 33, at 307-08 (stating that some Georgia courts have interpreted acknowledgment requirements of Georgia wills act expansively); J.G. Miller, *Substantial Compliance and the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 559-60 (1987) (stating that some courts are "generous" in construing wills act).

70. *See* Miller, *supra* note 69, at 560 (noting that desire to uphold wills may prompt courts to look beyond plain meaning of language of wills act in some cases); *see infra* notes 72-80 and accompanying text (discussing case in which "plain meaning" interpretation of term in wills act led to conclusion that testator had executed will properly).

71. *See infra* notes 81-94 and accompanying text (discussing case in which court's construction of wills act led to conclusion that will was formally deficient).

72. 588 A.2d 634 (Conn. 1991).

73. Gardner v. Balboni, 588 A.2d 634, 638 (Conn. 1991).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

The *Gardner* court adopted this construction of the statutory language in order to validate the will. The *Gardner* court noted that the challengers did not contest the authenticity of the testator's signature,[79] but rather challenged the will solely on the grounds of a formal deficiency. After explaining the proper definition of "subscribe," the court stated that rejecting the testator's signature as a valid subscription of the will would improperly elevate form over substance because the signature was authentic.[80]

Unlike the *Gardner* court, many courts have interpreted the wills acts in such a way that the execution of a document expressing testamentary intent falls short of the statutory requirements.[81] For example, in *Estate of Royal*,[82] the Supreme Court of Colorado dealt with a will containing no signatures which was offered for probate by the testator's daughter.[83] When the testator's sons challenged the will, two of the decedent's neighbors filed affidavits stating that they had been present at the execution of the will and now would be willing to sign the document as witnesses.[84]

The *Royal* court stated that the dispositive issue was whether the state's wills act permitted witnesses to sign a will after the testator's death.[85] The statute required that witnesses sign a will, but was silent as to when the witnesses should sign.[86] The court looked beyond the words of the statute and considered the legislative intent underlying the wills act formalities.[87] Because the *Royal* court believed that the legislature intended the execution requirements to reduce fraud in the making of wills,[88] the court imposed a time requirement for signing in order to strengthen the effectiveness of the statute as a device to prevent fraud.[89] The court stated that the statute's requirement of attestation by witnesses necessarily included a requirement that the witnesses sign the will before the testator's death.[90]

The *Royal* court's interpretation of the wills act in effect created an additional formality of execution, a requirement that witnesses must sign a

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79. *Id.*

80. *Id.*

81. *See, e.g.*, Succession of Babin, 215 So. 2d 649, 652 (La. Ct. App. 1968) (stating that trial judge's interpretation of requirement concerning attestation clause was too literal); Bell v. Timmins, 58 S.E.2d 55, 59 (Va. 1950) (stating that term "wholly" in wills act does not mean 100%).

82. 826 P.2d 1236 (Colo. 1992).

83. Estate of Royal, 826 P.2d 1236, 1237 (Colo. 1992).

84. *Id.*

85. *Id.* at 1236.

86. *Id.* at 1237.

87. *Id.* at 1239.

88. *Id.*

89. *Id.*

90. *Id.* at 1237, 1239. Compare the *Royal* holding with the holdings in *In re* Estate of Flicker, 339 N.W.2d 914, 915 (Neb. 1983), which required witnesses to sign a will before the testator's death, and *In re* Estate of Peters, 526 A.2d 1005, 1011 (N.J. 1987), which adopted the rule that witnesses must sign wills within a reasonable time after observing a testator sign or attest a will but declined to hold that witnesses may never sign a will after the testator's death.

will before the testator's death.[91] Because the execution of the purported will in this case violated this "new" timing requirement,[92] the will was technically deficient.[93] The *Royal* court then had to decide whether this formal defect was a fatal one. The *Royal* court did not excuse the defect in the contested will, but instead held that the purported will was invalid.[94]

C. *Applying the Formalities of Execution*

Once a court has interpreted the wills act language, the court then must decide how to apply the statute to the facts of individual cases. In other words, the court must determine how strictly testators must adhere to the wills act requirements, however construed.[95] A court's approach to applying the wills act formalities is a completely separate issue from, and may in fact bear little resemblance to, the court's approach to constructional issues. Courts that refuse to look beyond the plain meaning of the wills act language when interpreting the required formalities may be quite flexible when applying the requirements, and vice versa.[96]

Courts traditionally have required that testators strictly comply with formalities in all situations.[97] Scholars have identified a recent trend toward a more flexible application of the execution requirements, however.[98] Interpreting the relevant case law is difficult because courts do not use precise or consistent terminology[99] and because no bright lines divide the various approaches courts take in applying formalities of execution.[100]

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91. Estate of Royal, 826 P.2d 1236, 1237 (Colo. 1992) (agreeing with probate court that Colorado wills act required that witnesses sign will before testator's death).

92. *Id.* (noting that purported will contained no witnesses' signatures when proponent offered will for probate after death of testator).

93. *Id.* at 1240 (affirming judgment below that document was not valid will).

94. *Id.* Under the rule the court of appeals adopted below, which also required witnesses to sign before the testator's death but recognized an exception to this requirement, the will was invalid because the exception did not apply. *Id.* at 1237. It appears that the will should have been invalid regardless of the timing issue because no witnesses' signatures, whether made before or after the death of the testator, appeared on the will when the testator's daughter offered the will for probate. *Id.* The state statute expressly requires that witnesses sign wills. *Id.* However, the Colorado Supreme Court stated that the timing problem was the legal issue in the case. *Id.* at 1236.

95. *See infra* notes 107-63 and accompanying text (discussing several different rules concerning how strictly testators must comply with formalities of execution).

96. *See infra* notes 114-19 and accompanying text (describing case in which court considered legislative intent in construing wills act requirements but applied these requirements rigidly).

97. *See* Langbein, *supra* note 7, at 489 (stating that once court finds formal defect in will, that will is invalid); Mann, *supra* note 5, at 39 (noting that courts routinely invalidate wills for minor defects even when courts do not doubt that wills are genuine).

98. *See* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS, AND ESTATES 158-60 (1988) (describing modern trend toward reducing and relaxing wills act formalities).

99. *See* Miller, *supra* note 69, at 565-66 (stating that courts and legislatures can interpret "substantial compliance" many different ways); Nelson & Starck, *supra* note 36, at 355 (noting that term "substantial compliance," as used in will formalities cases, is ambiguous). For a discussion of the substantial compliance doctrine, see *infra* notes 120-47 and accompanying text.

100. *See* Miller, *supra* note 21, at 701 (describing *U.P.C.* approach to application of wills act requirements as being somewhere on continuum between approach under South Australia law and approach suggested by another scholar).

Despite the infinite variations on the theme of compliance with wills act formalities,[101] cases concerning the level of required compliance fall into three basic categories.[102] Many courts still require strict compliance with all formalities.[103] Others insist only that testators substantially comply with the statutory requirements.[104] A third approach is the dispensing power approach suggested by *U.P.C.* section 2-503 and in effect in some foreign jurisdictions.[105] The dispensing power approach is an even less stringent enforcement approach than the substantial compliance doctrine.[106]

1. Strict Compliance

American courts traditionally have invalidated any will that does not comply fully with each requirement for execution contained in the wills act, regardless of whether the defective document is a genuine expression of the testator's intent.[107] Most jurisdictions still follow the strict compliance rule.[108] Recent strict compliance decisions include decisions from Florida,[109]

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101. MCGOVERN ET AL., *supra* note 98, at 158 (stating that trend away from formalism is difficult to document due to infinite variations in facts of cases).

102. *See infra* notes 107-66 and accompanying text (describing three basic approaches to application of wills act requirements).

103. *See infra* notes 107-19 and accompanying text (discussing strict compliance doctrine). Perhaps the most notorious strict compliance decision is Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966) (invalidating purported will containing witnesses' signatures only on attached affidavit). Scholars have criticized the *Boren* court's inflexible approach to formalities. *See* Mann, *supra* note 5, at 39-40 (calling *Boren* line of cases odd and perverse); Miller, *supra* note 21, at 712 (stating that cases such as *Boren* are harsh, unfair, and absurd).

104. *See infra* notes 120-47 and accompanying text (explaining substantial compliance doctrine).

105. *See infra* notes 158-63 and accompanying text (discussing use of dispensing power in Manitoba, New South Wales, South Australia, Western Australia, and Northern Territory of Australia).

106. *See infra* notes 148-66 and accompanying text (discussing dispensing power).

107. *See* Langbein, *supra* note 7, at 489 (explaining that courts typically invalidate purported wills when courts find formal defect).

108. *See* Clougherty, *supra* note 31, at 290 (stating that most American jurisdictions currently will not validate purported wills that only substantially comply with wills act formalities).

109. *In re* Estate of Dickson, 590 So. 2d 471, 472 (Fla. Dist. Ct. App. 1991) (stating that testator must strictly comply with formalities of execution to make will or to revoke will by subsequent writing). In *Dickson*, the testator's attorney offered the testator's will for probate, but the testator's daughter challenged the will on the grounds that the decedent had revoked the will. *Id.* The Florida wills act permitted testators to revoke a will by performing certain destructive physical acts to the will or by expressly revoking the will in a later writing executed with full formality. *Id.* at 473. At the bottom of a self-proving affidavit attached to the will, the testator in *Dickson* had printed and signed a statement that the will was null and void. *Id.* at 472. The testator also had written "void" over the notarial seal on the will. *Id.* Noting that the court required strict compliance with statutory formalities to make or revoke wills, the *Dickson* court held that the testator had not revoked the will by a subsequent writing because the testator did not execute the writing he put on the will with full formality. *Id.* at 472-73. However, the court noted that the marking of the will by the testator could constitute enough of a destructive physical act to revoke the will. *Id.* The *Dickson* court remanded the case with orders that the probate court should consider evidence on the issue of revocation by physical act. *Id.* at 474.

Pennsylvania,[110] Idaho,[111] Texas,[112] and Montana.[113]

One typical example of a strict compliance case is *Estate of Royal*, which the Supreme Court of Colorado decided in 1992.[114] While the *Royal* court looked beyond the plain meaning of the statutory language in construing the requirements of the Colorado wills act,[115] the *Royal* court was not flexible in applying the statutory requirements as it had construed them to the contested will at issue in this case. The *Royal* court stated that although the Colorado legislature had reduced the number of will execution formalities in 1974, the legislature required strict adherence to the remaining formalities in order to prevent fraud.[116] The *Royal* court stressed that only the legislature, not the courts, may alter the rules set forth in the statute.[117]

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110. *In re* Estate of Proley, 422 A.2d 136, 138 (Pa. 1980) (holding that rule of strict compliance is legislative mandate). In *Proley*, the testator wrote her name on the portion of the will that served as the cover page when the document was folded properly. *Id.* at 137-38. The governing statute in Pennsylvania required the testator to sign the will at the end. State courts in earlier decisions had interpreted this requirement to mean that the testator must sign at what objectively appeared to be the logical end of the document. *Id.* at 138. The court in *Proley* held that the testator did not sign at the logical end and the document was not a valid will. *Id.* The court recognized that the decision frustrated the testator's apparent intent, but stated that only a strict application of the statutory requirements would adequately prevent fraud. *Id.*; *see also* John J. Burns, Recent Decision, 20 DUQ. L. REV. 365 (1982) (discussing *Proley* decision and related Pennsylvania cases).

111. *In re* Estate of McGurrin, 743 P.2d 994, 1002 (Idaho Ct. App.) (refusing to apply substantial compliance doctrine), *appeal denied*, 746 P.2d 85 (Idaho 1987). In *McGurrin* a party challenged the validity of a will because the testator and the witnesses had communicated concerning the will only by telephone. *Id.* at 995. The court decided that the controlling statute required that witnesses observe the testator sign or acknowledge the will. *Id.* at 999. After discussing and rejecting the substantial compliance doctrine, the court refused to validate the will. *Id.* at 1002.

For a discussion of statutory construction issues in *McGurrin*, see *supra* note 65.

112. Wich v. Fleming, 652 S.W.2d 353, 355 (Tex. 1983) (adhering to strict compliance rule); *see generally* Webb, *supra* note 12 (analyzing and criticizing *Wich* decision and related Texas cases). In *Wich* the testator executed her will in the presence of two witnesses. *Wich*, 652 S.W.2d at 354. Rather than signing at the end of the body of the will, the witnesses signed at the end of a self-proving affidavit printed at the bottom of the last page of the will. *Id.* The *Wich* court noted that testimony indicated that the testator and witnesses believed the execution was valid. *Id.* Citing an earlier case for the proposition that the attestation of the will was defective, and noting that only the legislature has the authority to change the requirements of the wills act, the *Wich* court upheld a trial court order denying probate. *Id.* at 355-56.

113. *In re* Estate of Sample, 572 P.2d 1232, 1234 (Mont. 1977) (invalidating will containing witnesses' signatures on attached affidavit only). In *Sample* the proponent of a will appealed from a lower court decision denying probate. *Id.* at 1232. The *Sample* court noted that because the purported will was not a holograph, state law required that witnesses sign the will. *Id.* at 1233. In this case, the witnesses had signed a self-proving affidavit on a separate page attached to the will, but had not signed anywhere on the body of the will. *Id.* Declaring that the will and the affidavit served separate functions, the *Sample* court decided that the witnesses had not signed the will itself and therefore held that the will was invalid. *Id.* at 1234.

114. Estate of Royal, 826 P.2d 1236 (Colo. 1992).

115. *See supra* notes 81-94 and accompanying text (discussing construction issues in *Royal* case).

116. *Royal*, 826 P.2d at 1238.

