The Superwill Debate: Opening the Pandora's Box?

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In recent years, the superwill [FN1] concept has sparked a renewed interest as commentators and legislators alike have sought to provide increased flexibility to testators in the disposition of their nonprobate assets. The basic premise underlying the superwill is that a testator may, by executing one testamentary document, dispose of both testamentary as well as nonprobate assets. The superwill thus is a substantial departure from existing law, under which a testator generally may not dispose of nonprobate assets through a will. [FN2] Traditionally, wills effectuate testamentary transfers, transfers that become legally operative only upon the testator's death. [FN3] During the testator's lifetime, the will beneficiaries possess merely an expectancy in the stipulated property rather than an actual property interest. [FN4] In contrast, through the use of many nonprobate mechanisms *278 to transfer property, a testator can create a presently effective, inter vivos interest in the intended beneficiary, though actual possession occurs only at the testator's death. [FN5]

Common forms of nonprobate dispositions include joint tenancies, revocable living trusts, life insurance policies, pensions, and such multiple-party bank accounts as joint bank accounts, Totten trusts, and payable-on-death bank accounts. [FN6] All nonprobate dispositions, however, share one important legal characteristic—the assets contained in a nonprobate disposition do not become part of the testator's probate estate. [FN7] From an estate planning perspective, the attraction of such will substitutes is obvious. Assets can be distributed to the designated beneficiaries immediately upon the transferor's death, with none of the delays associated with the probate process. [FN8] Furthermore, the assets contained in nonprobate dispositions generally are not subject to the claims of creditors. [FN9]

*279 Proponents of the superwill [FN10] advance several arguments in favor of the idea. First, it is more convenient for a testator to modify his or her nonprobate dispositions pursuant to one instrument rather than to make separate arrangements for each nonprobate asset. This argument is especially compelling for testators who are in a 'death-bed' situation, where time is of the essence. Second, allowing a testator to dispose of nonprobate assets in a will arguably comports with the average person's expectations that a will should be able to effectuate such transfers. The superwill thus would protect the interests of those testators who, because of either inappropriate legal advice or failure to seek any counsel at all, have disposed of their nonprobate assets in this fashion. [FN11] Third, the superwill arguably is more consistent, from a doctrinal standpoint, with the reality of nonprobate transfers. Specifically, most nonprobate dispositions may be more akin to testamentary transfers that pass only a tenuous expectancy interest to the intended beneficiary, rather than to inter vivos transfers that convey a presently effective interest in the stipulated property. [FN12] If this premise is accepted, *280 it could be contended that nonprobate dispositions, like testamentary transfers, should be able to be revoked or modified through a testamentary disposition.
Despite the appeal of these arguments, any proposed recognition of the superwill triggers numerous difficulties which must be resolved if the superwill is to be regarded as a positive influence in the estate planning sphere. This article explores the significant issues raised by the superwill's adoption. Part I examines questions relating to the mechanics of the superwill such as what type of nonprobate assets should be governed by a superwill and whether a testator should be able to make initial dispositions of nonprobate assets through the use of a superwill. Part II focuses on how adoption of the superwill affects the content of the probate estate from the standpoint of subjecting the assets disposed of in a superwill to the claims of the decedent's creditors, surviving spouse and pretermitted heirs. Part III explores the issues pertaining to the revocation and revival of superwills. Part IV treats the appropriate degree of protection for financial institutions, beneficiaries, and other third parties. We will demonstrate that the superwill can be a beneficial tool and that any difficulties created by its adoption can be resolved through careful drafting of proposed superwill legislation.

II. QUESTIONS INVOLVING THE MECHANICS OF THE SUPERWILL

The superwill raises numerous questions regarding the mechanics of permitting the disposition of nonprobate assets through wills. For instance, should a testator be able to dispose of all types of nonprobate assets through a superwill, or only nonprobate assets that are primarily testamentary in nature? Should a testator be able to dispose of nonprobate assets initially through a superwill, or should the superwill be limited to changes and revocations regarding dispositions of nonprobate assets created pursuant to previously executed instruments? Finally, how specifically must the superwill describe the particular nonprobate asset whose disposition will be affected by the superwill's terms?

Before these questions can be explored, we must examine the nature of nonprobate assets in general, as well as the manner in which the courts have handled their disposition. Typically, a testator must comply with the formalities of the statute of wills in order to effectuate a valid testamentary disposition. Most wills acts require that the will instrument be in writing, signed by the testator, and executed in the presence of witnesses. The rationale behind such statutes is to convince the courts that the testator truly intended to make the particular disposition. In addition, the requirements of the wills acts are designed to reduce the possibility of undue influence or the likelihood of the testator acting irrationally.

Nevertheless, courts have allowed certain types of property to pass outside the probate estate. Such nonprobate transfers are exempt from wills act requirements on the ground that they are non testamentary in nature. The underlying theory is that upon the creation of these assets, an inter vivos interest is deemed to have passed to the beneficiary of the nonprobate asset, and accordingly, such property is not considered to have been owned by the decedent at the time of death. One justification for excluding nonprobate assets from the probate estate is that the survivors of a decedent require funds immediately to cover the costs and expenses in connection with the death of the property owner. Thus, the recipients of nonprobate assets are entitled to their immediate distribution and need not suffer the delays of the probate process. Furthermore, nonprobate assets generally are not subject to the claims of creditors, pretermitted heirs, or spouses asserting elective share rights. Each of these nonprobate assets will be considered briefly in the following discussion.

*Joint tenancy is a common form of property ownership in which two or more people own an undivided interest in the entire property, and upon the death of one joint tenant, the rights of the remaining joint tenants automatically, and by operation of law, swell to encompass the entire property. Thus, the nature of the tenancy mandates that joint tenancy property pass to the surviving joint tenants, regardless of any provisions to the contrary in the decedent joint tenant's will. Revocable living trusts have become an increasingly popular means of excluding one's assets from the probate estate. The settlor of such a trust typically retains the right to the income of the trust for life, as well as substantial powers over the trust property such as the right to revoke, alter or amend the trust. Although the interest of the beneficiary of such a trust is extremely tenuous, most courts construe these trusts as valid, nontestamentary transfers. As such, they generally cannot be modified or revoked by a subsequent will, unless the trust instrument specifically provides that the settlor can revoke or alter the trust in his or her will.

At least one court, however, has taken the position that because the interest of a beneficiary of a revocable living trust is more akin to an expectancy, liberal methods of revocation should be sanctioned. In Pultz v. Tyree, the court held that
a revocable living trust that did not provide for a specific method of revocation could be revoked orally because of the
'primarily testamentary' nature of the instrument. [FN35]

*285 A third common form of nonprobate asset is the life insurance policy. Often, the issue arises as to whether an insured
may change the beneficiary of a revocable policy pursuant to the terms of a will, rather than through the specific insurance
policy requirements. As a general rule, courts have held that a will provision that purports to change the beneficiary of a life
insurance policy is ineffective. [FN36] Several courts, however, have held that an insured may change the beneficiary of a
life insurance policy by a subsequently executed will. [FN37] The rationale underlying the general rule is that the disposition
of proceeds through a revocable life insurance policy is nontestamentary in nature and, therefore, can only be changed or
modified in compliance with the terms of the policy. [FN38]

For many individuals, pension and employee benefit plans are becoming an integral part of the estate planning process.
Courts generally consider dispositions *286 of funds through such plans as nontestamentary transfers and, as such, cannot be
revoked, modified, or otherwise disposed of through a will. [FN39]

Finally, the multiple-party bank account is a nonprobate asset which shifts ownership of funds from the depositor to other
individuals upon the depositor's death. These accounts can take one of three forms: joint bank accounts, Totten trusts, and
POD accounts. [FN40] In general, the rights of a survivor to the proceeds of a joint bank account depend on whether the
decedent intended to create a present and vested interest in the survivor at the time the account was created. [FN41] If it can be
determined that a presently effective inter vivos interest has passed to the survivor upon the creation of the account, the
ultimate transfer of the assets to the survivor is treated as a nontestamentary disposition and therefore is not susceptible to
modification or disposition in a will. [FN42]

*287 A Totten trust is established when a person deposits money into an account in his or her name but intends the account
to be for the benefit of another. [FN43] The depositor still retains all rights to the account during his or her lifetime, and the
account may be revoked by the depositor at any time. As a result of the intended beneficiary's tenuous interest therein,
Totten trusts are often called tentative trusts. [FN44] According to the prevailing view, a Totten trust may be revoked by any
unequivocal act or declaration of the depositor, including, but not limited to, the designation of a new beneficiary of the
account pursuant to the terms of the depositor's will. [FN45]

*288 The third type of multiple-party bank account is the POD account. A POD account is distinguishable from a joint
bank account in that the beneficiary receives no present contract right or other interest at the time the POD account is created.
[FN46] Instead, the beneficiary of such an account has no interest until the death of the depositor. [FN47] Thus, the transfer
is regarded as testamentary. Because of the testamentary nature of a POD account, courts generally have held that such
accounts may be modified or revoked through wills. [FN48] Nevertheless, some recent decisions have permitted the assets
contained in a POD account to be distributed according to the terms of the account rather than the contrary provisions of a
subsequently executed will. [FN49]

*289 As the foregoing discussion suggests, the guiding light regarding the disposition of nonprobate assets has been the
distinction between testamentary and nontestamentary transfers. Whether a particular nonprobate asset may be disposed of
through a will generally depends on whether the instrument creating the nonprobate asset is deemed to give rise to a
nontestamentary transfer passing a present, inter vivos interest to the recipient. The logic behind this reasoning is that a
testator should be able to use a will to dispose of only those assets that the testator owns at the time of death. Thus, to the
extent that a present interest in a nonprobate asset has passed to the recipient during the testator's life, the testator no longer
owns that interest and arguably should not be able to dispose of it through a subsequently executed will. A joint tenancy, for
example, creates a valid present interest in all of the joint tenants, [FN50] even though a particular joint tenant's eventual
deposition right to the exclusive possession of the property held in joint tenancy is similar to an expectancy. [FN51] Nevertheless, a joint
tenant cannot defeat the survivorship element of a joint tenancy by disposing of the property through a will because the
decedent joint tenant's interest in the property technically ceases at the time of his or her death. [FN52] In contrast, because
the POD account has been determined by most courts to be a testamentary transfer, and therefore incapable of passing any
present interest to the designated beneficiary during the creator's life, such accounts are conducive to change or modification
by will. [FN53] Similarly, the interest that passes to a Totten trust beneficiary is so tenuous that it essentially is treated as a
testamentary transfer in most instances, and thus is susceptible to modification in a subsequent will. [FN54]

Upon closer scrutiny, however, the distinction between testamentary and nontestamentary transfers becomes suspect in that
it relies on the transparent fiction that will substitutes such as revocable living trusts, life insurance policies, and pension
plans can create vested, presently effective interests in their beneficiaries despite the fact that the grantors typically may revoke such transfers at any time. Indeed, a grantor generally may revoke the dispositions of these nonprobate assets, or change the beneficiaries, during his or her life through decisive and unequivocal acts evidencing the grantor's intent. [FN55] Doctrinally, courts have *290 justified this inconsistency by concluding that the grantor's retained power to revoke renders the beneficiary's interest 'vested subject to defeasance.' [FN56] The logical flaw inherent in this doctrinal justification is evident; in essence, such nonprobate dispositions create no more of an inter vivos interest in their intended beneficiaries than does an expectancy under a will [FN57] because they are subject to being eliminated if the creator exercises his or her retained power to revoke.