117. *Id.*

Because the witnesses to the contested will had not signed the will before the testator's death as required by the Colorado wills act,[118] the *Royal* court refused to admit the will to probate.[119]

2. Substantial Compliance

Unlike the *Royal* court, some state courts have excused errors in will execution that the courts deemed to be harmless.[120] Without statutory authorization to excuse noncompliance, the only way a court can excuse such defects is to rely on the judicial doctrine of substantial compliance.[121] The substantial compliance doctrine is essentially a functional or purposeful application of the wills acts.[122] In other words, the doctrine focuses on the purposes of the statutory formalities rather than the literal language of the statute.[123] A court applying the substantial compliance doctrine may recognize that a document is formally defective but nevertheless deem the document to satisfy the wills act because the document substantially complies with the relevant provisions.[124]

What constitutes "substantial compliance" with the wills act is a matter of debate.[125] Professor John H. Langbein has stated that in order to comply substantially with the wills act, a will must (1) express the intent of the testator and (2) sufficiently approximate the prescribed formalities so that the document satisfies the purposes of the wills act.[126] Most state courts that purport to apply a substantial compliance rule define substantial compliance somewhat differently. State courts generally demand not only that a purported will express the genuine intent of the testator and satisfy the purposes of the wills act, but also that the execution of the will deviate only slightly from the statutory requirements.[127]

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118. *Id.* at 1237 (noting that when proponent offered will for probate, will contained no witnesses' signatures); *see supra* notes 81-94 and accompanying text (discussing court's interpretation of attestation requirements in *Royal*).

119. *Royal*, 826 P.2d at 1240.

120. *See infra* notes 134-42 and accompanying text (discussing substantial compliance case from New Jersey); *see also* RESTATEMENT, *supra* note 1, at reporter's note (summarizing some American substantial compliance cases).

121. *See* Langbein, *supra* note 2, at 6 (stating that only avenue of reform open to court without legislative intervention is application of substantial compliance doctrine). For further discussion of this point, see *infra* note 153 and accompanying text (discussing whether courts may apply dispensing power without legislative authorization).

122. *See* Langbein, *supra* note 7, at 499 (explaining that substantial compliance doctrine is functional approach to wills act).

123. *See id.* (explaining that if execution is sufficient to serve purposes of wills act, substantial compliance doctrine permits excusing literal noncompliance with wills act).

124. *See* Langbein, *supra* note 2, at 6 (explaining that court applying substantial compliance doctrine recognizes document as defective but deems it in compliance with wills act).

125. *See infra* notes 126-27 and accompanying text (discussing different interpretations of what constitutes "substantial compliance" with wills act).

126. *See* Langbein, *supra* note 7, at 489 (setting out two-prong substantial compliance test).

127. *See* Mann, *supra* note 5, at 45 n.28, 61 (explaining that line of "substantial compliance"

Professor Langbein describes his interpretation of the substantial compliance doctrine by analogizing it to cases involving statute of frauds violations.[128] The statute of frauds mandates that certain transactions are invalid unless in writing.[129] However, courts often enforce contracts that violate the statute of frauds.[130] Courts may enforce such parol agreements under the judicially created partial performance and main purpose rules.[131] These rules alleviate the results of noncompliance with the statute of frauds in cases in which the purpose of the statute, fraud prevention, was served in spite of literal noncompliance with the statute's provisions.[132] Professor Langbein urges that courts also should excuse harmless defects in wills.[133]

A recent New Jersey case, *In re Will of Ranney*,[134] illustrates how the substantial compliance doctrine works in practice. In *Ranney*, the New

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cases from Kentucky focused on highly technical issues and did not apply Professor Langbein's formulation of substantial compliance doctrine); Miller, *supra* note 21, at 714 (referring to courts that have tacitly applied quantitative substantial compliance approach to validate marginal wills); 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: Part I*, 43 FLA. L. REV. 167, 229-30 (1991) (stating that some courts have applied quantitative principle of substantial compliance by holding that testator's conduct achieved sufficiently high level of conformity with requirements of execution to be in compliance with those formalities); W. R. Habeeb, Annotation, *Sufficiency of Publication of Will*, 60 A.L.R.2D 124, 136-37 (1958) (listing cases that required only "substantial compliance" with publication requirement). The brief descriptions of "substantial compliance" cases in this annotation indicate that the courts were not applying Professor Langbein's broad formulation of the substantial compliance doctrine and would not permit large deviations from the required formalities of execution. *Id. But see* Estate of Kajut, 22 Pa. D. & C. 123, 136 (1981) (citing Langbein for proposition that purpose of wills act is to promote intent of testators, and holding that execution of contested will substantially complied with requirements because execution fulfilled purposes of wills act formalities); *infra* notes 134-42 and accompanying text (discussing case in which court appeared to apply substantial compliance doctrine as described by Professor Langbein).

In *Kajut* some of a decedent's intestate heirs attacked the testator's purported will on several grounds, including improper execution. *Kajut*, 22 Pa. D. & C. at 124, 129. The Pennsylvania wills act required that when a testator signed a will by mark, another person should write the testator's name at the end of the will in the testator's presence. *Id.* at 129. Because the testator in *Kajut* was blind, he signed by mark. *Id.* at 130. Another person typed the testator's name at the end of the will, but did not do this in the testator's presence. *Id.* at 134. The court found that the will was a genuine expression of the testator's intent and had not been procured by fraud or undue influence. *Id.* at 129. The court determined that because the execution in this case fulfilled the purposes of the signature requirement—identifying the document and preventing fraud—the execution was at least in substantial compliance with the wills act. *Id.* at 130-31.

128. *See* Langbein, *supra* note 7, at 498 (discussing judicial treatment of statute of frauds as functional and nonformalistic).

129. *See* 2 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 275 (1950) (explaining that statute of frauds makes some oral contracts unenforceable).

130. *See* Langbein, *supra* note 7, at 498 (stating that courts validate some contracts that violate statute of frauds).

131. *See id.* (stating that courts enforce parol agreements under part performance and main purpose rules).

132. *See id.* at 499 (explaining that courts excuse noncompliance with statute of frauds if purposes of statute are served).

133. *See id.* at 489 (recommending substantial compliance doctrine to American courts).

134. 589 A.2d 1339 (N.J. 1991).

Jersey Supreme Court considered the validity of a purported will that contained no witnesses' signatures but that was attached to a properly witnessed, self-proving affidavit.[135] The controlling New Jersey statute required that all wills contain two witnesses' signatures.[136] The New Jersey Supreme Court rejected the appellate court's decision that because the signed affidavit was part of the will, the will had no formal defects.[137] The *Ranney* court recognized that the will was formally defective,[138] but remanded the case to the trial court with instructions that the trial court should determine whether the will substantially complied with the statutory formalities.[139]

The New Jersey Supreme Court explained that a requirement of strict compliance with formalities may lead to harsh results.[140] The *Ranney* court approvingly cited a comment in Tentative Draft Number Thirteen of the *Restatement (Second) of Property: Donative Transfers*. The cited *Restatement* comment states that even in the absence of a statute specifically authorizing courts to excuse deviations from the required formalities of execution, courts should excuse noncompliance with these formalities when the proponent of a purported will can establish that the testator intended that document to be the testator's will.[141] The *Ranney* court also cited other cases that purported to follow a rule of substantial compliance.[142]

Although a few courts have applied substantial compliance as a judicial doctrine, no American wills act expressly authorizes the substantial compliance approach to the formalities of execution.[143] The Australian state of Queensland, on the other hand, passed a law in 1981 that provides that substantial compliance with the formalities of execution is sufficient to validate a will.[144] Despite this express legislative authorization to excuse

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135. *In re* Estate of Ranney, 589 A.2d 1339, 1339 (N.J. 1991).

136. *Id.*

137. *Id.* at 1341.

138. *Id.*

139. *Id.* at 1346.

140. *Id.* at 1343.

141. *Id.* (citing RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS app. I, item 3 (Tent. Draft No. 13, 1990) for proposition that courts should excuse defects in execution if proponent of will proves that will is genuine expression of decedent's intent). The American Law Institute made slight changes to the revised § 33.1 comment g that appears in Appendix I in Tentative Draft Number 13 before approving the final draft of the *Restatement*. Comment g in the final draft of the *Restatement* states that courts should excuse formal defects in wills when the execution was in substantial compliance with the formal requirements and the defective will is a genuine expression of the testator's intent. RESTATEMENT, *supra* note 1, § 33.1 cmt. g.

142. *See In re* Estate of Ranney, 589 A.2d 1339, 1343 (N.J. 1991) (listing various cases in which courts followed substantial compliance rule).

143. *See supra* note 24 (noting that no state wills act expressly permits substantial compliance approach).

144. *See* Rosemary Tobin, *The Wills Act Formalities: A Need for Reform*, N.Z. L.J., June 1991, at 191, 194 (describing Queensland substantial compliance statute). The Queensland statute reads as follows: "The court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expresses the testamentary intention of the testator." *See* John K. de Groot, *Will Execution Formalities—What Constitutes Substantial Compliance?*, QUEENSL. L. SOC'Y J., Apr. 1990, at 93, 93 (setting out text of Queensland substantial compliance statute).

some defects in execution, the Queensland courts have not moved any farther away from formalism than have most United States courts that apply a judicial substantial compliance doctrine.[145] The Queensland courts generally have interpreted the substantial compliance statute to mean that courts may excuse only minor deviations from the prescribed formalities.[146] Queensland courts have demanded that wills express the intent of the testator and conform almost completely to the required formalities of execution.[147]

3. Dispensing Power

The revised section 2-503 in the 1990 *U.P.C.* states that courts may validate a formally defective testamentary instrument provided that the proponent of the defective document can prove by clear and convincing evidence that the document expresses the genuine intent of the testator.[148] The revised section 2-503 advocates an even less stringent approach to enforcing the wills act formalities than the substantial compliance doctrine: the dispensing power approach.[149] The dispensing power is not a judicially created doctrine, but rather is a power given to the courts of a jurisdiction by the jurisdiction's legislature.[150] A dispensing power provision allows courts, after recognizing defects in a document, nevertheless to validate the document, provided that the document reflects the intent of the testator.[151]

Although the dispensing power approach sounds very similar to a broad substantial compliance approach, three basic differences exist between the two. First, courts may adopt a substantial compliance approach either with or without express legislative authorization,[152] but courts may not use a dispensing power unless a statute expressly permits the dispensing power approach.[153] Second, courts applying a substantial compliance doctrine must

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145. *See supra* note 127 and accompanying text (explaining that most American courts that apply judicial substantial compliance doctrine validate defective wills only if testator almost complied with formalities of execution).

146. *See* Langbein, *supra* note 2, at 44 (explaining that Queensland courts interpret substantial compliance to be quantitative standard).

147. *See id.* (explaining that Queensland courts apply substantial compliance doctrine as new formal requirement in addition to requirement that testator intended document to be will, that is, testator must have intended document to be his will and testator must nearly have complied with formalities).

148. U.P.C. § 2-503 (1990).

149. *See supra* notes 14-18 and accompanying text (explaining dispensing power approach under *U.P.C.*).

150. *See infra* note 153 (discussing why legislature must authorize dispensing power approach); *see also* Langbein, *supra* note 2, at 7 (explaining that dispensing power is legislative corrective to harshness of strict compliance rule).

151. *See* Langbein, *supra* note 2, at 6 (noting that court using dispensing power approach may validate defective will that expresses testator's intent).

152. *See supra* notes 120-47 and accompanying text (discussing judicial doctrine of substantial compliance and Queensland substantial compliance statute).

153. *See* Langbein, *supra* note 2, at 6 (stating that dispensing power approach is not possible without legislative intervention); Miller, *supra* note 21, at 689 (stating that dispensing power

consider whether a purported will is genuine and whether the execution of the will served the purposes of the wills act formalities,[154] while courts using a dispensing power approach need consider only whether a purported will is genuine.[155] Finally, cases from jurisdictions in other countries that have dispensing power statutes indicate that courts are more willing to excuse defects under a dispensing power statute than under the substantial compliance doctrine.[156]

Although no American state has a dispensing power provision in its wills act,[157] some foreign jurisdictions do have dispensing power provisions. For example, the Canadian province of Manitoba enacted a broad dispensing power statute in 1983.[158] The Manitoba statute places only a civil burden

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approach is based on express legislative grant of authority to excuse deviation from requirements of wills act).

The 1989 Proceedings of the American Law Institute indicate that the late Professor A. James Casner believed courts could adopt a dispensing power approach without express legislative authorization. *See* A. James Casner, *Discussion of Restatement of Law, Second, of Property*, 66 A.L.I. PROC. 25, 34-35, 41 (1989) (arguing that statute of wills has become obsolete and that courts therefore may disregard explicit language of statute of wills in order to validate genuine wills). Casner supported a comment in Tentative Draft Number 12 of the *Restatement (Second) of Property* which stated that courts should treat technically defective wills as valid if the proponent of the will could prove by clear and convincing evidence that the will embodied the testator's intent. *See* RESTATEMENT (SECOND) OF PROPERTY § 33.1 cmt. g (Tent. Draft No. 12, 1989). Casner's view prompted criticism from his colleagues. *See* Professor Herbert Wenchsler, *Discussion of Restatement of the Law, Second, of Property*, 66 A.L.I. PROC. 25, 41 (1989) (stating his opinion that no high court would disregard explicit language of statute). Casner's view did not prevail; the comments to § 33.1 in the final draft of the *Restatement (Second) of Property* discuss the dispensing power approach as used in foreign jurisdictions but do not suggest that courts should adopt the approach without legislative action. *See* RESTATEMENT, *supra* note 1, § 33.1 cmt. g (discussing dispensing power statutes in foreign jurisdictions).