Professor Langbein has observed that 'if the fiction of lifetime transfer could be candidly rejected, no other policy of consequence would prevent the courts from honoring the transferor's intent.' [FN58] This analysis, which focuses on the testamentary nature of most nonprobate assets, would seem to militate in favor of allowing superwills to dispose of all nonprobate assets that pass to the beneficiaries only at the grantor's death. Under this approach, a superwill could dispose of only those nonprobate assets that are primarily testamentary in nature and could not alter or amend the dispositions of those few types of nonprobate assets in which the beneficiaries have a legitimate, presently effective interest. Thus, a joint tenant should not be able to eliminate the survivorship element of the interest through a superwill, since all parties to a joint tenancy possess a valid present interest in the property. [FN59]

Another issue concerning the mechanics of a superwill's operation is whether it should be used to dispose initially of nonprobate assets. If the law permitted a testator to use a superwill to revoke or amend an existing disposition *291 of a nonprobate asset, it might seem logical to extend the use of superwills to initial dispositions of nonprobate assets. Despite the doctrinal appeal of such a unified approach, practical considerations militate otherwise. For example, if a testator could use a superwill to dispose initially of a nonprobate asset, he or she would be able to impose responsibility, and potential liability, onto a third party, such as an insurance company, without that party's prior consent. Furthermore, the superwill might not contain all the documentation and other information required by the third party to memorialize the disposition. Ambiguities regarding the exact roles and responsibilities of third parties may also lead to problems. These considerations strongly suggest that the use of superwills should be limited strictly to the amendment or revocation of presently existing instruments that dispose of nonprobate assets.

Another procedural problem involving the mechanical operation of superwills is the requisite degree of specificity of the will's language regarding the disposition of the nonprobate asset. Typically, wills contain general residuary clauses providing for the disposition of 'all of the remainder' of the testator's property. If the law sanctioned the disposition of nonprobate assets through a superwill, it is questionable whether such general residuary dispositions would be sufficient to amend and alternately dispose of all of the testator's nonprobate assets. [FN60] Courts generally have taken the position that the disposition of assets through a will must be specific. [FN61] To reflect the testator's true intention regarding the revocation or modification of a nonprobate asset, the superwill language should also describe the asset specifically, as opposed to using general, and potentially ambiguous, terms. [FN62] This approach in fact parallels the current practice that the grantor of a nonprobate asset may revoke that asset only by some decisive or unequivocal act that reflects an intent to revoke. [FN63]

As the foregoing discussion demonstrates, allowing a superwill to revoke or amend previously existing dispositions of nonprobate assets of a testamentary nature is doctrinally sound because this approach recognizes that such dispositions do not create a real present interest in the beneficiaries until the grantor's death. Thus, superwills should be encouraged as long as they are limited to preclude initial dispositions of nonprobate assets and describe specifically the *292 previously existing nonprobate asset to be revoked or modified. The use of superwills, however, also raises important issues regarding the content of the probate estate. The following section explores these concerns.

III. THE IMPACT OF THE SUPERWILL ON THE PROBATE ESTATE

As discussed in the preceding section, the superwill concept is based on the testamentary nature of nonprobate transfers that do not become effective until the testator's death. [FN64] It could be argued doctrinally that the assets of all nonprobate dispositions that are testamentary in nature should be considered part of the decedent's probate estate. [FN65] regardless of whether the testator amended their disposition through a superwill. Once the disposition of a nonprobate asset is deemed to be a testamentary transfer, that nonprobate asset should be treated like any other asset owned by the testator at death; it should be subject to the probate procedure, even if the will does not effectuate a subsequent disposition of the testator's previously existing nonprobate asset.

Though perhaps doctrinally sound, the inclusion of all nonprobate dispositions of a testamentary nature in a decedent's
probate estate is undesirable from a policy standpoint and a substantial departure from existing practice. The probate process sometimes can be quite lengthy, [FN66] and the assets of the estate generally are not available to the survivors during the process. Family members and other survivors of the decedent who otherwise would have immediate access to the decedent's nonprobate assets would have to wait until the completion of the probate process to receive any funds needed to defray the costs and expenses connected with the testator's death. [FN67] In addition, under this approach all dispositions *293 of nonprobate assets that are testamentary in nature would be subject to the claims of the decedent's creditors, a result that generally conflicts with the transferor's objectives in arranging such nonprobate dispositions.

Nevertheless, it could still be argued that, regardless of whether all nonprobate assets of a testamentary nature become part of the decedent's probate estate, those nonprobate assets disposed of in a superwill should be included within the probate estate. If this were to occur, these nonprobate assets might become the potential target of claims made by the deceased's creditors. This result arguably could be justified on the grounds that it is inequitable to allow a testator to transfer, or otherwise dispose of, his or her nonprobate assets through the will provisions, while at the same time denying the creditors of the deceased any rights to such property. [FN68]

Consistent with the problem of creditors' claims is the concern that nonprobate assets included within the decedent's probate estate will be subject to the spousal elective share and the claims of pretermitted heirs. [FN69] In general, spousal elective share statutes give the surviving spouse who is dissatisfied with his or her portion under the decedent's will the option of renouncing the will and taking a specified share of the net probate estate. [FN70] There are two basic types of elective share statutes. The first provides that the surviving spouse is entitled to share only in the realty and personal property owned by the decedent at the time *294 of his or her death. [FN71] A testator who wished to deprive his or her spouse of a significant share of property could empty the probate estate entirely by invoking such will substitutes as outright gifts, trust arrangements with a third party beneficiary, and joint tenancies with a right of survivorship in a third party. [FN72] Since this type of elective share statute makes no effort to credit the surviving spouse's elective share with the amount of property the decedent transferred to a third party by such testamentary substitutes, the deceased spouse can, in theory, transfer all property during his or her lifetime and leave nothing in the probate estate.

As a matter of policy, however, courts generally frown on schemes that are designed to deprive one spouse of assets by diminishing the probate estate through inter vivos dispositions. [FN73] Courts and state legislatures have developed a multitude of tests designed to determine whether a particular inter vivos transfer actually constitutes a sham transaction, with the transferor retaining control and ownership over the asset allegedly transferred. [FN74]

*295 The second type of elective share statute is the Uniform Probate Code ('U.P.C.') version, adopted in a minority of jurisdictions. [FN75] Under the U.P.C. elective share statute, the surviving spouse's elective share is based on an augmented estate that recaptures all property transferred inter vivos by a decedent without adequate consideration to anyone except his or her spouse, to the extent that the transferor retained control during his or her lifetime, thus creating a will substitute. [FN76] The U.P.C. version of the elective share statute essentially abandons the need to determine whether a particular inter vivos transfer is illusory.

The various forms of protection for disinherited spouses generally are not available for children. In all states except Louisiana, [FN77] a testator is free to disinherit his or her children, as long as the testator complies with legal requirements. [FN78] Specifically, most states have pretermitted heir statutes that provide that living children, not mentioned or provided for in the testator's will, are entitled to an intestate share of their deceased parent's estate. [FN79] Thus, for a *296 parent to disinherit a child, the testator must specifically mention that child in his or her will and leave the child either nothing or a nominal amount. [FN80] Controversies arise, however, regarding the specificity needed to avoid the operation of a pretermitted heir statute. [FN81] Nevertheless, because those children who are *297 determined to be pretermitted heirs are entitled to an intestate share of their deceased parent's probate estate, the use of nonprobate assets as a means of transferring property has been one way to avoid potential claims by pretermitted heirs. Unlike cases involving the spouse's elective share, however, courts treating the claims of pretermitted heirs have not been particularly willing to void inter vivos transfers of assets in order to increase the pretermitted heir's intestate share. [FN82]

The adoption of the superwill raises the question whether all nonprobate assets disposed of in a superwill should become part of a decedent's probate estate. In other words, should such nonprobate assets be subject to the claims of creditors, surviving spouses choosing an elective share, and pretermitted heirs? From a doctrinal standpoint, it would be consistent to conclude that such nonprobate assets should be treated as part of the probate estate, given the testamentary *298 character of these transfers. [FN83] Despite the doctrinal appeal of this approach, however, other considerations militate against
including these nonprobate assets in the probate estate.

First of all, the argument of increased convenience—which has been an argument in support of the superwill [FN84]—does not mandate the inclusion of nonprobate assets in the probate estate. The convenience concern simply tries to ensure that testators have a routine and expedient means of changing or modifying the disposition of previously existing nonprobate assets. This concern does not warrant making such a drastic change in the existing law so as to include such nonprobate assets disposed of in a superwill in the decedent's probate estate.

Second, including nonprobate assets in the probate estate would not meet the expectations of the average person, another factor considered in favor of the adoption of the superwill. [FN85] In certain instances, inclusion in the probate estate of nonprobate assets may actually frustrate the expectations of most people. Since one of the primary attributes of the use of nonprobate assets is that they generally are excluded from the decedent's probate estate, [FN86] such assets typically are free from the claims of creditors who attack the decedent's estate in an attempt to satisfy outstanding debts. [FN87] The use of nonprobate assets is one means *299 by which an individual may ensure, through estate planning, that his or her designees will receive certain monetary benefits upon his or her death with few, if any, contingencies attached. [FN88] If nonprobate assets disposed of in a superwill are included in the decedent's probate estate, these critical expectations would be frustrated. With respect to creditors, no compelling reason exists to include these nonprobate assets within the decedent's probate estate; creditors, for the most part, do not invoke the probate process to satisfy their claims but instead rely on the survivors' voluntary payments, motivated by ethical considerations. [FN89] Moreover, institutional creditors have numerous means of protecting themselves aside from the probate process. [FN90]

Similarly, the elective share statutes discussed earlier provide a feasible means of assisting surviving spouses who feel that they have been deprived under the decedent's testamentary disposition. Suppose, for example, that a testator changes, through a superwill, the disposition of a previously existing nonprobate asset from his wife to his mistress. Under the statutory schemes already discussed, the wife should be able to rely on the relevant state law in recapturing that asset if the transfer is covered specifically by a state version of the U.P.C.'s augmented estate [FN91] or if the transfer is determined to be illusory under other *300 state statutory schemes. [FN92] Because the change of beneficiary of the nonprobate asset in his will has no effect on the wife's protection under relevant state law allowing recapture, the surviving spouse gains no advantage by the inclusion of nonprobate assets disposed of in a superwill within the decedent's probate estate. Stated another way, under present law, dissatisfied spouses already have the means of recapturing such assets. [FN93]

Suppose instead that the testator changes the beneficiary of a nonprobate asset from his mistress to his surviving spouse by way of a superwill. Here, one could make a strong argument that the testator reasonably expected that his spouse would be entitled to the distribution of the nonprobate asset, free from the claims of creditors and pretermitted heirs regardless of the change occurring through a superwill. Thus, the inclusion of these nonprobate assets within the decedent's probate estate would defeat the testator's expectations and disadvantage the surviving spouse. [FN94]

With respect to pretermitted heirs, the law currently does not afford such individuals the opportunity to recapture nonprobate dispositions in order to increase their intestate share. [FN95] Thus, pretermitted heirs lack the protection the surviving spouse receives in the same situation. The objective of pretermitted heir statutes is to provide an intestate share to those children of the testator who, for whatever reason, [FN96] are not mentioned in the will. As discussed above in connection with creditors' claims and elective shares, the rationales underlying the superwill can be effectuated without requiring the drastic change in the law that nonprobate assets disposed of in a superwill become part of the decedent's *301 probate estate, and thus subject to the claims of pretermitted heirs. [FN97]

A question remains, however, as to whether a nonprobate disposition to a child that appears in a superwill constitutes a sufficient mentioning of that child to prevent him or her from taking an intestate share as a pretermitted heir. The same question arises when a testator changes the beneficiary of a previously existing nonprobate asset from a child to another party in a superwill. It would seem as though the specific mentioning of a child in either situation should be sufficient to prevent that child from claiming as a pretermitted heir, since the child still is mentioned expressly in the body of the will itself. [FN98] This position is consistent with current law governing pretermitted heirs. Any specific mentioning of a child in a will generally operates to negate the application of a pretermitted heir statute. [FN99]

Taken together, the above arguments support the position that nonprobate assets disposed of in a superwill should not become a part of a decedent's probate estate. A contrary result would require a tremendous change in the status quo, undoubtedly causing unnecessary confusion and litigation. Moreover, the policies underlying the superwill can be effectuated
without drastically changing the law. Considerations of uniformity also suggest that all nonprobate assets, regardless of whether they are disposed of in a superwill or created by the decedent in an inter vivos fashion, be treated similarly and remain outside the probate estate. Thus, any proposed superwill legislation should provide specifically that any nonprobate assets disposed of in a superwill do not become part of the decedent's probate estate for any purpose, including satisfying the claims of the deceased's creditors, surviving spouse, and pretermitted heirs.

IV. QUESTIONS OF REVOCATION AND REVIVAL

The superwill concept raises some interesting issues with respect to the revocation and revival of wills. For instance, should the revocation of a superwill result in the reinstatement or revival of the original disposition of the nonprobate assets? In addition, should a successful challenge to the disposition of one nonprobate asset in a superwill have the effect of revoking all other nonprobate dispositions contained in the superwill, or perhaps even the entire superwill? Finally, how should courts handle a testator's subsequent disposition of a nonprobate asset disposed of in a superwill? To address these questions effectively, it is necessary first to examine generally the law on revocation and revival of wills.

Because of the ambulatory nature of a will, a will may be revoked at any time before the testator's death. [FN100] In general, a will may be revoked through *302 the execution of a subsequent instrument, [FN101] physical destruction or mutilation, [FN102] or by operation of law. [FN103] For purposes of this discussion, however, the *303 most important method of revocation is the execution of a subsequent instrument. Mere execution of a subsequent will is not in itself sufficient to revoke all prior wills. [FN104] The subsequent will must contain evidence that the testator intended the subsequent will to revoke the prior will. [FN105] This intention may be demonstrated explicitly, by a specific clause in the subsequent will that expressly revokes all prior wills, [FN106] or implicitly, by an inconsistency between the terms of the subsequent and prior wills. [FN107]

*304 Related to the effect of revocation in general is the specific issue of whether the revocation of a will may result in the revival of a previously existing will. Many states take the position that the mere destruction or revocation of a subsequent will, by itself, will not revive an earlier will; instead if the circumstances surrounding the destruction or revocation of the subsequent will reflect a clear intention on the part of the testator to revive an earlier will, that intent will be given effect. [FN108] Some states require that this intent be demonstrated only by the actual terms of the revocation, [FN109] thus precluding a revival in those instances in which a testator physically destroys a subsequent will without executing a new document. Other states allow the introduction of extrinsic evidence to establish the intent to revive. [FN110] Another means by which a testator may establish the intent to revive an earlier will is by republishing the earlier will by a codicil or other instrument in conformance with the statute of wills. [FN111] The doctrine of republication results in an implied restatement or rewriting, as of the time of the *305 republication, of a previously executed valid will. [FN112] In the absence of a statute, a reference in a codicil to a will as though it were still in effect republishes it. [FN113] Some statutes allow republication, however, only when the testator clearly manifests his or her intent in the codicil that revival of the prior will occur. [FN114]

The testator using a superwill should be able to revoke such a document by any of the three methods prescribed for the revocation of regular wills. [FN115] The mere fact that a superwill permits the disposition of nonprobate assets should not be sufficient to warrant different treatment regarding revocation. A more interesting issue is how the law would handle the revival or reinstatement of the terms of earlier nonprobate dispositions that were changed or modified by the superwill once the superwill has been revoked. In these instances, an analogy can be drawn to the present state of the law on revival. Specifically, there appears to be no reason why a testator could not, by a subsequent instrument or codicil, revoke a superwill and simultaneously revive or reinstate the manner in which such nonprobate assets would have been disposed of prior to the execution of the superwill. Again, the intent of the testator to revive such previously *306 existing nonprobate dispositions would have to be clear. [FN116] Moreover, in those jurisdictions that permit a testator's intent to revive a prior will to be demonstrated by the circumstances surrounding the revocation or destruction of a subsequent will, [FN117] previously existing dispositions of nonprobate assets could be revived in conjunction with a physical destruction of a subsequently executed superwill, assuming establishment of the requisite showing of intent to revive.

The revival or reinstatement of the manner in which previously existing nonprobate assets are disposed of may be accomplished through the destruction or revocation of a subsequently executed superwill in those jurisdictions allowing this method of revival. Nevertheless, because the question of revival is closely linked to the testator's intent, courts will be forced to make determinations of such intent before reinstating particular nonprobate dispositions in their previous form. One drawback to this approach is that it will likely be time consuming and costly for courts to make revival determinations. As a result of litigation delays, potential beneficiaries of the nonprobate assets may have to wait longer to receive the proceeds.
Thus, from the beneficiaries' standpoint, a major advantage of reviving the previously created nonprobate disposition will have been diminished. [FN118]

Perhaps one way to minimize the delay to beneficiaries in the revival of a superwill is to depart from the current law regarding revocation and revival of wills and adopt a blanket rule that only superwills that have actually been probated may revoke prior dispositions of nonprobate assets. This approach finds support in the analogous situation of a pour-over will, in which some or all of the testator's residuary probate assets are "poured over" into a previously existing revocable living trust. [FN119] Such wills have no effect upon the revocable *307 living trusts until the testator's death. [FN120] Similarly, the law could take the position that a superwill has no effect upon prior dispositions of nonprobate assets until such time as the superwill is probated. This approach would eliminate the need to establish the testator's intent with respect to revival. If this approach were followed, a time frame for submitting a superwill for probate, comparable to that for regular wills, should be adopted. [FN121] Thus, the distribution of the nonprobate assets would occur as expeditiously as possible. [FN122]

*308 Another possible revocation issue is the effect that a successful attack on one nonprobate asset would have on other nonprobate assets disposed of in a superwill. Specifically, would a successful challenge to a single nonprobate asset disposed of in a superwill revoke all of the nonprobate dispositions contained therein or perhaps even the entire superwill? General wills law provides that the invalidity of one portion of a will, or the successful challenge to one asset disposed of in a will, does not impair the validity of the other dispositions, or of the will itself, unless the invalidated portion was such an integral part of the overall testamentary disposition as to render the entire will a nullity. [FN123] In this regard, *309 there seems to be no reason to treat superwills any differently from ordinary wills. Thus, courts facing this issue will have to determine whether the nonprobate disposition in the superwill that has been invalidated is such a material part of the overall testamentary intent of the testator as to render the entire superwill invalid.

A further revocation problem arises if the testator subsequently disposes of a nonprobate asset that he or she had previously disposed of in a superwill. In situations involving ordinary wills, the doctrine of ademption applies when a testator makes a specific bequest of realty or personality in a will and later disposes of the asset that was the subject of the specific bequest. [FN124] In such instances, courts hold the specific gift to be adeemed since it is not part of the testator's estate at the time of death. [FN125] Once the specific bequest is held to have been adeemed, the gift fails, and the recipient under the will has no further rights to the asset. [FN126] Only specific bequests, which are gifts of particular items capable of being identified, can be adeemed. [FN127] If a particular bequest is construed *310 as demonstrative, it will not be subject to ademption. [FN128]

The doctrine of ademption should be applied by analogy to sustain a subsequent disposition of a nonprobate asset previously disposed of in a superwill, where the disposition of the nonprobate asset in the superwill constitutes a specific bequest. [FN129] If, however, the superwill appears to be making a demonstrative bequest that is to be satisfied primarily out of the proceeds attributable to a nonprobate asset, [FN130] the doctrine of ademption should not apply. Courts should apply prevailing standards in determining whether a particular designation contained in a superwill constitutes a specific or demonstrative bequest. [FN131]

The foregoing discussion demonstrates that the issues of revocation and revival do not present major obstacles to the introduction of the superwill. A blanket rule that only a validly probated superwill can negate prior dispositions of nonprobate assets could be invoked. Moreover, the existing rules regarding partial invalidity and ademption could be applied to superwills without any substantial difficulties. In contrast, many of the difficulties surrounding the adoption of the superwill involve questions relating to the appropriate protection for financial institutions and third parties. These issues are explored in the following section.

V. PROTECTION FOR FINANCIAL INSTITUTIONS, BENEFICIARIES' RIGHTS AND THIRD PARTIES

Perhaps one of the greatest practical difficulties inherent in the superwill concept is the vulnerable position in which it places certain parties--in particular financial institutions and life insurance companies--who are either the holders of funds of, or the payors under, certain nonprobate assets. For example, if the superwill concept is adopted, financial institutions must have some protection if they mistakenly pay the beneficiaries of nonprobate assets before being notified of the existence of a superwill with different beneficiaries. In addition, it is important to determine the manner in which notice of a superwill is to be provided to financial institutions, and the process by which the provision of such notice can be made as expeditiously as possible. In instances in which a superwill provision prevails over a prior beneficiary designation, one must determine *311 the rights of those beneficiaries under the superwill and the manner in which they should proceed to exercise those rights.
Attention also must be given to the status of bona fide purchasers who deal with the original beneficiaries of the nonprobate asset.

One preliminary issue is whether payment of nonprobate assets to those beneficiaries designated in a superwill should be delayed until the superwill has been probated. As discussed earlier, any delay in payment of nonprobate assets would have the undesirable effect of negating the primary utility of such forms of transfer. [FN132] Moreover, the immediate distribution of nonprobate assets disposed of in a superwill is consistent with the theory, advanced earlier, that nonprobate assets disposed of in a superwill should not become part of the decedent's probate estate for any purposes. [FN133] Nevertheless, it was argued herein that only a validly probated superwill should be able to negate previous dispositions of nonprobate assets. This position would suggest that nonprobate assets disposed of in a superwill should not be distributed until the completion of the probate process.

In most instances, the probate process is not an especially lengthy one. Therefore, generally it would not be unwarranted to delay the distribution of the nonprobate assets disposed of in the superwill until the end of the probate process. If a superwill is contested, however, the distribution of nonprobate assets could be delayed much longer. [FN134]

As a practical matter, most financial institutions would not make any payments under a superwill during the period in which the will can be contested. Nevertheless, even after an estate has been settled, the probate court always has the power to revoke its prior orders and reopen a case if the settlement of the estate was irregular or induced by fraud or mistake. [FN135] What is the result when, after such nonprobate assets are distributed to the beneficiaries designated in the superwill, the entire superwill, or even one nonprobate disposition contained in it, is invalidated? The concept of constructive trusts from basic wills law may provide an answer. [FN136] The superwill problem may be resolved similarly by allowing those who were entitled to the nonprobate assets in the absence of the invalidated superwill [FN137] to seek a constructive trust. [FN138] If the constructive trust remedy were applied in this situation, the beneficiaries of the nonprobate assets designated in the invalidated superwill would hold such assets for the benefit of the beneficiaries rightfully entitled to them.

Most of the difficulties involving financial institutions and other third parties involve the opposite situation: that is, a financial institution, prior to receiving notice of the superwill, pays the beneficiaries designated in a nonprobate asset disposition executed prior to the superwill. In general, the law protects such institutions as banks and life insurance companies from claims of wrongful payment in similar situations. [FN139] The rational is that such institutions should be entitled to notice if there has been any substantial change or modification in the terms of their duties. [FN140] The changing of a beneficiary certainly would constitute *313 a substantial change requiring notice. Absent such notice, courts will protect financial institutions from the consequences of their wrongful payment. [FN141]

In keeping with the foregoing, any superwill legislation should expressly exonerate a financial institution that pays the designated beneficiaries of a nonprobate asset before receiving notice of a different disposition in a superwill. [FN142] In addition, legislation should specify a definite time frame within which notice of the superwill's existence must be furnished by the executor of the decedent's estate to the concerned financial institutions. By requiring an expeditious period of notice, the chances will be reduced that financial institutions will make wrongful payments of nonprobate assets.