154. *See supra* notes 122-24, 126-27 and accompanying text (explaining that courts applying substantial compliance doctrine consider whether execution served purposes of wills act formalities).

155. *See* Miller, *supra* note 21, at 689 (contrasting substantial compliance approach and dispensing power on basis that only substantial compliance approach requires courts to determine whether execution was in functional compliance with wills act formalities). When Miller uses the term "functional compliance," he is referring to a level of compliance that fulfills the purposes or policies underlying the wills act formalities. *See id.* at 604-05 (discussing notion of functional compliance). Miller states that South Australian courts applying the South Australian dispensing power statute focus on the intent of the testator rather than the seriousness of the defect in execution. *Id.* at 690.

156. *See* Johnson, *supra* note 12, at 11 (arguing that dispensing power is needed because substantial compliance doctrine does not go far enough in validating formally defective wills); Langbein, *supra* note 2, at 1 (declaring substantial compliance provision in Queensland "a flop" because it is still too strict and advocating dispensing power approach of South Australia).

157. *See supra* note 24 (explaining that no state wills act expressly authorizes dispensing power or substantial compliance approach to wills act formalities).

158. *See* Langbein, *supra* note 2, at 2 (noting that Manitoba enacted dispensing power statute); Tobin, *supra* note 144, at 220 (discussing Manitoba dispensing power statute). The Manitoba statute reads as follows:

> Where, upon application, if the court is satisfied that a document or any writing on a document embodies
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> (a) the testamentary intentions of a deceased; or
>
> (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the

of proof on the proponent of a defective instrument to establish that the purported will expresses the testator's intent.[159] The Manitoba statute expressly encompasses defective alterations, revocations, and revivals of wills.[160]

Statutes in four Australian jurisdictions—South Australia, the Northern Territory, Western Australia, and New South Wales—allow courts to dispense with required formalities if the testator intended the defective document to be the testator's will.[161] The South Australia statute requires that the proponent of a defective will prove beyond a reasonable doubt that the testator intended the document to be the testator's will before the court may excuse a formal defect in the document.[162] Despite this high standard of proof, the South Australia courts have upheld the validity of many wills with fairly substantial defects, such as an inadequate number of witnesses or even the lack of the testator's signature.[163]

In order for Virginia courts to excuse defects in execution under a dispensing power approach, the Virginia General Assembly must pass a law expressly authorizing them to do so.[164] Unless the legislature indicated otherwise, a dispensing power provision would allow Virginia courts to validate any will expressing the intent of the testator.[165] In crafting a

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testamentary intentions of the deceased embodied in a document other than a will; the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

See R.S.M. 1982-83-84, c. 31, Wills Act § 23, *reprinted in* RESTATEMENT, *supra* note 1, at stat. note (setting out text of Manitoba dispensing power statute).

159. Tobin, *supra* note 144, at 220.

160. *Id.*

161. *See id.* at 191-92 (discussing dispensing power statutes in Australia); *see also* de Groot, *supra* note 144, at 93 (noting adoption of dispensing power statutes in South Australia, Western Australia, and New South Wales).

162. *See* Tobin, *supra* note 144, at 192 (discussing South Australia statute). The South Australia dispensing power statute reads in full:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

See de Groot, *supra* note 144, at 93 (setting out text of South Australia dispensing power statute); McCue & Kleehamer, *supra* note 50, at 47 (same).

163. *See* McCue & Kleehamer, *supra* note 50, at 47-48 (discussing cases decided under South Australia dispensing power statute and noting that South Australian courts have probated even unsigned wills); Langbein, *supra* note 2, at 15-33 (surveying cases decided under South Australia dispensing power provision); Miller, *supra* note 21 (discussing South Australia dispensing power cases throughout article).

164. *See supra* note 153 and accompanying text (explaining that courts cannot use dispensing power approach without legislative authorization).

165. *See supra* note 155 and accompanying text (stating that courts applying dispensing power approach need consider only whether purported will expresses intent of testator).

dispensing power statute, the General Assembly could look to existing dispensing power statutes in Manitoba and Australia as well as *U.P.C.* section 2-503 as models.[166]

II. VIRGINIA IN CONTEXT

To evaluate properly the advisability of a proposed reform, lawyers and legislators must understand what they are reforming.[167] Consequently, an examination of Virginia's wills act,[168] relevant Virginia case law,[169] and the fundamentals of Virginia probate procedure[170] is necessary in order to determine whether a dispensing power provision is a desirable addition to state law.[171] In addition, scholarly arguments concerning dispensing power provisions are more meaningful when set within the context of Virginia law.[172]

A. The Virginia Wills Act

Virginia law recognizes both ordinary attested wills[173] and holographic wills.[174] The Virginia Code requires that ordinary attested wills be in writing and signed by the testator or another person in the testator's presence and at the testator's direction.[175] The testator's name must appear on the will in such a manner as to make manifest from the face of the document that the testator intended the name to serve as the testator's signature.[176] The testator must sign the will or acknowledge the will in the presence of at

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166. *See supra* notes 158-63 and accompanying text (describing dispensing power statutes in effect in Manitoba, South Australia, Northern Territory of Australia, Western Australia, and New South Wales).

167. *See, e.g.*, Chaffin, *supra* note 33 (discussing Georgia law concerning wills act formalities before recommending reforms to state wills act).

168. *See infra* notes 173-90 and accompanying text (discussing Virginia wills act).

169. *See infra* notes 191-251 and accompanying text (discussing Virginia cases interpreting and applying Virginia wills act).

170. *See infra* notes 253-79 and accompanying text (discussing aspects of Virginia probate procedure relevant to wills act formalities).

171. *See infra* notes 280-402 and accompanying text (discussing whether Virginia General Assembly should adopt dispensing power provision).

172. *See infra* notes 280-388 and accompanying text (discussing scholarly arguments supporting and criticizing dispensing power provisions).

173. *See* VA. CODE ANN. § 64.1-49 (Michie 1950) (providing requirements for attested wills).

174. *See id.* (setting out requirements for holographs). For a description of Virginia law authorizing holographic wills and similar statutes in other jurisdictions, see Natale, *supra* note 5, at 163-69 (describing Virginia law concerning execution of holographs and similar provisions in other states). Virginia law also permits nuncupative wills for the personal estates of soldiers in actual military service and sailors at sea. *See* VA. CODE ANN. § 64.1-53 (Michie 1950) (authorizing nuncupative wills for soldiers and sailors). Because nuncupative wills are very rare, *see* Gulliver & Tilson, *supra* note 41, at 15 (stating that use of nuncupative wills is limited and rare); Langbein, *supra* note 7, at 491 (stating that nuncupative wills are widely authorized but rarely used), this Note will not discuss the requirements of execution for nuncupative wills.

175. VA. CODE ANN. § 64.1-49 (Michie 1950).

176. *Id.*

least two witnesses who are present at the same time.[177] The witnesses must subscribe the will in the testator's presence, but no specific form of attestation is necessary.[178] The witnesses must be competent,[179] but witnesses are not incompetent merely because they have an interest in the will or the estate of the testator.[180]

A holographic will is invalid in Virginia unless the will is wholly in the handwriting of the testator.[181] While the wills act does not require that witnesses observe the execution of a holographic will, at least two disinterested individuals must testify during probate proceedings that the will is wholly in the handwriting of the testator.[182] As in the case of an attested will, the testator must sign the holograph or have another person sign the holograph in the testator's presence and at the testator's direction, and the signature must be made in such a manner as to manifest that the testator intended the name to serve as the testator's signature.[183] The statute does not require that the testator date a holographic will[184] or that the will be among the testator's valuable papers and effects at the time of the testator's death.[185]

The Virginia wills act provides three ways in which a testator may revoke a valid will.[186] Two of these methods of revocation require that the testator execute a revoking document with full statutory formality.[187] First, a testator may revoke some provisions of a will by duly executing a subsequent will or codicil that is inconsistent with those provisions.[188] Second, a testator may revoke a will expressly in another valid will or in a writing that the testator executes with full statutory formality.[189] Finally, a

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* § 64.1-51.

181. *Id.* § 64.1-49.

182. *Id.*

183. *Id.*

184. *Id.*; *see* Natale, *supra* note 5, at 166-67 (explaining that Virginia provision for holographic wills does not require testator to date holograph). Some states do require that testators date holographs. *See id.* (describing date requirement in statutes governing holographs in various jurisdictions).

185. *See* Natale, *supra* note 5, at 169 (indicating that only North Carolina has valuable papers and effects requirement in statute authorizing holographic wills).

186. *See* VA. CODE ANN. § 64.1-58.1 (Michie 1950) (authorizing revocation of wills).

187. *See id.* (describing authorized means of revocation).

188. *Id.*

189. *Id.*; *see* Thompson v. Royall, 175 S.E. 748, 750 (Va. 1934) (holding attempted express written revocation invalid because testator did not execute revoking writing with full formality); Johnson, *supra* note 12, at 13 (noting that Virginia wills act incorporates execution formalities into provision governing revocation, and stating that this incorporation carries with it rule of strict compliance with formalities).

In *Thompson*, the testator decided to revoke her existing valid will and codicil. 175 S.E. at 748. Instead of revoking the documents by destroying them, the testator decided to retain the will and codicil as memoranda to be used in the event that she should decide to prepare a new will

testator may revoke a will by burning it, tearing it, or performing certain other physical acts that damage the document.[190]

B. Construction of the Wills Act in Virginia

The Supreme Court of Virginia has construed many of the requirements for the execution of wills set out in the Virginia wills act. For example, the court has interpreted the requirement that testators sign wills. The court has held that a signature by mark may be a valid signature.[191] Although the Virginia wills act does not require that a testator sign at the end of the will,[192] the appearance of the testator's name on the will must manifest that the testator intended the name as a signature.[193] Virginia courts normally will consider a testator's name or mark that does not appear at the end of the will to be equivocal rather than a manifest expression of signatory intent; thus, a name or mark not appearing at the end of a will may not be a valid signature without additional indications of signatory intent.[194] For instance, the Supreme Court of Virginia held in *Payne v. Rice*[195] that the testator's name on the will was not a valid signature because the testator's name appeared somewhere other than the end of the document and the purported will appeared incomplete.[196] On the other hand, the court decided in *Slate v. Titmus*[197] that the name of the testator was a valid signature, although the name did not appear at the end of the will, because the appearance of the name in the phrase "given under my hand" and other factors indicated that the testator intended the name on the will to serve as a signature.[198]

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in the future. *Id.* at 748-49. Her attorney wrote on the back of the will's cover and on the back of the codicil, "This will null and void . . .," and the testator signed these notations. After the testator's death, some of the beneficiaries under the will offered the will for probate. *Id.* at 749. The circuit court probated the will and the Supreme Court of Virginia affirmed the circuit court's decision. *Id.* at 750. The Supreme Court of Virginia stated that the testator's attempted revocation by writing was invalid because the testator did not execute the revoking writing with full formality. *Id.* The revoking writing was neither in the testator's handwriting nor accompanied by the signatures of attesting witnesses. *Id.* at 749.

190. *See* VA. CODE ANN. § 64.1-58.1 (Michie 1950) (authorizing revocation of wills by physical acts).

191. Ferguson v. Ferguson, 47 S.E.2d 346, 351 (Va. 1948).

192. McElroy v. Rolston, 34 S.E.2d 241, 243 (Va. 1945); *see* HAPNER, *supra* note 1, ch. 4, at 5 (stating that Virginia wills act does not require that testators sign wills at end).

193. Slate v. Titmus, 385 S.E.2d 590, 591 (Va. 1989).

194. *See McElroy*, 34 S.E.2d at 244 (noting that testator's name appearing somewhere other than end of will does not clearly indicate that testator intended name as signature).

195. 171 S.E.2d 826 (Va. 1970).

196. *See* Payne v. Rice, 171 S.E.2d 826, 829 (Va. 1970) (holding that testator's name at top of document did not manifest that testator intended name as signature).

197. 385 S.E.2d 590 (Va. 1989).

198. *See* Slate v. Titmus, 385 S.E.2d 590, 592 (Va. 1989) (holding that name of testator in body of document was valid signature due to emphatic phrase in which name appeared and other factors).

The Supreme Court of Virginia also has construed the statutory requirement that two people should witness a nonholographic will. The statute permits the testator either to sign in the presence of witnesses or to acknowledge the will to them.[199] The witnesses' signatures do not have to be in any particular form or at any particular place on the will.[200] Witnesses do not have to realize their status as witnesses when they sign the will; witnesses may believe they are signing as scribes or notaries public.[201] The requirement that the witnesses be competent means that they must be qualified to testify in court concerning the execution.[202]

Concerning the requirements that testators sign or acknowledge wills "in the presence" of witnesses and that the witnesses sign "in the presence" of testators, the court appears to have adopted a line of sight test. The presence requirements at least demand that the testator be conscious and awake when the witnesses sign the will.[203] The court held in *Young v. Barner*[204] that the attestation also must occur in the range of the testator's vision.[205] The court suggested in dictum in *Ferguson v. Ferguson*[206] that the witnesses must be able to see the testator sign in order for the testator to be signing "in their presence."[207]

Concerning holographic wills, the Supreme Court of Virginia has held that a court may ignore some nonmaterial writing on the document that is not in the testator's handwriting.[208] If a question exists as to whether the

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199. *See* Barnes v. Bess, 197 S.E. 403, 406 (Va. 1938) (holding that Virginia wills act permits testator to sign in presence of witnesses or acknowledge signature to them).

200. Robinson v. Ward, 387 S.E.2d 735, 738 (Va. 1990).

201. *Id.* at 739.