Consideration also must be given to the content of such notice provided to the concerned financial institutions. Financial institutions such as insurance companies and banks often have elaborate provisions in their agreements for changing a beneficiary. These provisions are included not only to ensure that property owners accurately carry out their donative intent, but also to protect financial institutions from claims of wrongful payment. Thus, when a testator changes the beneficiary of a nonprobate asset by way of a superwill, any specific notice requirements pertinent to the particular financial institution involved should be expressly incorporated within the superwill.

Even if a particular financial institution is given notice of the superwill and the beneficiaries of the nonprobate assets designated therein, it is possible that neither the executor nor the persons entitled to the assets under the superwill would ever request payment of the nonprobate assets. To provide guidance for financial institutions in this situation, superwill legislation should also specify a period of time after which financial institutions should be allowed to distribute nonprobate assets in violation of the superwill. Moreover, legislation should also grant financial institutions the specific authority to institute declaratory judgment proceedings should they at any time feel uncertain with respect to the appropriate course of
action. Assume, however, that a financial institution does not receive the appropriate notice of a superwill and pays the beneficiaries of a nonprobate asset according to the terms of an earlier instrument. To protect the beneficiaries designated in the superwill, any superwill legislation should expressly provide that such beneficiaries will have a cause of action against the previously designated beneficiaries. Nevertheless, a reasonable statute of limitations on such causes of action should be incorporated, so that beneficiaries under prior instruments eventually will have the security of knowing that the assets they have received are legally their own. [FN143]

Although the beneficiaries of a nonprobate asset disposed of in a superwill should be able to recover the nonprobate asset, or the proceeds of its sale, from the beneficiaries designated in a prior disposition, any bona fide purchasers who have dealt with such prior beneficiaries should be protected. Ample support for this proposition exists in the analogous case law regarding the effect of a subsequently produced will upon the status of bona fide purchasers transacting with either the beneficiaries under a prior will or the claimants of a properly administered intestate estate. In such instances, courts have held that the bona fide purchasers are protected against any claims by the beneficiaries under the subsequently produced will. [FN144] The rationale underlying this position is that the records of the probate process provide evidence of the ownership rights of the decedent's successors in interest, evidence on which bona fide purchasers may properly rely in dealing with such successors. [FN145] Similarly, the purchaser of a nonprobate asset from the beneficiary of that asset should be able to rely upon the documentation establishing the asset's creation, as long as that purchaser had no notice of a subsequently executed superwill that would alter the rights of the beneficiary with whom he or she is dealing. [FN146]

One final consideration regarding the appropriate degree of protection for financial institutions and other third parties involves choice of law. Suppose, for example, that an interested financial institution is located in one state and the superwill altering that institution's responsibility with respect to the nonprobate asset has been executed in another state. Which state law should govern, assuming the pertinent laws differ in this regard? One solution might parallel the approach adopted by Uniform Probate Code with respect to a will's validity in states where it otherwise would fail due execution requirements. The Uniform Probate Code provides that a written will is valid if it complies with the law of the place where the will is executed, or with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national. [FN147] This broad approach would be useful in the superwill situation because it would allow a validly executed superwill to be given effect in other states, and thus would protect foreign financial institutions governed by different statutory provisions.

The foregoing discussion regarding the rights of financial institutions, certain beneficiaries, and other third parties suggests that the adoption of the superwill concept raises some important issues requiring resolution if the interests of these parties are to receive adequate protection. Any proposed superwill legislation must provide adequate safeguards for all interests at stake.

VI. CONCLUSION

If the scope of the superwill concept is appropriately limited, it has the potential to exert a positive influence in the estate planning sphere. In particular, any proposed superwill legislation must provide that the superwill is limited to disposing of previously existing nonprobate assets of a testamentary nature, and that those nonprobate dispositions do not become part of the decedent's probate estate for any purposes. Moreover, the superwill concept should be implemented to cause minimal interference with the probate laws of respective jurisdictions. Finally, extensive protections must be afforded to such parties as financial institutions, beneficiaries, and bona fide purchasers so that their interests will not be shortchanged by superwill reform.


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(blockbuster will contains clause which changes a will substitute's beneficiary).

[FN2] See infra notes 29-33, 36-42, 49-52 and accompanying text for a discussion of nonprobate assets note generally disposed of through wills.

[FN3] 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 1.2, at 3 (1960) [hereinafter PAGE ON WILLS].

[FN4] For a typical description of a beneficiary's interest in a will prior to the maker's death, see 1 PAGE ON WILLS, supra note 3, § 1.2, at 3-4, which states: 'The will is not meant to create rights in others or to pass any interest in the property covered by the will prior to marker's death . . . Therefore, to revoke a will is not to recall or reclaim an interest in another.' See also BLACK'S LAW DICTIONARY 1433 (5th ed. 1979) (will is instrument disposing of property at death with ambulatory and revocable nature); 1 T. JARMAN, JARMAN ON WILLS 26 (8th ed. 1951) (no interest passes under will until death of testator); Ritchie, What is a Will?, 49 VA. L. REV. 759, 759-60 & n.3 (1963) (general definitions of wills). For definitions of wills in case law, see Howard's Ex'r v. Dempster, 246 Ky. 153, 155, 54 S.W.2d 660, 661 (1932) (will is ambulatory and revocable instrument disposing of maker's property after death); In re Estate of Cohen, 445 Pa. 549, 553, 284 A.2d 754, 756(1971) (will is legal declaration of person's intentions to dispose of his or her property after death); In re Estate of Brown, 507 S.W.2d 801, 803 (Tex. Civ. App. 1974) (will is instrument person makes to dispose of property after his or her death which is ambulatory and revocable during his or her lifetime).

[FN5] See 1 PAGE ON WILLS, supra note 3, § 6.1, at 218 (effective inter vivos transfer requires some interest or control, however small, be surrendered and some right in another party come into being at time of transaction). See, e.g., Pelt v. Dockery, 176 Ark. 418, 421-22, 3 S.W.2d 62, 64 (1928) (distinguishing between valid inter vivos deed and will); Emery v. Clough, 63 N.H. 552, 554-55, 4 A. 796, 798-99 (1886) (distinguishing between valid gift causa mortis and testamentary transfer). See generally Browder, Giving or Leaving--What is a Will? 75 MICH. L. REV. 845, 846 (1977) (inter vivos transfers often characterized as testamentary); McGovern, The Payable On Death Account and Other Will Substitutes, 67 NW. U.L. REV. 7, 7 (1972) (will substitutes such as life insurance, joint bank accounts, and revocable living trust circumvent restrictions imposed on wills); Ritchie, supra note 3, at 759-63 (nontestamentary dispositions not subject to statute of wills requirements); Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 15-18 (1941) (criteria for transaction to qualify as inter vivos transfer).

[FN6] A more complete list of will substitutes includes: (1) tenancies by the entirety, (2) homestead rights and exemptions, (3) partnership survivorship agreements, (4) government savings bonds payable to alternative payees, (5) government savings bonds payable to a named person and upon his death to a named survivor, (6) regular inter vivos trusts with powers, including that of revocation, reserved, (7) deeds creating future interests, such as an executory interest to take effect at the grantor's death or creating a remainder in the grantee with a life estate reserved in the grantor, (8) deeds unconditionally delivered to an escrow to be delivered to the grantee at the grantor's death, (9) promissory notes, given for consideration, payable at or after the maker's death, (10) annuity contracts and retirement programs with survivorship provisions, (11) gifts causa mortis, (12) gifts absolute, particularly those made in contemplation of death but with death not made a condition, (13) contracts of all kinds and infinite variety in which the obligation owed by one party is not due until his or her death or the death of the other party, including leases, releases, employment contracts; third party beneficiary contracts, contracts to make wills, and the like. 1 PAGE ON WILLS, supra note 3, § 6.1, at 219.


[FN8] Id.

[FN9] See generally Effland, Rights of Creditors in Nonprobate Assets, 48 MO. L. REV. 431, 431-35 (1983) (creditor's protection generally limited to probable estate). See also infra notes 24, 87-90 and accompanying text for a discussion of the claims of creditors regarding non-probate dispositions. Accordingly, the use of such nonprobate dispositions is an integral part of many estate plans. See 1 PAGE ON WILLS, supra note 3, at § 6.1 (nonprobate dispositions can be flexible and arranged to accomplish nearly same result as will); Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 HARV. L. REV. 1108, 1116-17 (1984) (increasing use of will substitutes to avoid probate); Intent to Change, supra note 1, at 719 (will substitutes frequently combined with traditional wills to form estate plan).

Joint tenancy, a common will substitute, is frequently referred to as 'a poor man's will.' The term was first used in In re Wilkin's Will, 131 Misc. 188, 198, 226 N.Y.S. 415, 430 (1928). Joint tenancy consists of an interest in real or personal property held by two or more people, each of whom has an undivided interest in the whole. 2 H. TIFFANY, THE LAW OF
REAL PROPERTY § 418 (3d ed. 1939) [hereinafter TIFFANY ON REAL PROPERTY]. The primary incident of joint tenancy is survivorship, by which the entire tenancy remains in the survivors upon the death of each joint tenant. See D'Ercole v. D'Ercole, 407 F. Supp. 1377, 1380 (D. Mass. 1976) (joint tenants hold property by one joint title and in one right, and upon death property does not descend to heirs or under will). See generally R. KRATOVIL, REAL ESTATE LAW §§ 296-301 (6th ed. 1974) (joint tenancy estates in real property). Because each joint tenant has a present interest in the property, the subsequent enlargement of the survivors's interest is not a testamentary transfer and, accordingly, is neither subject to the statutes of wills nor part of the decedent's estate. See infra notes 29, 50-52 and accompanying text for a discussion of the rights of joint tenants.

[FN10]. The American Bar Association ('ABA') currently is considering an addition to section 6-401 of Article VI of the Uniform Probate Code. One proposal, in favor of the superwill concept, would permit a testator, pursuant to the terms of his or her will, to control the disposition and revocation of nonprobate assets. The second proposal, which opposes the superwill concept and is in accord with most of the case law, would prohibit any testamentary control over the disposition of nonprobate assets. See REPORT TO MEMBERS OF COMMITTEE ON THE 'SUPERWILL,' April, 1987, at 3 [hereinafter REPORT TO MEMBERS] (one function of probate is paying off decedent's debts); REVISED OUTLINE OF PROPOSED ADDITION TO ARTICLE VI, UNIFORM PROBATE CODE, REGARDING TESTAMENTARY CONTROL OVER NONPROBATE ASSETS 1-4 [hereinafter REVISED OUTLINE].

[FN11]. See Intent to Change, supra note 1, at 738 (citing the factors discussed in the text in support of superwill doctrine).

[FN12]. See Langbein, supra note 9, at 1110-15. Professor Langbein has argued that nonprobate assets should be treated as testamentary transfers, but not subject to the requirements of the statute of wills. Langbein, supra note 9, at 1130-34. He favors a doctrinally unified law of succession that would apply to both probate and nonprobate death transfers. Id. at 1135-41. Langbein characterizes will substitutes as 'nonprobate wills' that the average testator thinks of as, and expects to be treated just like, testamentary transfers in every respect except for the requirements of the relevant statute of wills and the need to go through the probate system. Id. at 1136-37. He reasons that the current use of the lifetime-transfer theory to uphold will substitutes as non-testamentary is a spurious legal fiction that proves too much by illogically removing will-like transfers from other succession rules. Id. at 1128. Instead, Langbein supports exempting will substitutes from the statutes of wills and probate if they have analogous formalistic and ritualistic safeguards, but otherwise would treat them as wills or testamentary transfers under the law. Id. at 1132, 1138. A significant effect of rejecting the lifetime-transfer theory for upholding the use of nonprobates assets is that there would no longer be any theoretical justification for barring modification of the assets by will. See infra notes 46-49 and accompanying text for a discussion of the nature of POD accounts and their potential modification or revocation in subsequently executed wills. Therefore, acceptance of Professor Langbein's substantial compliance or alternative formality test for will substitutes tends to support acceptance of the Super Will concept as well.