202. Ferguson v. Ferguson, 47 S.E.2d 346, 351 (Va. 1948).

203. *See* Tucker v. Sandidge, 8 S.E. 650, 662 (Va. 1888) (stating that testator must be conscious and awake for witnesses to be in testator's presence).

204. 68 Va. (27 Gratt.) 96 (1876).

205. Young v. Barner, 68 Va. (27 Gratt.) 96, 106 (1876). When the witnesses were in the same room as the testator when they signed the will, the Virginia courts will presume that the witnesses signed in the testator's presence within the meaning of the statute. *See* Nock v. Nock's Ex'rs, 51 Va. (10 Gratt.) 106, 120 (1853) (stating that fact that witnesses signed will while in same room as testator was prima facie proof that witnesses signed will in presence of testator); Neil v. Neil, 28 Va. (1 Leigh) 6, 20 (1829) (presuming that witnesses signed in presence testator because witnesses signed while in same room as testator); HAPNER, *supra* note 1, ch. 4, at 7 (stating that Virginia courts raise presumption that witnesses were in testator's presence when they signed in room where testator was located). The Supreme Court of Virginia was equally divided on the issue of whether the witnesses had signed in the testator's presence when the witnesses signed the will outside the room where the testator was but the testator could have placed himself in a position where he could have seen the witnesses sign. Moore v. Moore's Ex'r, 49 Va. (8 Gratt.) 307, 324-25, 327, 331-32 (1851).

206. 47 S.E.2d 346 (Va. 1948).

207. *See* Ferguson v. Ferguson, 47 S.E.2d 346, 350-51 (Va. 1948) (noting that certain individual was seated where he could see testator sign will, but not deciding whether testator signed in presence of that person).

208. *See* Bell v. Timmins, 58 S.E.2d 55, 59 (Va. 1950) (explaining that court may ignore some printed language on holograph); Gooch v. Gooch, 113 S.E. 873, 876 (Va. 1922) (holding that court may ignore printed matter on holograph if handwritten part forms complete will).

testator intended to incorporate some nonhandwritten material as a substantive portion of the holograph, a court may avoid invalidating the will by presuming that the holograph did not incorporate the printed matter.[209] If testators alter holographic wills in their own handwriting above the original signature, the alterations will be valid because Virginia courts will presume that the testator re-executed the signature.[210] Material added after the signature, however, normally will not be valid unless it is signed separately.[211]

The Virginia wills act requires that two disinterested witnesses identify the testator's handwriting on a holographic will at probate.[212] The Supreme Court of Virginia held in *Bowers v. Huddleston*[213] that an expert witness cannot serve as one of the required witnesses if the expert merely compares the purported will with other exemplars of the decedent's handwriting.[214] Another witness must identify the exemplars as genuine samples of the testator's handwriting.[215]

As construed by the Virginia courts, the Virginia wills act is neither the most nor the least restrictive of the state wills acts.[216] Although it mandates fewer formalities than do some other state wills acts,[217] the Virginia wills act still provides plenty of opportunities for testators to make errors in executing wills and revoking wills in writing.[218] Two of the required formalities, attestation by witnesses[219] and the presence requirements,[220] seem especially formalistic and harsh because they serve little useful purpose in modern society.[221]

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209. *See* Moon v. Norvell, 36 S.E.2d 632, 635 (Va. 1946) (protecting validity of holograph by deciding that testator did not intend to incorporate typed paragraphs in holograph).

210. Fenton v. Davis, 47 S.E.2d 372, 374 (Va. 1948).

211. *See id.* at 377 (holding that additions to holograph below signature were not valid part of will); Triplett v. Triplett's Ex'r., 172 S.E. 162, 167 (Va. 1934) (stating that changes in body of holograph made in testator's handwriting are admissible to probate).

212. VA. CODE ANN. § 64.1-49 (Michie 1950).

213. 399 S.E.2d 811 (Va. 1991).

214. Bowers v. Huddleston, 399 S.E.2d 811, 812-13 (1991) (holding that handwriting expert may not serve as one of required witnesses if expert merely compares handwriting on holograph with exemplars of decedent's handwriting).

215. *Id.*

216. *See* RESTATEMENT, *supra* note 1, at stat. note (listing requirements of execution in all states).

217. *See, e.g.*, ARK. CODE ANN. § 28-25-103 (Michie 1987) (requiring that testator sign at end of will, that person signing as proxy for testator sign his own name, and that testator request witnesses to sign will).

218. *See supra* note 189 (describing Virginia case in which court held attempted written revocation of will ineffective due to formal defect); *infra* note 317 (listing Virginia cases in which courts held purported wills invalid due to formal defects).

219. *See supra* notes 199-202 and accompanying text (describing attestation requirements in Virginia wills act).

220. *See supra* notes 203-07 and accompanying text (describing presence requirements in Virginia wills act).

221. *See* Chaffin, *supra* note 33, at 320-21 (suggesting that legislature eliminate requirement that witnesses sign in presence of testator because it serves no important purpose); John E.

C. *Application of the Wills Act in Virginia*

Until the middle of this century, Virginia courts demanded strict compliance with the wills act requirements.[222] For example, the Supreme Court of Virginia in the 1945 case of *Hamlet v. Hamlet*[223] relied on the strict compliance doctrine in upholding a trial court's refusal to probate an unsigned holograph.[224] The *Hamlet* court rejected the appellant's argument that the name of the testator, which appeared in the second paragraph of the document, was a valid signature.[225] Although the principal issue in the case was what constituted a valid signature under the wills act, the court noted that Virginia law required strict compliance with formal requirements. The *Hamlet* court stated that no mere intention or effort to dispose of property by will, however clearly and definitely expressed in writing, was sufficient unless executed in the manner mandated by the statute.[226]

The Virginia Supreme Court reiterated its adherence to the strict compliance rule in several other cases during the first half of the 1900s.[227] While

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Donaldson, *Law Reform—Suggested Revisions to Virginia's Wills Statutes: Part Two*, VA. B. ASS'N J., Fall 1983, at 10, 16 (recommending that legislature abolish presence requirements because they do little to increase ceremony or reduce fraud); Lindgren, *supra* note 24 (arguing throughout article that legislatures should abolish attestation requirements).

222. *See infra* notes 223-29 and accompanying text (discussing strict compliance rule in Virginia). *But see* Sturdivant v. Birchett, 51 Va. (10 Gratt.) 67, 89 (1853) (validating will because actual execution was reasonable and substantial, if not literal, compliance with required formalities). In *Sturdivant*, the witnesses subscribed the will in a different room from the room where the testator was located. *Id.* at 68. The court seemed to state that the attestation was not defective based on precedent, *id.* at 73, but language at the end of the opinion suggests that the will was technically defective and the court validated it anyway. *Id.* at 89; *see* Johnson, *supra* note 12, at 14 n.10 (describing *Sturdivant* as substantial compliance case).

223. 32 S.E.2d 729 (Va. 1945).

224. Hamlet v. Hamlet, 32 S.E.2d 729, 733 (Va. 1945).

225. *Id.*

226. *Id.* at 732 (quoting Meany v. Priddy, 102 S.E. 470, 470 (Va. 1920) for proposition that attempted will is invalid unless testator duly executes will).

227. *See* McElroy v. Rolston, 34 S.E.2d 241, 244 (Va. 1945) (noting Virginia's adherence to strict compliance rule). The *McElroy* court stressed that strict compliance with precise, fixed rules prevents disorder and confusion in probate law. *Id.* The *McElroy* court stated that the importance of fixed rules outweighs the harsh results that may occur when courts refuse to probate formally defective wills. *Id.* In *Clarkson v. Bliley*, 38 S.E.2d 22 (Va. 1946), a case concerning adoption and intestacy laws, the Supreme Court of Virginia relied on the law of wills as an analogy to support the court's application of a strict compliance rule. *Id.* at 27. The *Clarkson* court described the strict execution requirements for wills as protective safeguards. *Id.* The *Clarkson* court stated that courts must require strict compliance in order to discourage claims to shares in estates, whether made in good faith or not, by anyone other than a legal heir or beneficiary of a valid will. *Id.* Because execution safeguards are so important, equity could not reform a defective will no matter how clearly and emphatically the defective document might express testamentary intent. *Id.*; *accord* Spinks v. Rice, 47 S.E.2d 424, 429-30 (Va. 1948) (stating that courts must apply wills act requirements strictly in all cases).

the court historically required strict compliance with the wills act formalities, the court simultaneously stressed that courts should respect the intent of testators.[228] The court stated that judges therefore should be careful not to add any requirements to the statute through judicial interpretation.[229]

The Virginia Supreme Court tentatively changed its position on the issue of compliance in the 1950 case of *Bell v. Timmins*.[230] In *Bell* the appellant challenged a purported holographic will because some words in the document were not written in the testator's handwriting.[231] Testimony indicated that a friend had made some changes to the will at the testator's request in order to clarify the grammar and punctuation of the will.[232] The changes did not alter the substance of the will.[233]

The *Bell* court appeared to apply the substantial compliance doctrine[234] when the court held that the part of the will in the testator's handwriting was a valid holograph despite the presence of other writing on the document.[235] The *Bell* court had no doubt that the purported will was a genuine expression of the testator's intent: the court stated that the case did not involve concealment or forgery[236] and that the will undoubtedly was valid before the testator's friend altered the will.[237] The *Bell* court also considered the purposes of the required formalities and the degree to which the contested will deviated from those formalities. The court explained that the legislature did not intend the requirements of the wills act to restrain testators, but to protect them.[238] In the circumstances of the *Bell* case, the court noted that the alterations that the testator's friend added to the will were de minimis and immaterial.[239] The court concluded that courts should

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228. *See* Moon v. Norvell, 36 S.E.2d 632, 634-35 (Va. 1946) (noting that wills act was not intended to restrain testators and stating that courts should interpret genuine expressions of testamentary intent to protect their validity whenever possible).

229. *See* Savage v. Bowen, 49 S.E. 668, 669-70 (Va. 1905) (stating that courts should follow wills act strictly but not add any requirements to it).

230. 58 S.E.2d 55 (Va. 1950). Whether the *Bell* court needed to apply the doctrine of substantial compliance to reach its decision is unclear because the court construed the formality at issue, the handwriting requirement for holographs, very broadly. *See id.* at 58-59 (explaining that requirement that holograph be "wholly" in handwriting of testator does not demand that will be 100% in handwriting of testator).

231. Bell v. Timmins, 58 S.E.2d 55, 56 (1950).

232. *Id.* at 57.

233. *Id.*

234. *See id.* at 60 (explaining that courts should insist upon substantial compliance with wills acts). Although the *Bell* court stated that it did not intend to relax the statutory requirements, *id.* at 59, both the reasoning and the decision in the case reflect a substantial compliance approach.

235. *See id.* at 63 (holding that lower court was correct in admitting to probate holograph as originally written by testator).

236. *Id.* at 57.

237. *Id.* at 58.

238. *Id.* at 60 (quoting Moon v. Norvell, 36 S.E.2d 632, 634 (Va. 1946) for proposition that purpose of wills act is not to restrain testators).

239. *Id.*

give the statute requiring formalities of execution a fair construction and insist upon *substantial compliance* with the statute.[240]

In the 1990 case *Robinson v. Ward*,[241] the Virginia Supreme Court again applied the substantial compliance doctrine.[242] The testator dictated her will to a friend, Ward.[243] Because Ward was the first named beneficiary, Ward wrote her own name in the first line of the will.[244] When Ward had completed the document, the testator read it over and signed it.[245] The testator later acknowledged the will to a doctor, who signed it as a witness in the presence of Ward and the testator.[246] The testator's heirs challenged the will on the grounds that only one witness had signed the will properly because Ward's name in the first line of the will was not a valid witness's signature.[247]

The court in *Robinson* held that sufficient subscription by Ward existed to constitute substantial compliance with the controlling statute.[248] The court in *Robinson* stressed that the evidence disclosed no hint of fraud, that the testator had the capacity to make a will, and that the purported will accurately expressed the testator's intentions.[249] The court quoted language from the 1853 case of *Sturdivant v. Birchett*[250] for the proposition that a reasonable and substantial compliance with the required formalities should suffice.[251] Thus, the substantial compliance rule is currently the law in Virginia, but the Virginia Supreme Court has applied the substantial compliance doctrine in only two modern cases.

D. Aspects of Virginia Probate Procedure Related to the Wills Act Formalities[252]

1. Jurisdiction over Probate Matters

Because much of the criticism that scholars have directed at dispensing power provisions concerns the overall competency of probate courts and

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240. *Id.*

241. 387 S.E.2d 735 (Va. 1990).

242. *See* Robinson v. Ward, 387 S.E.2d 735, 739 (Va. 1990) (holding that signing by witness substantially complied with statutory requirements).

243. *Id.* at 737.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 738.

248. *Id.* at 739; *see* Johnson, *supra* note 12 at 10-11 (describing *Robinson* as substantial compliance case).

249. Robinson v. Ward, 387 S.E.2d 735, 739 (Va. 1990).

250. Sturdivant v. Birchett, 51 Va. (10 Gratt.) 67 (1853).

251. *Robinson*, 387 S.E.2d at 740 (quoting *Sturdivant*, 51 Va. (10 Gratt.) at 89, for proposition that courts should require only substantial compliance with wills act formalities).