[FN13]. See infra notes 17-63 and accompanying text for a discussion of these issues.

[FN14]. See infra notes 64-99 and accompanying text for a discussion of these issues.

[FN15]. See infra notes 100-131 and accompanying text for a discussion of these issues.

[FN16]. See infra notes 132-147 and accompanying text for a discussion of these issues.

[FN17]. See 2 PAGE ON WILLS, supra note 3, § 19.4, at 63-64 (will not executed in compliance with statute invalid).

[FN18]. See, e.g., CAL. PROB. CODE § 6110 (West Supp. 1988) (will must be in writing, signed by testator or someone in testator's presence and by direction, signed by two witnesses present at same time while testator signs or acknowledges signature); ILL. REV. STAT. ch. 110 1/2, para. 4-3 (1987) (will must be in writing, signed by testator or by some person in testator's presence and by direction and attested by two or more witnesses in presence of testator); MASS. GEN. LAWS ANN. ch. 191, § 1 (West Supp. 1981) (will must be signed by testator or by person in testator's presence and by express direction and attested and subscribed in testator's presence by three or more witnesses).

[FN19]. 2 PAGE ON WILLS, supra note 3, § 19.4, at 66.

[FN20]. See Gulliver & Tilson, supra note 5, at 3-5. Dean Gulliver lists three functions of the various statutes of wills: (1)
the ritual function, (2) the evidentiary function, and (3) the protective function. Id. at 5-13. The ritual function ensures that the transferor's declarations are deliberately intended to effectuate a transfer. Id. at 5-6. Mere oral statements testified to after the transferor's death easily could be taken out of context and confuse the issue of the decedent's intent. Id. at 3-4. Ideally, the formal writing and signing requirements of the statutes of wills emphasize to the testator the gravity of the situation and lessen the chance that the exercise is being done in jest. Id. at 5-6.

The evidentiary function of the statutes of wills is important because the testator is dead when the issue is tried and witnesses may not remember much about the signing at the time of the probate proceedings. Id. at 6. The writing requirement clarifies the testator's intent and gives the reviewing court something concrete to analyze in depth. Id. The signature requirement is evidence that the testator executed the document and, if the signature is at the end of the document, read it as well. Id. at 7-8. The requirement in some statutes that the testator sign the will in the presence of witnesses is another evidentiary safeguard, ideally enabling the witnesses to testify with greater certainty that the will was intended to be operative. Id. at 9.

The protective function of the statutes of wills is to safeguard the testator, at the time of the execution of the will, against undue influence or other forms of imposition. Id. at 9. For example, the almost uniform requirement that witnesses attest to the will substitutes by the formalities of their execution. Id. at 10. The purpose of the requirement that the attesting witnesses be competent is to protect the testator by surrounding him or her with a group of financially disinterested witnesses who would prevent rash decisions or undue influence by others. Id. at 11-13.

Dean Gulliver argues that the protective function and its requirements are unnecessary under modern conditions. Id. at 10. Gulliver points out that testators generally execute wills while in the prime of their lives, rather than on their death beds, as was common when the original statute of wills was passed. Id. at 9-10. He further finds that requiring the witnesses to sign in the presence of the testator and be competent are both unnecessary and unrelated to the goals of the wills acts. Id. at 11-13. Gulliver concludes that while the statutes of wills do serve some valid ritualistic and evidentiary purposes, so do many of the will substitutes by the formalities of their execution. Id. at 17-39. Professor Langbein carries on where Dean Gulliver left off by arguing that substantial compliance with the valid requirements of the statutes of wills should be sufficient to uphold any testamentary transfer, regardless of whether an inter vivos interest can be found. See Langbein, supra note 9, at 1135-41. See also supra note 12 for a discussion of Langbein's theory in more detail.


[FN22]. See, e.g., Tennant v. John Tennant Memorial Home, 167 Cal. 570, 577-78, 140 P. 242, 246 (1914) (instrument not testamentary if present interest is passed at time of execution); Farkas v. Williams, 5 Ill. 2d 417, 433, 125 N.E.2d 600, 608-09 (1955) (valid inter vivos trust not subject to wills act because nontestamentary disposition); Lowry v. Lowry, 541 S.W.2d 128, 132 (Tenn. 1976) (joint bank account with right of survivorship disposed of according to its terms and did not pass by will); Westerfield v. Huckaby, 474 S.W.2d 189, 194 (Tex. 1972) (trust held valid, not illusory or testamentary even though settlor was initial trustee, life beneficiary, and had power to revoke or modify trust).

[FN23]. See Zimmerman v. Mutual Life Ins. Co., 156 F. Supp. 589, 592 (A. Ala. 1957) (Alabama law); In re Edwards' Estate, 140 Or. 431, 435-36, 14 P.2d 274, 276 (1932) (joint bank accounts increasingly used because funds are immediately available upon death of joint tenant and are used to pay necessary expenses resulting from death). See also T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 41, at 179 (2d ed. 1953) (living trusts may provide for payment of settlors debts and funeral expenses); Ritchie, supra note 4, at 762 (upon death, proceeds from nonprobate assets can be used to satisfy unpaid debts and administration expenses if other assets insufficient); Gulliver & Tilson, supra note 5, at 39 (trust transfers are simplistic, economic, and beneficiary receives funds more quickly which may be needed for continued support). But see McGovern, supra note 5, at 11-14 (criticizing 'financial need' justification because use of will substitutes not limited to those in need of them).

[FN24]. See supra note 9 and infra notes 87-90 and accompanying text for a discussion of creditors' rights to nonprobate assets. But see Chase v. Redding, 79 Mass. (13 Gray) 418, 420 (1859) (gifts causa mortis subject to creditors' claims); Beakes Dairy Co. v. Berns, 128 A.D. 137, 138-39, 112 N.Y.S. 529, 529-30 (1908) (Totten trusts subject to creditors' claims, given tenuous nature of interest that passes to beneficiary during transferor's lifetime). See infra note 44 and accompanying text for a discussion of Totten trusts.

[FN25]. See infra note 82 and accompanying text for a discussion of the rights of pretermitted heirs to nonprobate assets.
A joint tenant has the power during his or her lifetime to sever unilaterally the joint tenancy by conveying his or her interest in the property to another party. 2 TIFFANY ON REAL PROPERTY, supra note 9, § 421, at 209. The result of such a conveyance is that the nonsevering joint tenant holds the property as a tenant in common with the party to whom the interest is conveyed. The element of survivorship is not present with respect to property owned in tenancy in common, and each conveyance is that the nonsevering joint tenant holds the property as a tenant in common with the party to whom the interest is conveyed. See, e.g., Ridge v. Bright, 244 N.C. 345, 353, 93 S.E.2d 607, 613 (1956) (owner of shares of stock can make himself trustee of shares for benefit of another by oral or written declaration of trust without delivery of document to beneficiary or any change in corporation's records); Farkas v. Williams, 5 Ill. 2d 417, 421-24, 125 N.E.2d 600, 603-04 (1955) (present interest found even though settlor named himself as trustee, retained right to receive all cash dividends, to vote, sell, redeem, exchange or otherwise deal in or with stock of trust fund, receive proceeds of sale or redemption of stock, and reserved right to revoke); Westerfield v. Huckaby, 462 S.W.2d 324, 327 (Tex. Ct. App. 1976) (modern trend to uphold inter vivos trust no matter how extensive process retained by settlor), aff'd, 474 S.W.2d 189 (Tex. 1971). But see Johns v. Bowden, 68 Fla. 32, 46-47, 66 So. 155, 159 (1914) (beneficiaries interest subject to grantor's right to transfer to others during lifetime was contingent interest, therefore, instrument was testamentary); Fefly v. Bryant, 19 Tenn. App. 612, 93 S.W.2d 344, 345 (1935) (no inter vivos trust where donee's father reserved right to use funds as needed during his lifetime); Warsco v. Oshkosh Sav. & Trust Co., 183 Wis. 156, 160-62, 196 N.W. 829, 830-31 (1924) (no valid trust where donor retains whole beneficial interest in trust property). The view that inter vivos trusts retaining too much settlor control are to be treated as testamentary is now largely obsolete. See, e.g., Coleman v. First Nat'l Bank, 89 Nev. 51, 53-54, 506 P.2d 86, 88 (1973) (court declined to adopt position of earlier courts and held inter vivos trust valid where settlor retained right to trust income for life, to revoke, amend, and dispose of trust principal at death). Furthermore, the doctrine is still used to recapture assets (1) under spousal privilege statutes, see infra notes 69-76 and accompanying text for a discussion of such statutes, and (2) for tax purposes, see, e.g., Estate of Parsons v. Wisconsin Dept of Revenue, 119 Wis. 2d 343, 350 N.W.2d 722, 724-25 (1984) (beneficial interest in inter vivos trust to pass at death for state estate tax purposes where beneficiaries had no right to use and enjoyment of any trust assets until settlor's death), aff'd, 122 Wis. 2d 180, 361 N.W.2d 687 (Wis. 1985).
his lifetime. See, e.g., Brown v. Int'l Trust Co., 130 Colo. 543, 547, 278 P.2d 581, 583 (1954) (provision in settlor's will ordering assets of life insurance trust to be paid to person other than trust beneficiary ineffective); Leahy v. Old Colony Trust Co., 326 Mass. 49, 52-53, 93 N.E.2d 238, 240 (1950) (provisions in settlor's will revoking all earlier dispositions and bequeathing all to another ineffective); In re Estate of Henning, 116 N.J. Super. 491, 495, 282 A.2d 786, 788 (1971) (will could not revoke trust during settlor's lifetime because it had no legal effect until settlors' death). See generally Annotation, Exercise By Will of Trustor's Reserved Power to Revoke or Modify Inter Vivos Trust, 81 A.L.R. 3d 959 (1977 & Supp. 1987) (comprehensive discussion of rule and cases applying it) (hereinafter Trustor's Reserved Power to Revoke).

[FN33]. A provision allowing the revocable living trust to be amended or revoked through the terms of the settlor's will is fairly unusual, but nevertheless useful. See Annotation, supra note 32, at 962 (some states hold revocable inter vivos trusts valid where settlor never exercised right to revoke during his or her lifetime).


[FN35]. Id. at 698, 705 P.2d at 1230. Although Poltz did not involve a specific revocation of a revocable living trust by the settlor's will, the court was persuaded that the settlor intended to revoke the trust based not only on her oral statements, but also by the terms of her subsequently executed wills, which had drastically reduced the amount given to the trust beneficiary under the terms of her original will. Id. at 696, 705 P.2d at 1230. In addition, some courts have departed from the majority position by specifically holding that revocable living trusts can be revoked by subsequently executed wills. See In re Estate of Lowry, 93 Ill. App. 3d 1077, 1085, 418 N.E.2d 10, 16 (1981) (clause in will specifically revoking inter vivos trust held effective to revoke trust the day will was executed where trust provided it could be revoked during testator's lifetime); First Nat'l Bank v. Oppenheimer, 23 Ohio Op. 2d 19, 23, 190 N.E.2d 70, 74 (1963) (dictum suggests that will validly executed subsequent to trust and delivered to trustee during settlor's lifetime may revoke living trust); Sanderson v. Aubrey, 472 S.W.2d 286, 288 (Tex. Ct. App. 1971) (applying Texas statute providing that every trust is revocable by trustor during his or her lifetime unless expressly made irrevocable by express terms of trust, court held that inter vivos trust revoked by express revocation in settlor's will; to avoid statute's requirement that trust must expressly allow revocation, the court reasoned that revocation language in the will was not testamentary in its operation but instead became effective on day will was executed).


[FN38]. See, e.g., Gordon v. Portland Trust Bank, 201 Or. 648, 656, 271 P.2d 653, 655 (1954) (discussing rationale underlying general rule that an insured may not change beneficiary of life insurance policy subsequently executed will).

Nevertheless, various exceptions to this general rule do exist. Courts have allowed the provisions of a will to change the beneficiary of a life insurance policy when the beneficiary predeceases the insured and thus loses his or her vested right to the insurance proceeds. See, e.g., Cook v. Cook, 17 Cal. 2d 639, 646, 111 P.2d 322, 327 (1941) (where named beneficiary predeceased insured, insured's will may dispose of proceeds); In re Castagnola's Estate, 68 Cal. App. 2d 732, 737, 230 P. 188, 190 (1924) (when wife, as named beneficiary of insurance policy, predeceased husband, designations of proceeds to husband's estate valid); United States Trust Co. v. Winchester, 277 Ky. 434, 440-41, 126 S.W.2d 814, 817 (1939) (husband had right to dispose of insurance proceeds by will in by three policies). Similarly, courts have allowed the provisions of a will to change the beneficiary of a life insurance policy when the terms of the policy explicitly permit the naming of a beneficiary in a will. See, e.g., New York Life Ins. Co. v. Valz, 141 F.2d 1014, 1015-16 (5th Cir. 1944) (Florida statute specifying that insured has right to dispose of insurance trust assets through will effectively incorporated such provision in each policy). In addition, when the policy does not name a specific beneficiary but designates the insured's estate as the payee, courts have allowed a subsequently executed will to designate the beneficiary. See, e.g., In re Clemens' Estate, 226 Iowa 31, 34, 282 N.W. 730, 731 (1939) (insurance proceeds payable to insured's estate may be disposed of in insured's will).
In five equal shares. Id. The court held that the creation of a joint account with a right of survivorship gives rise to a contract testator at death cannot include property held in such joint accounts because such property is not deemed to be owned by the

providing for the transfer of the proceeds therein at death. Id. at 131. Thus, a will that transfers property owned by the
testator at the time of death. Id. In so holding, the court emphasized the clear and unambiguous nature of the contract language, as opposed to the more general language contained in the will. Id. at 132. A son and three daughters brought an action against their brother, executor of the estate of their deceased mother, claiming that the proceeds of a joint account held by the brother with the deceased mother should have been included in the
probate estate. Id. at 130. The plaintiffs relied on the decedent's subsequent will, which left her estate to each of her children in five equal shares. Id. The court held that the creation of a joint account with a right of survivorship gives rise to a contract providing for the transfer of the proceeds therein at death. Id. at 131. Thus, a will that transfers property owned by the testator at death cannot include property held in such joint accounts because such property is not deemed to be owned by the testator at the time of death. Id. In holding, the court emphasized the clear and unambiguous nature of the contract language, as opposed to the more general language contained in the will. Id. at 132. See also McNabb v. Fisher, 38 Ariz. 288, 296-97, 299 P. 679, 681-82 (1931) (denying existence of inter vivos interest where language at issue was vague as to donor's intent); Tesch v. Miller, 227 Ark. 74, 76-77, 296 S.W.2d 392, 394 (1956) (finding right of survivorship based on clear and unambiguous terms of signature card); Crabtree v. Garcia, 43 So. 2d 466, 467 (Fla. 1949) (upholding joint savings account trust as creating right of survivorship based on clear language in account agreement); DePasqua v. Bergstedt, 355 Mass. 734, 736, 247 N.E.2d 354, 355 (1969) (clear survivorship language in joint account agreement raises rebuttable presumption that valid interest was intended to pass).

This principle is illustrated in Lowry v. Lowry, 541 S.W.2d 128 (Tenn. 1976). In that case, the court specifically addressed the effect of a subsequent will on the disposition of nonprobate assets previously established by the testator. Id. at 132. A son and three daughters brought an action against their brother, executor of the estate of their deceased mother, claiming that the proceeds of a joint account held by the brother with the deceased mother should have been included in the
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in the beneficiary of such an account before the trustee's death. Id. at 123, 71 N.E. at 751. The court upheld the account as a nontestamentary transfer, finding that a tentative interest did vest in the beneficiary at the time the account was opened. Id. at 125-26, 71 N.E. at 752. All states except Ohio, however, have now adopted the Totten rule by statute. Blue Valley Fed. Sav. & Loan Ass'n v. Burrus, 617 S.W.2d 111, 113 (Mo. Ct. App. 1981).

[FN44]. In re Totten, 179 N.Y. at 125-26, 71 N.E. at 752. The Totten court stated: 'A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely . . . .' Id. (emphasis added). Accord In re Scanlon's Estate, 313 Pa. 424, 427, 169 A. 106, 108 (1933) (quoting Totten). See also RESTATEMENT (SECOND) OF TRUSTS § 58, comment b (1959) (recognizing Totten Trusts). Moreover, creditors of the depositor may satisfy their claims from the account on one of two grounds. First, the beneficiary's interest may be too tenuous to avoid piercing. See, e.g., Beakes Dairy Co. v. Berns, 128 A.D. 137, 138-39, 112 N.Y.S. 529, 529-30 (1908) (because depositor of money in trust for another has right to absolute disposition of it during lifetime, it is subject to his creditors at his death). Second, the inadequacy of estate assets may revoke the tentative trust. See, e.g., In re Reich's Estate, 146 Misc. 616, 620-21, 262 N.Y.S. 623, 628 (1933) (where general assets of estate insufficient to pay creditors and reasonable funeral and administration expenses, funds of tentative trust used to satisfy debts, with excess going to beneficiary). See generally A. SCOTT, LAW OF TRUSTS § 58.5, at 543-44 (3d ed. 1967) (discussing both theories of allowing creditors to recover).

[FN45]. This rule, known as the Pennsylvania Rule, was set forth initially in In re Rodgers' Estate, 374 Pa. 246, 97 A.2d 789 (1953). Under this view, the execution of the new will changing the beneficiary would constitute a declaration by the depositor that evidences an unequivocal intent to revoke the trust or change the beneficiary, and would be sufficient to effectuate such a change or revocation. See id. at 250-53, 97 A.2d at 791-92. See also RESTATEMENT (SECOND) OF TRUSTS § 58(b) (1977) (all bank account trusts should be revocable by will).

In contrast to the Pennsylvania Rule, the Maryland Rule provides that the depositor of a Totten trust may revoke such a trust at any time during his or her lifetime, but not pursuant to the terms of a will. See generally Annotation, Revocation of Tentative ('Totten') Trust of Savings Bank Account by Inter Vivos Declaration or Will, 46 A.L.R.3d 487, 501-110 (1972) (discussing revocability of Totten trusts by will). The Maryland Rule reasons that the will is not effective until the death of the testator, and accordingly, revocation in a will does not constitute a revocation during the testator's lifetime. See, e.g., Bradford v. Eutaw Sav. Bank, 186 Md. 127, 132, 46 A.2d 284, 286 (1946) (trust cannot be revoked, in whole or part, by will); U.P.C. § 6-104(e) (1982) (Totten trusts and POD accounts should be treated like joint bank accounts, and none of these nonprobate assets should be subject to revocation by will). The Maryland Rule is the extreme minority position and is limited to that state alone under the common law. Annotation, supra, at 504 n.14. However, several of the fifteen jurisdictions that have adopted portions of the Uniform Probate Code have adopted § 6-104(e) and, therefore, are under the equivalent of the Maryland Rule by statute. See, e.g., ARIZ. REV. STAT. ANN. § 14-6104(E) (1975) (beneficiary designation in trust account or P.O.D. cannot be changed by will).

[FN46]. See Compton v. Compton, 435 S.W.2d 76, 78 (Ky. Ct. App. 1968) (trust may be created by one who holds property as trustee for benefit of another); Blais v. Colebrook Guar. Sav. Bank, 107 N.H. 300, 302, 220 A.2d 763, 765 (1966) (where joint account not established because account in name of depositor alone, payable to him during his life, and payable to another at his death, disposition was invalid as testamentary); Eger v. Eger, 39 Ohio App. 2d 14, 22-24, 314 N.E.2d 394, 402-03 (1974) (beneficiary of POD account, unlike joint tenant, cannot withdraw funds and has no right in account until death of grantor); Grace v. Klein, 150 W. Va. 513, 519, 147 S.E.2d 288, 292-93 (1966) (bank deposit may be valid gift causa mortis provided present right to fund conferred on donee).

[FN47]. See In re Atkinson's Estate, 85 Ohio L. Abs. 540, 544, 175 N.E.2d 548, 550 (1961) (bank account stating 'payable on death' to deceased's two daughters did not confer present interest and therefore invalid testamentary disposition); Tucker v. Simrow, 248 Wis. 143, 145, 21 N.W.2d 252, 252 (1946) (invalid testamentary disposition where depositor did not deliver certificates of deposit nor confer immediate present interest to named beneficiaries by savings account). See supra note 46 and accompanying text for a discussion of beneficiary's interest in POD account.


[FN49]. See, e.g., Johnson v. Garellick, 118 Ill. App. 2d 80, 83, 254 N.E.2d 597, 599 (1969) POD account passes to beneficiary despite provision in depositor's will that wife take entire estate); Virginia Nat'l Bank v. Harris, 220 Va. 336, 340- 42, 257 S.E.2d 867, 870-71 (1979) (POD accounts not revocable by will since governed by same rules as joint accounts in

[FN50]. See supra note 29 and accompanying text for a discussion of joint tenancy.

[FN51]. Obviously, a joint tenant has no guarantee that he or she will survive fellow joint tenants. In addition, a joint tenancy may be severed unilaterally by one of the joint tenants. See supra note 29 and accompanying text for a discussion of joint tenancy.

[FN52]. See supra notes 10 and 29 and accompanying text for a discussion of the disposition of a joint tenant's interest by will.

[FN53]. See supra notes 47-49 and accompanying text for a discussion of the disposition of a joint tenant's interest by will.

[FN54]. See supra notes 43-45 and accompanying text for a discussion of Totten trusts and beneficiaries' interest.


[FN56]. See, e.g., Terrell v. Graham, 576 S.W.2d 610, 612 (Tex. 1979) (adopting passing-interest formulation in context of interpreting nature of deed); Buehler v. Buehler, 323 S.W.2d 67, 69 (Tex. Ct. App. 1959) (adopting passing-interest formulation in context of pension plan case); Tucker v. Simrow, 248 Wis. 143, 145, 21 N.W.2d 252, 252 (1946) (distinguishing POD bank account from joint account on ground that present interest passes only in latter). See generally Langbein, supra note 9, at 1126-34 (discussion of present interest); McGovern, supra note 5, at 9-10 (joint account no different than POD account in conveyance of present interest).

[FN57]. See Langbein, supra note 9, at 1128 (only form of words differentiates 'the revocable and ambulatory interest created by a will, and a vested but defeasible interest in life insurance or pension proceeds').

[FN58]. See Langbein, supra note 9, at 1138. In this article, Professor Langbein advocates that the main will substitutes should be treated as 'nonprobate wills,' so that the construction law of wills and will substitutes may be unified. Id. at 1136-38.

[FN59]. See supra notes 29, 50-52 and accompanying text for a discussion of this point. This approach is consistent with one version of the American Bar Association's initial draft of the superwill provisions, to be added to Article VI of the Uniform Probate Code, which provides that the superwill would cover 'all non-probate assets, except those which involve the lifetime rights of other parties or which already are subject to comprehensive legal rules; for instance, interests in real property, joint tenancies and other joint ownership arrangements, powers of appointment and revocable trusts.' See REPORT TO MEMBERS, supra note 10, at 4. Therefore, the types of nonprobate assets to be covered by the proposed superwill reform include, but are not limited to, multiple-party accounts, life insurance policies, and pension and other employee benefit plans. See REVISED OUTLINE, supra note 10, at 1.