252. For a detailed discussion of probate and estate administration matters beyond the scope of this Note, see Andrew H. Hook, *Special Problems in Probate Administration*, *in* VIRGINIA PROBATE: BEYOND THE BASICS 123, 125-36 (National Business Inst., Inc. ed., 1989) (discussing estate administration in Virginia); Robert A. Hickey, *Probate Procedures and Administration*, *in* ESTATE PLANNING AND PROBATE IN VIRGINIA 239, 241-80 (National Business Inst., Inc. ed., 1992) (discussing recent developments in probate law and providing overview of attorney's duties during probate and administration of estate).

the thorny proof problems that could arise in dispensing power cases,[253] a brief examination of Virginia probate procedure is essential in order to determine whether Virginia should adopt a dispensing power statute. Virginia confers probate jurisdiction by statute upon the state's circuit courts.[254] The clerks of such courts have the authority to determine whether a will is valid, including whether the testator properly executed the will, in an ex parte proceeding.[255] Sometimes, however, a circuit court judge may make the initial determination of a will's validity in an inter partes proceeding.[256]

The Virginia Code grants circuit courts the authority to impeach or establish a will after a clerk has made an order concerning the will in an ex parte proceeding.[257] Any interested party can appeal to the circuit court as a matter of right from a clerk's order admitting or refusing to admit a will to probate.[258] In such an appeal, the circuit court will review the issues de novo.[259]

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253. *See infra* notes 350-80 and accompanying text (explaining that some schlars criticize dispensing power provisions because such provisions confer broad discretion on probate courts and may present difficult proof problems).

254. *See* VA. CODE ANN. § 64.1-75 (Michie 1950) (conferring probate jurisdiction upon circuit courts); W. HAMILTON BRYSON, HANDBOOK ON VIRGINIA CIVIL PROCEDURE 81 (2d ed. 1989) (stating that Virginia statutes confer probate jurisdiction upon circuit courts); JAMES G. ARTHUR ET AL., BASIC PROBATE IN VIRGINIA 5 (1990) (stating that Virginia circuit courts and circuit court clerks have jurisdiction over probate matters).

255. *See* VA. CODE ANN. § 64.1-77 (Michie 1950) (stating that clerks may probate wills); BRYSON, *supra* note 254, at 81 (stating that clerks enter probate orders in ex parte proceedings). Ex parte proceedings are judicial or quasi-judicial hearings in which the decisionmaker hears only one party. BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

256. *See* VA. CODE ANN. § 64.1-80 (Michie 1950) (authorizing inter partes probate proceedings before circuit court judges); ARTHUR ET AL., *supra* note 254, at 32 (noting that circuit court judge may probate will in inter partes proceeding). Parties in an inter partes probate proceeding may request a jury, and the decision in the proceeding bars the parties from filing a bill in equity to impeach or establish the will. *See id.* An inter partes probate proceeding normally is used when a question exists as to the validity of the will and some potential challengers are under a disability. Bruce Lee Mertens, *Probate Litigation*, *in* VIRGINIA PROBATE: BEYOND THE BASICS 139, 142 (National Business Inst., Inc. ed., 1989).

257. *See* BRYSON, *supra* note 254, at 81 (stating that circuit courts have power to impeach or establish wills after clerk has made order in ex parte probate proceeding). The power to impeach or establish wills is part of the circuit courts' equity jurisdiction. *Id.*

258. VA. CODE ANN. § 64.1-78 (Michie 1950) (authorizing appeals from clerk's order to circuit court by any interested party); *see* HAPNER, *supra* note 1, ch. 8, at 4 (stating that interested parties can appeal clerk's order as matter of right); Mertens, *supra* note 256, at 141 (stating that any interested party may appeal clerk's order as matter of right to circuit court within six months of date of order).

259. VA. CODE ANN. § 64.1-78 (Michie 1950); *see* Mertens, *supra* note 256, at 141 (stating that any interested party may appeal clerk's order to circuit court for de novo review). Appellants must file appeals under § 64.1-78 within six months of the date of the clerk's order. *See id.* A person who was not a party in a hearing which resulted in a clerk's order admitting or refusing to admit a will to probate has 12 months in which to appeal the order to the circuit court. *See* VA. CODE ANN. §§ 64.1-88 to -89 (Michie 1950) (authorizing persons not parties in proceeding before clerk to bring bill of complaint in equity to circuit court within one year of order); Mertens, *supra* note 256, at 141 (discussing §§ 64.1-88 to -89).

The Virginia Supreme Court has the authority to review probate cases,[260] but the Virginia Court of Appeals does not.[261] The civil jurisdiction of the Virginia Court of Appeals is limited.[262] The General Assembly did not grant the court of appeals jurisdiction to review probate decisions either as part of that court's original[263] or appellate jurisdiction.[264] Thus, a party aggrieved by a probate proceeding must file a petition for review directly with the Virginia Supreme Court.

Decisions concerning whether testators properly executed wills are currently in the hands of circuit court clerks and judges.[265] Unless the Virginia legislature expressly stated otherwise,[266] the circuit court clerks and judges would handle the application of any dispensing power statute in Virginia.[267] Because the Virginia Court of Appeals lacks jurisdiction over probate matters,[268] the Virginia Supreme Court would be the sole state tribunal with authority to review the circuit courts' decisions under a dispensing power provision.[269]

2. Evidentiary Issues in Probate Proceedings

The proponents of a purported will must prove by a preponderance of the evidence that the testator validly executed the document offered for probate[270] and that the testator executed the document with testamentary intent.[271] Once the proponents prove testamentary intent and due execution,

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260. *See* BRYSON, *supra* note 254, at 82 (stating that Virginia Supreme Court has jurisdiction over probate matters).

261. *See infra* notes 262-64 and accompanying text (describing jurisdiction of Virginia Court of Appeals).

262. *See* County of Roanoke v. Friendship Manor Apt. Village Corp., No. 0394-85 (Va. Ct. App. Sept. 4, 1985) (stating that civil jurisdiction of Virginia Court of Appeals is limited).

263. *See* VA. CODE ANN. § 17-116.04 (Michie 1950) (outlining original jurisdiction of Virginia Court of Appeals).

264. *See id.* §§ 17-116.05-05:1 (describing appellate jurisdiction of Court of Appeals).

265. *See supra* notes 254-59 and accompanying text (explaining that circuit court clerks and judges have jurisdiction over probate).

266. *See* H.D. 2160, Va. Gen. Ass., Reg. Sess. (1993) (requiring that circuit court judges, not clerks, hear all dispensing power cases in inter partes proceedings). This proposed bill demonstrates that the legislature is free to require that courts use certain procedures in hearing dispensing power cases. *See* H.D. 2160 (specifying that judges must hear dispensing power cases in inter partes proceedings). This bill, which proposed a dispensing power statute for Virginia, died in committee during the 1993 session of the Virginia General Assembly. *See supra* notes 26-27 (describing proposed bill and fate of bill in 1993 session of legislature).

267. *See supra* notes 254-59 and accompanying text (noting that circuit court clerks and judges handle probate).

268. *See supra* notes 261-64 and accompanying text (noting that Virginia Court of Appeals lacks jurisdiction over probate matters).

269. *See supra* note 260 and accompanying text (noting that Supreme Court of Virginia has jurisdiction to hear appeals from probate proceedings in circuit courts).

270. *See* Cross v. Grimes, 37 S.E.2d 1, 3 (Va. 1946) (stating that burden is on proponents of document to prove due execution by preponderance of evidence).

271. *See* McElroy v. Rolston, 34 S.E.2d 241, 243 (Va. 1945) (stating that proponents must prove testamentary intent and valid execution).

the burden of proof shifts to the challengers to establish that the will is invalid.[272] Testators and their lawyers wish to do everything possible to make proof of due execution a routine matter.[273]

The Supreme Court of Virginia uniformly has held that extrinsic evidence is inadmissible to show that a document was executed with testamentary intent.[274] The court also has refused to admit extrinsic evidence to prove that the testator complied with certain required formalities of execution.[275] Extrinsic evidence is admissable, however, for other purposes in probate cases.[276] For example, in cases involving lost wills, the court has allowed the proponents and the challengers of purported wills to introduce extrinsic evidence concerning the circumstances surrounding the making of a will and declarations made by the testator.[277] Extrinsic evidence also is admissible to prove that the handwriting on a holographic will is the testator's[278] because the wills act requires that two witnesses testify at probate as to the handwriting's genuineness.[279] Thus, the Virginia circuit courts do use extrinsic evidence in many probate cases.

III. Policy Arguments For and Against a Dispensing Power Provision for Virginia

A. Promoting the Testator's Intent

Carrying out the testator's intent is the rallying cry of dispensing power proponents.[280] Certainly the many cases in which courts have stated that

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272. *See* Croft v. Snidow, 33 S.E.2d 208, 211 (Va. 1945) (stating that contestants must carry burden of proof to show testamentary incapacity after proponents show due execution of purported will).

273. *See* Donaldson, *supra* note 221, at 17 (recommending that lawyers follow established practices in will execution even if Virginia reduces number of formalities, because certain formalities assure convenience of probate); Lindgren, *supra* note 24, at 547 (noting that need to persuade court to admit will to probate provides incentive for testators to comply with formalities).

274. *See, e.g.*, Mumaw v. Mumaw, 203 S.E.2d 136, 139 (Va. 1974) (stating that testamentary intent must be clear from face of purported will); Quesenberry v. Funk, 125 S.E.2d 869, 874 (Va. 1962) (stating that final testamentary intent must be clear on face of purported will or codicil); Fenton v. Davis, 47 S.E.2d 372, 374 (Va. 1948) (stating that extrinsic evidence is not admissible to establish testamentary intent); Hapner, *supra* note 1, ch. 4, at 1 (stating that face of purported will must indicate that testator intended document to be her will).

275. *See* Slate v. Titmus, 385 S.E.2d 590, 591 (Va. 1989) (stating that signature must appear proper from internal evidence); Payne v. Rice, 171 S.E.2d 826, 828 (Va. 1970) (refusing to admit extrinsic evidence on issue of whether signature was valid under wills act).

276. *See infra* notes 277-79 and accompanying text (referring to certain probate matters in which Virginia courts admit extrinsic evidence).

277. *See* Tate v. Wren, 40 S.E.2d 188, 193 (Va. 1947) (stating that testator's declarations are admissible to strengthen or rebut presumption that testator revoked lost will); Bowery v. Webber, 23 S.E.2d 766-67 (Va. 1943) (admitting evidence of testator's affection for granddaughter to rebut presumption that testator had destroyed lost will that devised property to granddaughter).

278. *See* Bowers v. Huddleston, 399 S.E.2d 811, 811-12 (Va. 1991) (explaining that one lay witness and one expert witness testified as to genuineness of handwriting); J. Rodney Johnson, *Wills, Trusts, and Estates*, 25 U. Rich. L. Rev. 925, 939-40 (1991) (discussing *Bowers*).

279. Va. Code Ann. § 64.1-49 (Michie 1950).

280. *See* Langbein, *supra* note 2, at 4 (noting that stringent application of wills act formalities

purported wills were genuine expressions of the testators' intent but refused to probate the documents due to technical errors seem harsh.[281] When courts refuse to probate wills, property not otherwise disposed of by the testator passes by intestate succession.[282] Because the distribution plans of state intestacy statutes frequently do not reflect the dispositive preferences of decedents,[283] the net result of a technical defect in execution is often that the decedent's property passes to individuals to whom the decedent did not wish to give the property.[284]

Opponents of dispensing power statutes, however, argue that the formalities of execution promote the intent of testators.[285] The formalities

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leads to invalidation of genuine wills, and advocating harmless error rule); R.T. Oerton, *Dispensing with the Formalities*, 141 NEW L.J. 1416, 1416 (1991) (advocating partial dispensing power to prevent courts from invalidating wills that courts know to be genuine); Tobin, *supra* note 144, at 195, 220 (recommending that New Zealand adopt dispensing power statute to promote intent of testators). Some scholars who have not gone so far as to advocate a dispensing power approach to formalities of execution also have noted that rigid insistence on strict compliance with statutory formalities defeats the intent of testators. *See* Fassberg, *supra* note 5, at 636-39 (advocating that courts apply formalities functionally rather than formalistically because refusal to probate wills undercuts the intent of testators); Gulliver & Tilson, *supra* note 41, at 2, 2 n.2 (stating that courts should favor effectuating intent of testators but noting that formalities of execution may frustrate intent).

281. *See, e.g.*, *In re* Smith v. Nelson, 299 S.W.2d 645, 645 (Ark. 1957) (holding typed will invalid solely because only one witness had signed will and statute required two witnesses); Estate of Peters, 526 A.2d 1005, 1010, 1015 (N.J. 1987) (invalidating will because witnesses did not sign within reasonable time after testator made will, as required by statute); Ross v. Taylor, 165 N.W. 1079, 1080 (S.D. 1917) (holding will invalid because testator did not declare to witnesses that document was testator's will, and state wills act required such a declaration); Miller, *supra* note 69, at 561-62 (summarizing several British cases in which wills were invalid due to technical defects, and describing these cases as harsh); Oerton, *supra* note 280, at 1416 (summarizing British case in which court refused to admit to probate alterations testator wrote on will because testator did not sign alterations); *see also* James F. Baxley, Case Comment, 17 SETON HALL L. REV 180, 181 (1987) (discussing prior history of *Peters* case).

282. *See supra* note 9 (stating that property not otherwise disposed of at testator's death passes under intestacy laws).

283. *See* Fellows, *supra* note 9, at 323-24, 340-84 (describing intestacy statutes that do not reflect decedent's wishes as trap for ignorant and misinformed and analyzing several ways in which intestacy statutes deviate from dispositive preferences of most decedents); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1190 (1986) (stating that some intestacy statutes limit share of estate which passes to spouse when children of decedent are alive, despite fact that most Americans would not want to limit spouse's share of estate in this situation); Mann, *supra* note 5, at 67 n.142 (stating that intestacy statutes often do not reflect desires of decedents); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1047, 1078-113 (1978) (noting that intestacy statutes reflect tradition more than social science data and demonstrating that some provisions of Iowa's intestacy law do not reflect dispositive preferences of Iowa public).

284. *See supra* note 283 (explaining that intestacy statutes often do not correspond with dispositive preferences of testators). In *Peters* the purported will that the court refused to admit to probate left the testator's estate to his stepson, but the decedent's estate ultimately escheated to the state of New Jersey under the state's intestacy statute. *Peters*, 526 A.2d at 1006.

285. *See infra* notes 286-90 and accompanying text (explaining why dispensing power critics believe formalities of execution promote intent of testators).

protect the testator from fraud[286] and undue influence[287] during the execution of the will.[288] After testators are dead and therefore cannot testify concerning their intent,[289] the requirements prevent lying witnesses from persuading courts to admit to probate oral statements or informal writings that the testators never intended to be their wills.[290]

On the issue of promoting the testator's intent, the proponents of the dispensing power carry the field. Several scholars have stated that the protective function of the wills act formalities is nearly obsolete today because many wills are made by healthy testators in lawyers' offices.[291] Furthermore, because most of the fraud and duress that wrongdoers practice on testators does not occur during the execution ceremony,[292] the formalities are not a very effective protective device.[293] A clever wrongdoer who did choose to act during the execution ceremony would make certain that the testator executed the will correctly.[294] Additionally, a party who suspects

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286. *See* HAPNER, *supra* note 1, ch. 3, at 6-8 (describing fraud and how litigators must prove fraud in Virginia probate cases); REPPY & TOMPKINS, *supra* note 1, at 20-21 (describing three basic kinds of fraud in wills cases); Milton D. Green, *Fraud, Undue Influence, and Mental Incompetency*, 43 COLUM. L. REV. 176, 179 (1943) (defining fraud as conscious misrepresentation or concealment made with intent to influence another to enter or refrain from entering transaction); A.J. White Hutton, *Undue Influence and Fraud in Wills*, 37 DICK. L. REV. 16, 43-53 (1932) (setting out basic rules of law concerning fraud in wills and describing how litigators prove fraud in probate matters).

287. *See* HAPNER, *supra* note 1, ch. 3, at 6-9 (describing undue influence and how to prove undue influence in Virginia probate cases); Green, *supra* note 286, at 180 (stating that undue influence occurs when party in dominant relationship over another uses unfair persuasion to induce weaker party to act).

288. *See* Clougherty, *supra* note 31, at 283, 290 (arguing that excusing noncompliance with certain witnessing requirements could increase danger of fraud); *supra* note 50 and accompanying text (explaining function of formalities to protect testators from fraud and undue influence).

289. *See* Chaffin, *supra* note 33, at 298 (stating that testator cannot defend himself against fraud during probate proceedings because testator will be dead before probate begins); Victor A. Sachse III, *Discussion of Restatement of the Law, Second, of Property*, 66 A.L.I. PROC. 25, 36 (1989) (stating that testator is dead during probate and unable to speak on her own behalf).

290. *See* Gulliver & Tilson, *supra* note 41, at 6 n.15 (discussing nearly successful fraud in fifteenth century English probate case in which witnesses falsely testified that decedent had made oral will leaving his estate to his wife); Nelson & Starck, *supra* note 36, at 339 (same).

291. *See* Gulliver & Tilson, *supra* note 41, at 9 (stating that retaining formalities of execution for protective purposes is difficult to justify in modern conditions); Lindgren, *supra* note 24, at 554 (stating that protective functions of wills act formalities are less important today due to decline in deathbed wills); Mann, *supra* note 5, at 49 (arguing that testators need less protection today because many testators execute wills in lawyers' offices).

292. *See* HAPNER, *supra* note 1, ch. 3, at 8 (stating that "fraud in inducement" is more prevalent than "fraud in execution"); 1 HARRISON, *supra* note 1, § 114 (stating that fraud most usually noted in cases and books is type of fraud in inducement, not fraud during execution of will); Green, *supra* note 286, at 197-98 (listing several cases of fraud in wills, none of which involve fraud at time of execution); Nelson & Starck, *supra* note 36, at 352 (stating that undue influence normally occurs over long period of time rather than merely during execution of will).

293. *See* Mechem, *supra* note 31, at 504-05 (arguing that forgery of wills is not great hazard and that presence of witnesses at execution of will not stop fraud during execution).

294. *See* Johnson, *supra* note 12, at 11 (stating that schemers who seek to procure wills through fraud or undue influence will be able to comply with required formalities easily); Lindgren, *supra* note 24, at 562 (stating that most wrongdoers who practice fraud on testators comply with statutory formalities).

that a beneficiary under a will exercised fraud or undue influence on the testator can challenge the will on these grounds regardless of the existence of a dispensing power statute.[295]

The Virginia legislature already has undermined the protective function of the wills act formalities by providing in the wills act that holographic wills are valid[296] when testators meet a few minimal requirements.[297] The handwriting requirement alone provides little protection to testators. Because the Virginia wills act does not require that witnesses attest holographs,[298] a wrongdoer can procure a holographic will naming the wrongdoer as a beneficiary as easily as the wrongdoer could obtain a ransom note.[299] Refusing to enact a dispensing power statute because of a desire to protect testators would be incongruous with Virginia's evident policy choice in the area of holographic wills that little protection of testators is necessary.

Although testators are dead before probate[300] and therefore unable to defend themselves if hopeful beneficiaries present false wills to the probate court,[301] a dispensing power statute would not enable wrongdoers to establish false wills easily.[302] The proponent of a defective will has the burden of proof in a proceeding to have the will admitted to probate under a dispensing power statute.[303] The *U.P.C.* recommends that courts require clear and

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295. *See* Gulliver & Tilson, *supra* note 41, at 9 (noting existence of independent remedies for fraud and undue influence); Lindgren, *supra* note 24, at 562 (stating that party who suspected fraud or undue influence had occurred in probate case could challenge will on these grounds even if attestation requirements were completely abolished).

296. *See* Langbein, *supra* note 7, at 498 (arguing that allowing holographs reveals legislative policy to abandon protective policy of wills act formalities); Lindgren, *supra* note 24, at 558 (stating that handwriting requirement for holographic wills provides little protection against forgery); Natale, *supra* note 5, at 169 n.60 (stating that most false wills are holographs).

297. *See supra* notes 181-85, 208-15 and accompanying text (discussing requirements for holographic wills in Virginia).

298. *See* Mann, *supra* note 5, at 50 (noting that holographic wills are valid without attestation); Rees, *supra* note 5, at 634 (explaining that witnesses are not required to attest holographic wills); *supra* notes 181-85, 208-15 and accompanying text (discussing requirements for holographs in Virginia).

299. *See* Gulliver & Tilson, *supra* note 41, at 13-14 (noting that undue influence is danger in execution of holographs because wrongdoer can obtain holograph as easily as ransom note); Langbein, *supra* note 7, at 497 (noting that requirements for execution of holographs do not offer testators much protection because wrongdoers can obtain holographs by compulsion); Natale, *supra* note 5, at 160 n.7 (noting that risk of fraud and duress exists in execution of holographs despite requirement that holographs be in testators' handwriting).

300. *See supra* note 289 (listing authority for proposition that testators generally are dead before probate). *But see* RICHIE, *supra* note 4, at 337 n.15 (explaining that probate may occur when statutes presume absentee testator dead, but court will set aside probate if testator later appears); Mechem, *supra* note 31, at 521 (mentioning that states could permit ante-mortem probate by statute).

301. *See supra* note 289 and accompanying text (noting that testators are unable to testify during probate proceedings).

302. *See infra* notes 303-07 and accompanying text (listing reasons that dispensing power would not allow wrongdoers to easily establish false wills).

303. *See* Wills Act Amendment Act (No. 2) of 1975, section amending the Wills Act of 1936,

convincing evidence of genuineness,[304] not merely a preponderance of the evidence,[305] before admitting a document to probate under a dispensing power provision. The experience of South Australia with its dispensing power statute[306] indicates that courts would hesitate to admit oral wills or unsigned wills to probate because of the difficulty in establishing testamentary intent for wills that have such large formal defects.[307]

Not only do the opponents of a dispensing power approach overemphasize the protective function of the wills act formalities,[308] but they also seem to forget that the laws should promote the intent of *all* testators.[309] The wills acts should not be so complex that they punish poor testators who cannot afford good lawyers.[310] Virginia should be especially sensitive to promoting the expressed intent of testators who do not seek legal advice in preparing wills because Virginia recognizes holographic wills,[311] which generally are homemade wills.[312]

The recent willingness of the Virginia Supreme Court to apply some kind of substantial compliance doctrine to will execution cases is commendable.[313] However, a dispensing power statute would provide much clearer authorization for courts to uphold the intent of bumbling testators than

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§ 12(2), 8 S. AUSTL. STAT. 665 (placing burden of proof on proponents of purported will to prove testamentary intent beyond reasonable doubt); U.P.C. § 2-503 (1990) (placing burden on proponents of technically defective will to prove by clear and convincing evidence that document expresses testamentary intent of decedent).

304. *See* U.P.C. § 2-503 (1990) (stating that burden of proof under statute is clear and convincing evidence); Miller, *supra* note 21, at 701-02 (stating that *U.P.C.* raised required level of proof from civil preponderance of evidence standard that Langbein originally favored to clear and convincing evidence standard).

305. *See supra* note 314 (discussing standard of proof under *U.P.C.* § 2-503).

306. *See supra* notes 161-63 and accompanying text (discussing dispensing power law in South Australia).

307. *See* Langbein, *supra* note 2, at 22 (stating that South Australia dispensing power cases indicate that courts are less likely to dispense with writing and signature requirements than presence and attestation requirements because writing and signature requirements have great evidentiary and cautionary value).

308. *See supra* notes 291-307 and accompanying text (discussing why dispensing power will not undermine protective function of wills act formalities).

309. *See* Mechem, *supra* note 31, at 503 (stating that testators who do not employ lawyers have same right to make wills as their more prosperous or sophisticated brothers and sisters who employ good lawyers).

310. *See* Lindgren, *supra* note 24, at 545 (stating that wills acts should not punish testators because they could not afford to hire good lawyers); Mann, *supra* note 5, at 51 (stating that errors in attestation are almost always fault of attorneys); Mechem, *supra* note 31, at 503 (arguing that wills act should not assume all testators make wills in offices of large law firms).

311. *See supra* notes 174, 181-85 and accompanying text (noting that Virginia recognizes holographs as valid wills when testators fulfill certain requirements).

312. *See* Chaffin, *supra* note 33, at 324-25 (noting that holographs are informal and are useful for people who cannot obtain legal assistance); Natale, *supra* note 5, at 160 (stating that purpose of allowing holographs is to permit private dispositions without complexities); *infra* note 348 and accompanying text (noting that many holographs are letters or notes left in desk drawers).

313. *See supra* notes 230-51 and accompanying text (discussing substantial compliance cases in Virginia).

either a judicial substantial compliance doctrine or a substantial compliance statute.[314] Having decided only two substantial compliance cases[315] after moving away from a strict compliance rule,[316] the Virginia Supreme Court has not clarified what kinds of formal defects Virginia courts may excuse through the substantial compliance doctrine. Many cases in the Virginia Reports tell the sad stories of documents that were clearly meant to be wills but which were denied probate because of formal defects in their execution.[317]

Because a dispensing power statute would promote the intent of testators,[318] a discussion of whether Virginia should adopt a dispensing power statute should focus on a single issue: would a dispensing power statute violate any public policy concerns that outweigh the policy of effectuating the intent of testators?[319] The scholarship on will formalities discusses several social policies that a dispensing power statute might violate.[320] The following examination of these competing policy concerns reveals that none outweighs the policy of promoting the intent of testators.[321] However, the criticisms of the dispensing power approach discussed below suggest potential weaknesses of the approach that the Virginia legislature should seek to avoid by careful consideration and drafting if the legislature does decide to enact a dispensing power statute.[322]

B. Litigation Levels

A dispensing power provision could increase litigation by encouraging parties to argue that technically defective wills are genuine.[323] While an

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314. *See* Langbein, *supra* note 2, at 1, 41-45 (stating that Queensland substantial compliance statute is much less successful than South Australia dispensing power statute because courts will excuse only very minor defects under substantial compliance statute); Miller, *supra* note 21, at 689 (stating that dispensing power seems by definition to give courts broader discretion than judicial doctrine of substantial compliance).

315. *See supra* notes 230-51 and accompanying text (discussing Virginia substantial compliance cases).

316. *See supra* notes 222-29 and accompanying text (discussing traditional rule of strict compliance in Virginia).

317. *See, e.g.*, Payne v. Rice, 171 S.E.2d 826, 829 (Va. 1970) (holding will invalid because testator did not sign will properly); Fenton v. Davis, 47 S.E.2d 372, 377 (Va. 1948) (holding that section of holograph testator wrote under signature after original execution was invalid because testator did not sign additions); Tucker v. Sandidge, 8 S.E. 650, 662 (Va. 1888) (holding will invalid because testator slipped into unconsciousness before witnesses could sign will in testator's conscious presence, as required by wills act).

318. *See supra* notes 291-317 and accompanying text (arguing that dispensing power statutes promote intent of testators).

319. *See infra* notes 323-88 and accompanying text (discussing public policies that dispensing power approach could violate and arguing that these policies do not outweigh policy of promoting testators' intent).

320. *See infra* notes 323-80 and accompanying text (discussing public policies that dispensing power statute could violate).