[FN60]. This process is referred to as a 'cross-channel revocation.' See REPORT TO MEMBERS, supra note 10, at 3.

[FN61]. See Flynn v. Flynn, 469 S.W.2d 886, 887 (Ky. Ct. App. 1971) (will must be sufficiently clear in meaning to enable court to determine testators intention); In re McKean's Estate, 159 Pa. Super. 409, 412-14, 48 A.2d 74, 75-76 (1948) (presumption that heir is never disinherited except by plain words or necessary implication); In re Teubert's Estate, 298 S.E.2d 456, 462-63 (W. Va. 1982) (will may fail if terms too vague and uncertain to enforce); Hunt v. Furman, 132 W. Va.
(valid disposition of property requires definite subject and object; if either is uncertain, defect is fatal to will).

[FN62]. Cf. In re Estate of Service, 49 Misc. 2d 399, 404-05, 267 N.Y.S.2d 782, 788 (1965) (Totten trust could be revoked in will, but account had to be specifically identified). See also Lowry v. Lowry, 541 S.W.2d 128, 132 (Tenn. 1976) (will typically cannot prevent survivor from taking under joint account, but will in question only described asset generally).

[FN63]. See supra note 55 and accompanying text for a discussion of revocation of a nonprobate asset.

[FN64]. See supra notes 12, 57-58 and accompanying text for a discussion of the basis of the superwill concept.

[FN65]. The probate estate consists of the assets owned by the decedent at death, although the approaches to defining the probate estate differ. T. ATKINSON, supra note 23, § 115, at 629-32. Illinois, for example, does not have a separate definition of the probate estate, but provides that a testator with capacity may dispose of through a will 'the real and personal estate which he [or she] has at the time of his [or her] death.' ILL. REV. STAT. ch. 110 1/2, para. 4-1 (1987). Washington also does not define the probate estate specifically, but does state that the net estate 'refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against, and debts of, the estate.' WASH. REV. CODE ANN. § 11.02.005 (1987).

Some states, however, do define the probate estate. New Jersey, for example, defines 'estate' as 'all of the property of a decedent, minor or mental incompetent, trust or other person whose affairs are subject to this title as the property is originally constituted and as it exists from time to time during administration.' N.J. STAT. ANN. § 3B-1-1 (West 1983). The New Jersey definition is modeled on the U.P.C. definition, which provides: 'Estate includes the property of the decedent, trust, or other person whose affairs are subject of this Code as originally constituted and as it exists from time to time during administration.' U.P.C. § 1-201 (1983).


[FN67]. See In re Edwards Estate, 140 Or. 431, 448, 14 P.2d 274, 280 (1932) (joint account proceeds allowed to pass as nonprobate asset, citing expense and delay of probate). See also supra note 23 and accompanying text for a discussion of this point.

[FN68]. See infra note 89 and accompanying text for the proposition that nonprobate assets typically are free from creditors' claim.

[FN69]. This concern also may arise in connection with subjecting nonprobate assets to the family allowance and homestead exemptions. Homestead exemptions exempt the family home from claims of creditors for a statutory amount. See, e.g., ILL. REV. STAT. ch. 110, para. 12-901 (1987) ($7,500); N.Y. CIV. PRAC. L. & R. § 5206 (McKinney 1985) (up to $10,000). The primary purpose of the homestead exemption is to guarantee the continuance of a home for a debtor's family. See 1 PAGE ON WILLS, supra note 3, § 16.8, at 773-74 (statutes exempt family residence from sale for debts for use by spouse and minor children). The statutes apply to the probate estate because they generally provide that the death of the owner does not destroy the homestead qualifies, continued for the benefit of the surviving spouse for life and for surviving minor children during their minority. See, e.g., ILL. REV. STAT. ch. 110, para. 12-902 (1987) (exemption continues after death for benefit of surviving spouse until youngest child becomes 18 years of age).

Family allowance statutes provide the surviving spouse and minor children of a decedent with a 'reasonable allowance' out of the estate during its period of administration. E.g., U.P.C. § 2-403 (1983). The purpose of these statutes is to ease the burden of the delay of probate on the decedent's immediate family. T. ATKINSON, supra note 23, § 34, at 129.

Both the homestead exemption and the family allowance rights are statutory and may not be defeated by will. Therefore, insofar as the rights of the surviving members of the family have priority over the takers under the will, these devices operate to restrict testamentary disposition. Although justifiable from a policy standpoint to subject nonprobate assets disposed of in a superwill to the homestead exemption and family allowance, will defeat the testator's intent where the beneficiaries of the nonprobate dispositions are neither the testator's spouse nor children.

[FN70]. The spousal elective share is computed based on the net probate estate. W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 21-24 (1960). For example, Illinois' elective share statute provides that 'the surviving spouse is entitled
Approximately fifteen states have adopted this version of the elective share. See, e.g., NEB. REV. STAT. §§ 30-2317 to . . . [a] share of the testator's estate after payment of all just claims. . . . ’ ILL. REV. STAT. ch. 110 1/2, para. 2-8(a) (1987). See also ILL. REV. STAT. ch. 110 1/2, para. 18-10 (1987) (defining 'all just claims'). Therefore, the surviving spouse gets his or her share only after all of the creditors' claims have been satisfied.

[FN71]. See, e.g., ILL. REV. STAT. ch. 110 1/2, para. 2-8 (1987) (surviving spouse entitled to one third of entire estate if testator leaves a descendant or one half of estate if testator leaves no descendant); MASS. GEN. LAW ANN. ch. 191, § 15 (West Supp. 1988) (surviving spouse entitled to percentage of real and personal property subject to other code provisions and whether testator left kindred and/or issue); N.H. REV. STAT. ANN. § 560:10 (1974) (surviving spouse's statutory share of personally and real estate depends upon whether testator leaves children, issue of children, mother, father, sister or brother).

[FN72]. See, e.g., Johnson v. La Grange State Bank, 73 Ill. 2d 342, 361, 383 N.E.2d 185, 194 (under present donative intent test, any valid will substitute removes asset from decedent's estate and surviving spouse would accordingly 'have no interest in it').

[FN73]. See Annotation, Validity of Intervivos Trust Established by One Spouse which Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property, 39 A.L.R.3d 14, 18-20 (1971).

[FN74]. One popular test focuses on the decedent's retention of control over the assets. See, e.g., Newman v. Dore, 275 N.Y. 371, 379-80, 9 N.E.2d 966, 969 (1937) (in determining that inter vivos trust arrangements were illusory for purposes of computing wife's share of deceased husband's estate, court invoked test that focused on whether decedent intended to retain control over assets disposed of by inter vivos transfer). See also Staples v. King, 433 A.2d 407, 411 (Me. 1981) (for recapture is decedent intended to surrender complete dominion over property); Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 618 (Mo. 1939) (recapture of assets for probate estate allowed where court found intent to defraud spouse).

Another test for determining the invalidity of lifetime transfers is set forth in the Illinois Validity of Lifetime Transfer of Property Act, ILL. REV. STAT. ch. 110 1/2, para. 601 (1987), which provides that absent an 'intent to defraud,' an otherwise valid transfer shall not be deemed illusory because the deceased retained any power or right with respect to the property. The phrase 'intent to defraud' has been interpreted to mean the fraud perpetuated by the transferor's absence of a donative intent to make a conveyance of a present interest in the property. See Johnson v. La Grange State Bank, 73 Ill. 2d 342, 359-60, 383 N.E.2d 185, 192-93 (1978) (inter vivos trust valid to defeat spousal elective share claim under present donative intent test). Under this standard, retention of control by the transferor is viewed as only one factor in determining whether the requisite degree of donative intent exists. See id. at 36-64, 383 N.E.2d at 193-94 (citing Toman v. Svoboda, 39 Ill. App. 3d 394, 401, 349 N.E.2d 668, 675 (1976) (retention is 'highly relevant on the existence of a present donative intent,' but nevertheless 'far from controlling on that issue')). The test endorsed in Illinois probably makes it more difficult for a surviving spouse to recapture inter vivos transfers into the probate estate because retention of control must be considered in conjunction with the nature of the beneficiary's interest under the inter vivos transfer in determining whether the inter vivos transfer created a present interest. Some courts, however, utilize far more beneficial standard to the surviving spouse. See, e.g., Sullivan v. Burkin, 390 Mass. 864, 871-74, 460 N.E.2d 572, 574 (1984) (standard focusing on decedent's intent or whether inter vivos transfer illusory rejected; appropriate standard is whether decedent spouse alone retained lifetime power to direct disposition of trust assets for his benefit).


[FN76]. This retention of control can be shown by the transferor retaining either possession, enjoyment or income, the power to revoke or consume or invade the principal, or the right to hold property with another with a right of survivorship. U.P.C. § 2-202 (1983). See supra note 74 for a discussion of the retention-of-control test. In addition, the Uniform Probate Code recaptures transfers to a donee within two years of the decedent's death to the extent that the aggregate transfers to any one donee in either of two years exceeds $3,000. See U.P.C. § 2-202. Under the Uniform Probate Code, the augmented estate consists of all recaptured property in addition to property the spouse derives from the decedent without consideration, and property the spouse derived from the decedent and has given away in a will substitude fashion. Therefore, under the Uniform Probate Code, the augmented estate makes it more difficult to defeat a surviving spouse's elective share, but also credits the surviving spouse with property received from the decedent outside of the probate estate. Kurtz, supra note 75, at 1015-33. This approach discourages a surviving spouse, who has been well taken care of through other means, from electing a share of the decedent's probate estate, thus disturbing the entire estate plan. Id. at 1036.

Approximately fifteen states have adopted this version of the elective share. See, e.g., NEB. REV. STAT. § 30-2317-2319 (1985) (time limit for petitioning for elective share; proceeding for elective share; effect of election; liability of others
for balance of elective share). New York, moreover, has adopted its own, more complex, version of the augmented estate

[FN80]. See E. CLARK, L. LUSKY & A. MURPHY, CASES AND MATERIALS ON GRATUITOUS TRANSFERS,
WILLS, INTESTATE SUCCESSION TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION
183 (3d ed. 1985) (no state except Louisiana has enacted legislation to require shares for disinherited minor children).

[FN78]. 1 PAGE ON WILLS, supra note 3, § 3.12, at 95.

as they would if testator died intestate unless it is clear that omission was intentional); OKLA. STAT. ANN. tit. 84, § 132
(West 1970) (same).

In addition, nearly all states have statutes protecting heirs who are born to a testator after the execution of a will. See, e.g.,
CONN. GEN. STAT. § 45-162 (1981) (if, after making of will, child born to testator or minor child legally adopted by him
or her, such birth or adoption operates as revocation); ILL. REV. STAT. ch. 110 1/2, para. 4-10 (1987) (unless provision
made in will for after-born child or unless it appears by will that it was intention to disinherit, child entitled to intestate
share); TEX. PROB. CODE ANN. § 67 (Vernon 1980) (where child was living when will was executed, afterborn revokes);
VA. CODE ANN. § 64.1-70 & 77 (1987) (where no child living, afterborn takes intestate; if child living, afterborn takes
smaller of equal share or intestate); U.P.C. § 2-302 (if testator fails to provide in will for any children born or adopted after
execution of will, omitted child receives share). The statutes in this latter group, however, vary in an important respect. Most
afterborn pretermitted child statutes allow an afterborn child to take a share when he is not provided for in the will. See, e.g.,
ILL. REV. STAT. ch. 110 1/2, para. 4-10 (1987) (testator’s child born after will is made entitled to receive same portion as if
testator died intestate unless it appears in will that intention was to disinherit). But under several statutes, the pretermination
provision does not apply if the testator had one or more children when the will was executed and devised substantially all of
his or her estate to the other parent of the omitted child. See, e.g., MO. ANN. STAT. § 474.240 (Vernon Supp. 1988) (share
for omitted child where testator devised substantially all of estate to omitted child’s parent); TEX. PROB. CODE § 67
(Vernon 1982) (where omitted child’s parent is principal beneficiary, omitted child does not receive intestate share); U.P.C. §
2-302(a) (no intestate share where testator devised substantially all of estate to parent of omitted child).