321. *See infra* notes 323-88 and accompanying text (examining competing policy concerns and arguing that none outweighs policy of promoting testators' intent).

322. *See infra* notes 386, 388 and accompanying text (discussing issues legislature should consider in drafting dispensing power statute).

323. *See* Miller, *supra* note 69, at 578-79 (noting that dispensing power provision could

English study found that very few wills presented for probate were technically defective and therefore fodder for dispensing power cases,[324] many more people might present technically defective wills for probate if the rules for admitting wills to probate were more flexible.[325] Some scholars suggest that adopting a dispensing power rule would cause at least an initial increase in litigation levels,[326] especially if the legislature gave the courts few guidelines for applying the dispensing power statute.[327]

The South Australia dispensing power statute did increase probate litigation in the first few years after the legislature passed the statute.[328] Professor Langbein blames the increase in litigation levels not on the dispensing power statute itself, but on a South Australia rule of procedure that prevents parties who stand to benefit from a purported will from waiving their right to seek probate of the will.[329] No such procedural quirk exists in Virginia; Virginia law does not insist that parties present a purported will for probate if all the interested parties agree to suppress the will.[330] Some of the cases litigated in South Australia therefore would not have been litigated in Virginia.[331]

A decrease in the number of technical challenges to wills would offset any increases in litigation that a dispensing power statute might cause.[332]

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promote litigation); Clougherty, *supra* note 31, at 289 (stating that dispensing power statutes will increase litigation by disrupting channeling function of formalities).

324. *See* Miller, *supra* note 69, at 579 (stating that study in England in 1978 found that fewer than 400 wills presented for probate per year are technically defective); Oerton, *supra* note 286, at 1418 (discussing same study).

325. *See* Miller, *supra* note 69, at 579 (stating that more people might present defective wills for probate if dispensing power provision were in effect); Oerton, *supra* note 280, at 1418 (stating that statistics concerning how many technically defective wills people presented for probate do not include probably far greater number of cases in which people saw that courts were bound to reject defective wills and therefore did not submit wills at all). *But see* Fassberg, *supra* note 5, at 647 (arguing that proponents of wills will rarely invoke dispensing power because proponents must prove testamentary intent to court).

326. *See* Miller, *supra* note 21, at 706 (stating that adoption of dispensing power rule would cause initial increase in probate litigation because courts would need to determine parameters of rule through application); *supra* note 323 (citing authorities for proposition that dispensing power provision could increase litigation).

327. *See* Glendon, *supra* note 283, at 1190-91, 1195-96 (stating that granting courts too much discretion promotes litigation and recommending that legislatures set out in statutes clear guidelines for judges).

328. *See* Langbein, *supra* note 2, at 37-38 (describing litigation "boomlet" that followed adoption of dispensing power statute in South Australia).

329. *See id.* (arguing that litigation increase in South Australia occurred because interested parties in South Australia probate cases cannot waive their rights).

330. *See* ARTHUR ET AL., *supra* note 254, at 7 (stating that Virginia law does not require courts to probate will if no one requests probate of will); M.L. Cross, *Family Settlement of Testator's Estate*, 29 A.L.R.3D 8, 39-43 (1970) (noting general rule that all interested parties may agree to suppress will). Fraudulent concealment of a will, however, is a crime in Virginia. ARTHUR ET AL., *supra* note 254, at 7.

331. *See* Langbein, *supra* note 2, at 41 (stating that adopting dispensing power rule will not lead to litigation boom in jurisdictions that allow noncourt processing of uncontested estates).

332. *See* Lindgren, *supra* note 24, at 572 (noting that under strict compliance rule, parties

When courts do not have the power to excuse technical errors in will execution, every formality becomes a fruitful ground for will contests.[333] People would be less likely to contest wills on formal grounds if courts had the power to excuse formal defects.[334] The two substantial compliance cases from the Virginia Supreme Court[335] do little to discourage will contests on the grounds of formal defects[336] because the cases deal with relatively minor formal defects[337] and their holdings are narrow.[338]

C. *Undermining the Ritual Function of the Formalities*

To the extent that a dispensing power provision discourages compliance with the statutory formalities,[339] the provision would reduce the level of ceremony surrounding will execution and therefore would undercut the ritual function of the formalities.[340] Most probate law scholars agree, however, that a dispensing power provision would not discourage testators from

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litigate whether testator complied with formalities); Miller, *supra* note 69, at 578 (noting that decrease in purely technical challenges could offset any increase in litigation caused by dispensing power statute); Oerton, *supra* note 280, at 1418 (noting existence of strong arguments that introduction of dispensing power would reduce litigation). Oerton notes that because people ordinarily do not litigate cases which they are certain to lose, no case in which strong evidence of genuineness existed would need come before the courts at all if a dispensing power statue were in place. *Id.*

333. *See* Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, PRAC. LAW., Jan. 1992, at 61, 68 (noting that sloppy execution ceremony provides ammunition for parties who wish to contest will); Donaldson, *supra* note 221, at 16 (stating that each formality required for valid will execution presents potential source of litigation as to whether testator in fact observed such formality); Mann, *supra* note 5, at 64 (demonstrating how strict compliance rule has prompted high volume of litigation concerning what constitutes compliance with various formalities).

334. *See* Professor A. James Casner, *Discussion of Restatement of the Law, Second, of Property*, 66 A.L.I. PROC. 25, 29-30 (1989) (suggesting that dispensing power would eliminate litigation over will formalities); *supra* note 332 (explaining that dispensing power statute would reduce litigation concerning whether testator technically complied with formalities of execution).

335. Robinson v. Ward, 387 S.E.2d 735 (Va. 1990); Bell v. Timmins, 58 S.E.2d 55 (Va. 1950); *see supra* notes 230-51 and accompanying text (discussing *Robinson* and *Bell*).

336. *See supra* note 333 (indicating that every formality which courts cannot excuse becomes fruitful ground for litigation).

337. *See supra* notes 230-51 and accompanying text (discussing Virginia substantial compliance cases). In *Bell* the Supreme Court of Virginia excused a deviation from the requirement that holographs be entirely in the handwriting of the testator; the part of the will which the testator did not write did not affect the substance of the will. *See supra* notes 230-40 (discussing holding in *Bell*). In *Robinson* the Supreme Court of Virginia permitted the name of a beneficiary in a dispositive clause to serve as a witness's signature despite the fact that the beneficiary did not intend to act as a witness. 387 S.E.2d at 740. Because earlier Virginia cases had stated that witnesses did not always need to realize their status as witnesses during the execution of a will, *id.* at 739, the formal defect in *Robinson* must have been quite minor.

338. *See supra* notes 230-51 and accompanying text (demonstrating that particular facts of *Bell* and *Robinson* were essential to holdings in these cases).

339. *See infra* notes 341-42 and accompanying text (arguing that dispensing power statute would not discourage compliance with formalities of execution).

340. *See supra* note 51 and accompanying text (discussing "ritual" or "cautionary" function of formalities).

complying with the requirements for will execution.[341] In most dispensing power cases from foreign jurisdictions, the purported wills were defective because the testator had made a mistake while attempting to execute the will properly.[342]

The argument that the Virginia legislature should not excuse noncompliance with the formalities of execution because these formalities instill a cautious, reflective spirit in the testator[343] is unpersuasive in light of current Virginia law. The Virginia legislature already has undermined the ritual function of formalities significantly by recognizing holographs as valid wills.[344] With the exception of the requirement that the testator must intend to make a disposition of property in a holograph,[345] the requirements for the execution of holographs are so minimal[346] that they do not set the making of a holograph apart from casual, everyday activities such as writing a letter.[347] In fact, many holographs are part of letters or notes left in desk drawers.[348] The Virginia legislature would be inconsistent in rejecting a

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341. *See* Beyer, *supra* note 37, at 421, 427-28 (warning attorneys to avoid using only bare minimum of formality in will execution and noting potential for malpractice suit concerning will execution); Chaffin, *supra* note 33, at 308 (stating that attorney should be certain to satisfy rules of will execution of every state rather than relying on minimum requirements of state in which attorney practices); Donaldson, *supra* note 221, at 17 (arguing that Virginia attorneys would continue to follow established practices for will execution even if legislature were to eliminate some required formalities, because formalities simplify probate and increase likelihood that document will be valid under wills acts of other jurisdictions); Johnson, *supra* note 12, at 13 (stating that attorneys would continue to strictly follow formalities despite dispensing power statute in order to simplify probate); Lindgren, *supra* note 24, at 570 (stating that lawyers will abide by requirements of wills act even if errors in execution would not invalidate will). *But see* Clougherty, *supra* note 31, at 288-89 (arguing that dispensing power statute may encourage testators and attorneys to be careless in executing wills).

342. *See* Fassberg, *supra* note 5, at 648 n.84 (stating that most testators attempt to execute valid wills); Miller, *supra* note 69, at 575-76 (noting that in 14 of first 15 cases decided under South Australia's dispensing power statute, execution errors appeared to be mistakes by testator). *But see* Miller, *supra* note 127, at 342-43 (discussing South Australia cases in which noncompliance appeared to be deliberate).

343. *See supra* note 51 and accompanying text (discussing ritual function of formalities).

344. *See* Donaldson, *supra* note 221, at 16 (stating that ceremonial function of formalities has limited importance in jurisdictions, such as Virginia, that permit holographs); Lindgren, *supra* note 24, at 558 (arguing that statute permitting holographs is difficult to reconcile with statute requiring attestation for other wills because execution of holographs serves no ritual function); *supra* note 174 and accompanying text (noting that Virginia recognizes holographic wills).

345. *See supra* note 274 and accompanying text (stating that proponent of any will must prove testamentary intent).

346. *See supra* notes 181-85, 208-15 and accompanying text (describing requirements for holographs in Virginia). Testators must write and sign holographs entirely in their own handwriting, and two witnesses must identify the testator's handwriting at probate. *See* VA. CODE ANN. § 64.1-49 (Michie 1950) (setting out requirements for will execution).

347. *See* Chaffin, *supra* note 33, at 325 (noting that holographs are so informal as to create doubt concerning whether testator intended purported holograph as final will); Mann, *supra* note 5, at 50 (stating that holograph cases are often ludicrous because courts accept suicide notes, recipes, and tractor fenders with writing scratched on them as holographs).

348. *See, e.g.*, *In re* Kimmel's Estate, 123 A. 405, 406-07 (Pa. 1924) (validating as holographic

dispensing power rule to strengthen the ritual function of formalities while permitting holographic wills.[349]

D. *Difficulty in Implementing Dispensing Power Statutes*

Another objection some scholars have made to the suggestion that legislatures adopt dispensing power statutes is simply that courts will find such provisions difficult to implement.[350] Because testators are dead before probate,[351] a court trying to decide whether a technically flawed will is genuine must determine what was intended by a person who is now dead.[352] One of the reasons legislatures have required formal execution is that formalities, such as the requirement that testators sign wills, provide concrete, internal evidence that the testator executed the will with testamentary intent.[353] Any document at issue in a dispensing power case will by definition lack some of the required formalities[354] and thus will provide the court with less internal evidence of testamentary intent than would a nondefective will.[355] Extrinsic evidence of a decedent's intent may be unreliable.[356]

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will section of letter that also discussed proper way to pickle pork and possibility that testator might visit relatives); Thomas v. Copenhaver, 365 S.E.2d 760, 764 (Va. 1988) (validating as holographic will piece of note paper containing various dispositive provisions, testator's signature, and date that testator left in desk drawer); Mumaw v. Mumaw, 203 S.E.2d 136, 138 (Va. 1974) (stating that letters may be valid wills if letters clearly express testamentary intent); *see also* John O'Grady, *Recent Developments Affecting Probate Administration and Taxation*, *in* VIRGINIA PROBATE: BEYOND THE BASICS 1, 9 (National Business Inst., Inc. ed, 1989) (discussing *Thomas*).

349. *See supra* notes 343-49 and accompanying text (explaining that holographs undercut ritual function of formalities).

350. *See infra* notes 351-64 and accompanying text (discussing potential difficulties in implementing dispensing power statutes).

351. *See supra* notes 289, 300 (explaining normal rule that testators are dead before probate and discussing possible rare exceptions to this rule).

352. *See* Mann, *supra* note 5, at 61 (arguing that one reason judges have been inflexible in application of wills act formalities is that courts have difficulty determining testator's intent at probate); William F. Ormiston, *Formalities and Wills: A Plea for Caution*, 54 AUSTL. L.J. 451, 454-55 (1980) (noting that courts applying dispensing power statute must examine intent of testator and stating that determining intent after testator has died is difficult).

353. *See supra* notes 52-54 and accompanying text (discussing evidentiary purpose of formalities).

354. *See* Langbein, *supra* note 2, at 6 (stating that courts may apply dispensing power rule when courts recognize purported will is defective); Miller, *supra* note 21, at 688 (stating that courts use dispensing power to excuse noncompliance with statutory formalities); *supra* notes 148-66 and accompanying text (discussing dispensing power).

355. *See supra* notes 52-54 and accompanying text (explaining that formalities provide courts with internal evidence of testamentary intent).

356. *See* Ormiston, *supra* note 352, at 456 (noting that witnesses in probate cases may be forgetful or interested in outcome of case); Clougherty, *supra* note 31, at 290 (stating that proponents' stake in outcome of probate case makes evidence that proponents present unreliable). Ormiston recommends that courts should be hesitant to admit testimony concerning the testator's direct expressions of intent because the testator, who is no longer alive to testify at probate, may not have made such expressions sincerely. Ormiston, *supra* note 352, at 455.

The fact that Virginia circuit courts already must consider what was intended by a decedent[357] and must rely heavily on extrinsic evidence[358] in some probate proceedings indicates that the courts would be able to handle dispensing power cases competently.[359] Courts focus directly on the testator's intent in deciding whether to admit a purported holographic will to probate[360] and in handling certain other probate matters.[361] Virginia circuit courts also hear some probate cases, such as suits to establish lost wills,[362] that require the courts to consider a great deal of extrinsic evidence.[363] Case law from foreign jurisdictions demonstrates that substantial amounts of extrinsic evidence have been available for the courts in most dispensing power cases.[364]

E. Granting Discretion to Probate Courts and Promoting Uncertainty in the Law

The strongest objection to the Virginia legislature's passage of a dispensing power statute is that such a rule would confer too much discretion on the state circuit courts.[365] Statutes conferring discretion on the courts remove substantive decisions from the legislature and place them in the hands of judges.[366] Although a certain level of judicial

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357. *See infra* notes 360-61 and accompanying text (discussing types of cases in which courts must examine testator's intent at probate).

358. *See supra* notes 276-79 and accompanying text (explaining that Virginia courts admit extrinsic evidence in some probate proceedings).

359. *See* Johnson, *supra* note 12, at 14 (stating that Virginia courts would handle dispensing power provision with same discernment that courts currently exercise in other instances in which courts have extensive control over life, liberty, and fortunes of people).

360. *See* Mann, *supra* note 5, at 50 (stating that testator's intent is key issue in probate proceedings concerning holographic wills).

361. *See* Chaffin, *supra* note 33, at 350 (noting that courts examine decedent's intent in deciding whether to apply doctrine of dependent relative revocation); Mann, *supra* note 5, at 61 n.126 (noting that courts directly consider testator's intent in cases in which challenger contends that will was sham or joke).

362. *See supra* note 277 and accompanying text (discussing use of extrinsic evidence in cases to establish lost wills).

363. *See* 1 HARRISON, *supra* note 1, § 129 (noting that courts admit much extrinsic evidence when challengers attack testator's capacity to make will); Hutton, *supra* note 286, at 50-53 (discussing how to prove fraud in probate cases in Virginia and demonstrating that attorneys use extrinsic evidence to prove fraud); Ormiston, *supra* note 352, at 456 (noting that courts use extrinsic evidence in applying family maintenance statutes).

364. *See* Miller, *supra* note 69, at 582 (stating that in most dispensing power cases, courts have found sufficient amounts of extrinsic evidence to determine intent of testators).

365. *See infra* notes 366-80 and accompanying text (discussing concern that dispensing power statute would confer too much discretion on circuit courts).

366. *See* Glendon, *supra* note 283, at 1166 (noting that legislatures can transfer responsibility for decisions to courts by conferring discretion on courts). Glendon notes that discretion is on the rise in many areas of American law, and she contends that a balance of fixed rules and judicial discretion is needed to promote both coherence and flexibility in the law. *Id.* at 1165-66. Not everyone is comfortable with the idea of conferring discretion on the courts to decide substantive matters of probate law. *See* Ormiston, *supra* note 352, at 453, 457 (stating that legislatures should not give courts discretion to excuse all formal defects in wills and stating that legislatures should instead reconsider which required formalities truly are necessary and reform statute).

discretion is needed to prevent rules from becoming too inflexible,[367] judicial discretion increases arbitrariness and uncertainty in judgments.[368] Very broad delegations of discretion in statutes make meaningful review of trial court decisions impossible because the statute contains no significant limitations on trial court action.[369] A lack of appellate review stifles the development of judicial interpretations of the statute.[370]

Virginia circuit courts are competent to exercise discretion in dispensing power cases.[371] Although court clerks normally decide whether to admit a will to probate,[372] Virginia law permits a de novo appeal as a matter of right from a clerk's order.[373] Therefore, interested parties could make certain that a circuit court judge decided a dispensing power case.[374] Virginia circuit court judges are accustomed to applying judicial discretion in deciding cases because other areas of Virginia law grant judges broad discretion.[375]

However, adopting a dispensing power provision in Virginia could make probate law very uncertain for a long time.[376] Virginia is a strong common-law state in which cases from the 1800s are frequently the most recent authority on a point of law. A dispensing power statute would place in doubt all of the common law concerning the execution of wills[377]

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367. *See* Glendon, *supra* note 283, at 1166-67 (stating that some judicial discretion is necessary to promote flexibility, creativity, and adaptability in the law).

368. *See* Fassberg, *supra* note 5, at 628 (noting that form connotes consistency, universality of treatment, and protection against arbitrariness); Glendon, *supra* note 283, at 1166 (noting that statutes must balance discretion with rules to promote coherence in law). Because of a belief that probate judges are not competent to exercise broad discretion, states traditionally have been especially concerned about granting discretion to probate courts. *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 117 (1944) (noting that probate court judges often are not even lawyers and receive lower salaries than other judges at trial court level); Simes & Basye, *supra* note 63, at 988, 992 (noting that states often have characterized probate courts as inferior and have demonstrated mistrust of probate decisions).

369. *See* P.S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 4 (1985) (noting that broad delegations of discretion fail to provide meaningful standards for review of lower court decisions); Mann, *supra* note 5, at 64 (arguing that strict rules governing will execution cases allow appellate courts to control discretion and decisions of lower courts).

370. *See* Atiyah, *supra* note 369, at 5 (stating that fruitful development of common law is stifled without appellate court control of lower court decisions).

371. *See* Johnson, *supra* note 12, at 14 (stating that Virginia courts would be able to exercise dispensing power with discernment).

372. *See* ARTHUR ET AL., *supra* note 254, at 31 (stating that proponents of will normally go to circuit court clerk for probate); *supra* notes 254-59 and accompanying text (discussing probate of wills in Virginia circuit courts).

373. *See supra* notes 258-59 and accompanying text (discussing provision in Virginia Code for de novo appeals from clerks' probate orders).

374. *See supra* note 258 and accompanying text (stating that any interested party may appeal to circuit court from clerk's order admitting or refusing to admit will to probate).

375. *See* Johnson, *supra* note 12, at 14 (stating that Virginia courts have extensive control over life, liberty and fortunes of people in many instances).

376. *See infra* notes 377-80 and accompanying text (discussing possibility that dispensing power statute could cause uncertainty in Virginia probate law).

377. *See* Miller, *supra* note 69, at 580 (noting that dispensing power statute could create

that the state courts have been developing for over 200 years.[378] Furthermore, because the Supreme Court of Virginia is the only state court with jurisdiction to hear appeals from probate decisions,[379] the meaningful review that is so critical to promoting consistent interpretations and applications of the law[380] would be sorely lacking in dispensing power law.

Although the potential for a dispensing power statute to create uncertainty in Virginia probate law is troubling,[381] none of the criticisms that scholars have leveled at dispensing power provisions outweighs the policy of effectuating the intent of testators. A dispensing power statute may cause an initial increase in probate litigation,[382] encourage some suits with difficult proof problems,[383] and force the circuit courts to use their discretion in determining when to excuse formal defects.[384] However, the legislature can reduce the degree to which such statutes increase litigation or promote uncertainty in the law by including in the statute clear guidelines for the circuit courts to follow.[385] For example, the legislature should state expressly whether the statute covers deliberate execution errors or only innocent mistakes, whether the statute covers defective revocations and alterations of wills, and what level of proof courts should require in dispensing power cases.[386] In any case, the conveyance of a testator's estate to the intended beneficiaries after some expense and delay seems preferable to the speedy and inexpensive conveyance of the testa-

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uncertainty concerning which documents courts will admit to probate); Miller, *supra* note 21, at 719 (arguing that dispensing power approach blurs parameters of law of wills and increases amorphism in law of wills); Clougherty, *supra* note 31, at 289 (stating that dispensing power statute would create uncertainty in probate law).

378. *See* SHEPHERD'S STAT. OF VA. ch. 30 (1792) (setting out requirements for execution and revocation of wills).

379. *See supra* notes 261-64 and accompanying text (explaining that Virginia Court of Appeals does not have jurisdiction over probate matters).

380. *See supra* note 370 and accompanying text (noting importance of appellate review in development of common law).

381. *See supra* notes 376-80 and accompanying text (discussing potential of dispensing power statute to create uncertainty in Virginia probate law).

382. *See supra* notes 324-38 and accompanying text (discussing potential of dispensing power statute to increase litigation).

383. *See supra* notes 350-64 and accompanying text (noting that dispensing power cases would force probate courts to examine intent of testators and to analyze extrinsic evidence).

384. *See supra* notes 365-75 and accompanying text (explaining that dispensing power statute would confer broad discretion on Virginia circuit courts).

385. *See* Glendon, *supra* note 283, at 1191 (noting that granting too much discretion to courts may promote litigation); *supra* notes 366-69 and accompanying text (noting that lack of guidelines in statutes promotes uncertainty in law).

386. *See* Langbein, *supra* note 2, at 53 (criticizing South Australia dispensing power statute because it does not explicitly cover defective written revocations); Miller, *supra* note 69, at 566, 583-86 (noting that dispensing power has many forms and discussing possible variations in harmless error rules). Miller notes that harmless error statutes vary as to what level of proof proponents of defective wills must meet and as to whether attempted compliance with the formalities by the testator is necessary for courts to validate a defective will. Miller, *supra* note 69, at 583-86.

tor's estate to people whom the testator did not wish to receive the estate.[387]

The legislature also can minimize the risk that a dispensing power statute would allow dishonest witnesses to establish any scrap of paper as a legal will. The legislature should require that the proponents of wills in dispensing power cases prove the wills' genuineness by clear and convincing evidence.[388] Because dispensing power statutes promote the intent of testators without violating any equally weighty policy concerns, the Virginia legislature should adopt a dispensing power statute.

IV. CONCLUSION

The traditional insistence by American courts that testators comply strictly with every formality of execution in the state wills acts[389] leads to harsh results. Courts following the strict compliance rule refuse to probate many genuine expressions of testamentary intent due to technical defects, and frustrate the testators' expressed desires.[390] Many scholars suggest that courts should excuse harmless errors in the execution of wills or that legislatures should expressly authorize courts to dispense with the statutory formalities in order to validate documents clearly intended to be wills.[391] Although some American courts have been willing to validate defective documents that substantially comply with the wills act formalities,[392] no state legislature yet has adopted a dispensing power statute.[393] Presently, dispensing power statutes exist only in foreign jurisdictions.[394]

Although the Virginia wills act does not require as many formalities as the wills acts of certain other states,[395] Virginia case law indicates that many Virginia testators do make errors in executing wills.[396] The Virginia Supreme Court historically followed the strict compliance rule and invalidated any

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387. *See id.* at 581 (noting that dispensing power provisions promote intent of testators even if dispensing power litigation delays administration of some estates); Oerton, *supra* note 280, at 1418 (suggesting that spending estate's money on dispensing power litigation may be preferable to giving estate to people whom testator did not intend to share in estate).

388. *See* U.P.C. § 2-503 cmt. (1990) (stating that legislatures should require clear and convincing evidence of testator's intent in dispensing power cases to provide procedural safeguard appropriate to seriousness of issue).

389. *See supra* notes 107-19 and accompanying text (discussing traditional strict compliance rule).

390. *See supra* notes 5-10 and accompanying text (noting that strict compliance rule causes courts to invalidate genuine but defective wills and frustrates expressed intent of testators).

391. *See supra* notes 11-12 and accompanying text (noting that scholars have advocated judicial and legislative harmless error rules concerning execution of wills).

392. *See supra* note 120 and accompanying text (noting that some courts apply judicial substantial compliance doctrine).

393. *See supra* note 24 (noting that no state wills act contains dispensing power provision).

394. *See supra* notes 157-66 and accompanying text (describing dispensing power statutes abroad).

395. *See supra* note 217 and accompanying text (noting that Virginia requires fewer formalities of execution than do some other states).

396. *See supra* note 317 (listing Virginia cases concerning defective wills).

formally defective will.[397] After moving away from the strict compliance rule in 1950, the Virginia Supreme Court has applied a judicial substantial compliance doctrine in two cases to excuse minor formal defects in wills.[398]

Virginia should take the next step in the process of promoting the intent of testators: Virginia should adopt a dispensing power statute. A dispensing power statute would provide clearer authorization for the courts to excuse harmless errors in wills than does the substantial compliance doctrine.[399] Although a dispensing power statute could cause an initial increase in litigation, create uncertainty in Virginia probate law, and force the state circuit courts to handle some difficult cases,[400] these potential problems with a dispensing power approach do not outweigh the benefit of protecting the intent of testators.[401] Moreover, the General Assembly can minimize the potential negative consequences of a dispensing power statute by careful drafting. If the General Assembly does enact a dispensing power statute, the General Assembly should delineate clearly the scope of the statute and should state expressly that the level of proof required in dispensing power cases is clear and convincing evidence.[402]

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397. *See supra* notes 222-29 and accompanying text (discussing traditional strict compliance rule in Virginia).

398. *See supra* notes 230-51 and accompanying text (discussing Virginia substantial compliance cases).

399. *See supra* note 314 and accompanying text (noting that dispensing power provisions provide clearer authorization than substantial compliance doctrine for courts to excuse defects in wills).

400. *See supra* notes 323-80 and accompanying text (discussing potential problems that dispensing power approach could cause).

401. *See supra* notes 381-88 and accompanying text (concluding that policy of promoting intent of testators outweighs potential disadvantages of dispensing power approach).

402. *See supra* notes 386, 388 and accompanying text (recommending that General Assembly unambiguously define scope of statute and require that proponents of defective wills in dispensing power cases meet clear and convincing burden of proof).