[FN80]. 2 PAGE ON WILLS, supra note 3, § 21.107, at 539-40.

[FN81]. The main controversies in this respect arise when a will contains a mention of or nominal provision for the testator's
heirs, 'children,' or the 'contestants of this will,' and the children argue that such a group designation is not sufficient to
prevent them from taking an intestate share under the pertinent state pretermitted heir statute. The results of such cases vary.
Compare Goff v. Goff, 352 Mo. 809, 815-16, 179 S.W.2d 707, 711 (will provision stating 'I give to any person who might
contest this will the sum of $1.00 only, in lieu of any other share or interest in my estate, either under this will or through
intestate succession' did not sufficiently provide for testator's grandchildren to avoid their taking under pretermitted heir
statute) with Estate of Hilton, 98 N.M. 420, 427, 649 P.2d 488, 495 (1982) (nominal gift to 'contestants' sufficient to
disinherit grandchildren).

Essentially, three varieties of pretermitted heir statutes exist. Under what are referred to as the Missouri-type statutes, the
primary question is whether the child is in fact unmentioned in the will, regardless of the testator's intent. See, e.g., S.C.
CODE ANN. §§ 21-7-450, 21-7-460 (Law. Co-op. 1976) (if no provision made by will for any child born after writing of
will, such child entitled to equal share). In states operating under these 'naming' statutes, the majority position has been that
unmentioned heirs may elect an intestate share even if their omission was intentional. See, e.g., Goff v. Goff, 352 Mo. 809,
815-16, 179 S.W.2d 707, 711 (1944) (under Missouri-type statute, immaterial that testator intended to disinherit child unless
provision in will is indicative of that purpose); In re Haines' Will, 98 N.J. Eq. 628, 633, 129 A. 867, 869 (1925) (whether
after-born child is provided for must be found in instrument); Marett v. Broom, 160 S.C. 91, 95, 158 S.E. 216, 220 (1931)
(under certain statutes, no reference to intention of testator to exclude child controls question of whether omitted child shares
in estate). But see Guion v. Guion, 232 Miss. 647, 660, 100 So. 2d 351, 357 (1958) (evidence of testator's intent, including
events after execution of will and before testator's death, admissible to prove intent to disinherit under Missouri-type statute).
Although 'naming' pretermitted heir statutes are known as Missouri-type statutes, Crumps Estate v. Freeman, 614 P.2d 1096,
1098 (Okla. 1980) (defining Missouri-type statute), Missouri has since altered its pretermitted heir statute to take some
degree of testator intent into account. Compare MO. ANN. STAT. § 468.290 (Vernon 1956) (repealed naming statute) with
MO. ANN. STAT. § 464.240 (Vernon Supp. 1988) (unnamed child entitled unless it appears from will that omission was
intentional).

Under what are referred to as the Massachusetts-type statutes, a child omitted from the will may not elect his or her intestate
share if the omission was intentional. See, e.g., MASS. GEN. LAWS ANN. ch. 191, § 20 (West 1958 & Supp. 1988) (if testator omits children, they take unless it appears that omission was intentional and not occasioned by accident or mistake). In states operating under these statutes, the majority position has been that extrinsic, or parole, evidence is admissible to demonstrate the intention to disinherit. See, e.g., Jordan v. Jordan, 155 Me. 5, 12, 150 A.2d 763, 765 (1959) (declarations of testatrix admissible); Goff v. Britton, 182 Mass. 293, 296, 65 N.E. 379, 380 (1902) (testator's declarations to scrivener admissible); In re Dorey's Estate, 210 Minn. 136, 139-40, 297 N.W. 561, 563 (1941) (oral communication between testator and attorney admissible to show intent); In re Estate of Jones, 408 P.2d 482, 486 (Mont. 1965) (conversation of testator and scrivener admissible to show that testatrix did not mention adopted daughter); Jackson v. Blomstedt, 82 R.I. 27, 30, 105 A.2d 667, 668 (1954) (testator's intention to omit children may be shown in will itself or by extrinsic evidence). But see In re Estate of Cooke, 96 Idaho 48, 54, 524 P.2d 176, 182 (1974) (extrinsic evidence of testator's intent inadmissible under Massachusetts-type statute); Crump's Estate v. Freeman, 614 P.2d 1096, 1099 (Okla. 1980) (same).

Finally, some variations of the Massachusetts-type statutes provide that an unmentioned child takes by the will itself that the testator intended to disinherit the child. See, e.g., CAL. PROB. CODE § 6570, 6571 (West Supp. 1988) (unmentioned child entitled to intestate share unless testator's failure to provide for child in will was intentional and apparent from will); ILL. REV. STAT. ch. 110 1/2, para. 4-10 (unless it appears by will that it was intention of testator to disinherit child, child entitled to receive intestate share). Under such statutes, it has been held that examining the will alone is sufficient and that extrinsic evidence is not admissible to show intent. See, e.g., Estate of Smith, 9 Cal. 3d 74, 80, 507 P.2d 78, 82 (1973) (intent to disinherit cannot be established by extrinsic evidence); Carpenter v. Snow, 117 Mich. 489, 494, 76 N.W. 78, 80 (1898) (intention to disinherit can only be established from will itself); Sandon v. Sandon, 123 Wis. 603, 607, 101 N.W. 1089, 1090 (1905) (declarations of testator regarding making of will inadmissible to show intent to disinherit after-adopted child). Some courts, however, have held that, under such statutes, extrinsic evidence is admissible to clarify the intent expressed in the will. See, e.g., Hedlund v. Miner, 395 Ill. 217, 224, 69 N.E.2d 862, 866 (1946) (facts and circumstances surrounding testator's time of execution admissible to explain ambiguity); Spieldenner v. Spieldenner, 54 Ohio Op. 290, 292, 122 N.E.2d 33, 36 (Prob. 1954) (court may resort to extrinsic circumstances surrounding execution of will to determine testator's intention).

[FN82]. Unlike interpretations of spousal elective share statutes, where courts have developed doctrines (such as the retention-of-control test) that recapture assets that otherwise would have passed outside the probate estate as nontestamentary transfers (see supra notes 74-76), there are no such doctrines that support a stricter interest test for scrutinizing the validity of inter vivos transfers under pretermitted heir statutes. Therefore, if an asset is to be recaptured for the probate estate under creditors' claims, though technically not part of the probate estate. See, e.g., Beakes Dairy Co. v. Berns, 128 A.D. 137, 139, 112 N.Y.S. 529, 530 (1928) (Totten trusts subject to creditors' claims, given tenuous nature of interest passing to creditors' rights when certain will substitutes are used. See, e.g., WIS. STAT. ANN. § 701.07 (West 1983) (trust property subject to settlor's power to revoke, modify, or terminate also subject to claims of settlor's creditor). See also U.P.C. § 6-107(e) (1982) (no multiple-party account effective against estate of deceased party to transfer to survivor sums needed to pay debts if other assets of estate are insufficient).

Moreover, in recognizing that certain will substitutes are nontestamentary, some courts have held that they are nevertheless subject to creditors' claims, though technically not part of the probate estate. See, e.g., Casagranda v. Donahue, 178 Mont. 479, 486, 585 P.2d 1286, 1290 (1979) (joint bank account free from creditors' claims because it passed outside probate estate); De Forge v. Patrick, 162 Neb. 568, 573, 76 N.W.2d 733, 736 (1953) (creditor of deceased joint tenant left with no right against joint tenancy property, debtor's interest having ceased at death); Murphey v. C.I.T. Corp., 347 Pa. 591, 594, 33 A.2d 16, 18 (1943) (revocable living trust could not be pierced by creditor because power to revoke is only 'power' and not 'property'). Some states, however, have enacted statutes that protect creditors' rights when certain will substitutes are used. See, e.g., WIS. STAT. ANN. § 701.07 (West 1983) (trust property subject to settlor's power to revoke, modify, or terminate also subject to claims of settlor's creditor). See also U.P.C. § 6-107(e) (1982) (no multiple-party account effective against estate of deceased party to transfer to survivor sums needed to pay debts if other assets of estate are insufficient).
beneficiary during transferor's lifetime); Ch v. Redding, 79 Mass. (13 Gray) 418, 420 (1859) (gifts causa mortis subject to creditors' claims). Finally, an inter vivos transfer always can be challenged as a fraudulent conveyance and recaptured for the benefit of creditors if the owner of the property gratuitously conveyed the interest while insolvent, or became insolvent as a result of such conveyance. See, e.g., ILL. REV. STAT. ch. 59, para. 4-6 (1987) (fraudulent conveyances void); UNIF. FRAUDULENT CONVEYANCE ACT § § 1-14 (1918) (same). See also Creditors' Rights Against Trust Assets, 22 REAL PROP., PROB. & TRUST J. 735, 737-38 (1987) (discussing revised Uniform Fraudulent Conveyance Act, now called Uniform Fraudulent Transfer Act, used as tool by creditors to recapture assets previously transferred by an insolvent testator).

Some commentators believe that despite these limited protections for creditors, widespread use of will substitutes still may misadvantage creditors in certain instances. See Effland, supra note 9, at 432 (exwife's claim to property from divorce settlement may be defeated if exhusband remarries and arranges for property to pass inter vivos to second wife); Langbein, supra note 9, at 1125 (decentralized procedures of nonprobate system allow assets to be dispersed without creditors' knowledge).

[FN88]. Of course, in circumstances in which the particular nonprobate fails to satisfy the 'present interest' test, the courts have included the nonprobate asset in the decedent's probate estate. See supra notes 21-22, 50-52 and accompanying text for a discussion of this point. See Powers v. Provident Inst. for Sav., 124 Mass. 377, 380 (1878) (no inter vivos transfer of Totten trust). In addition, even in circumstances in which an inter vivos interest does pass to the recipient, some courts have found such interests to be much more susceptible to revocation. See Passaic Nat'l Bank v. Taub, 137 N.J. Eq. 544, 547, 45 A.2d 679, 680 (1945) (inadequacy of estate assets to pay creditors constitutes sufficient indicia of testator's intention to revoke otherwise valid Totten trust). See also supra notes 24 & 87 for authority on the point that Totten trusts and gifts causa mortis are generally subject to claims of the depositor's creditors. In these situations, the asset is included within the probate estate of the decedent and therefore is subject to both the claims of creditors and the probate process. 1 A. SCOTT, supra note 44, § 58.5, at 543-44.

[FN89]. See Langbein, supra note 9, at 1120-25 for a full discussion of this proposition. See also Effland, supra note 9, at 433 (most decedents' estates have sufficient probate assets to meet claims of unsecured creditors).

The American Bar Association Committee on superwill legislation has recommended that nothing in their proposed revision of Article VI of the Uniform Probate Code shall limit the rights of creditors 'under the laws of the state.' REVISED OUTLINE, supra note 10, at 3.

[FN90]. According to one commentator, '[c]ontract creditors rely on security arrangements; retail organizations protect themselves by purchasing insurance against the risk of death of debtors or are content to write losses off on income tax returns; tort creditors sue primarily for the amount of insurance coverage.' Effland, supra note 9, at 431.

[FN91]. See supra note 76 and accompanying text for a discussion of the treatment of the surviving spouse's elective share under the U.P.C. elective share statute which utilizes the concept of augmented estate.

[FN92]. See supra notes 70-74 and accompanying text for a discussion of spousal elective share statutes other than the U.P.C. version.

[FN93]. An argument could be made that nonprobate assets disposed of in a superwill should become part of the decedent's probate estate for the purpose of computing the surviving spouse's elective share, but for no other purpose. See Montgomery v. Michaels, 54 Ill. 2d 532, 538-39, 301 N.E.2d 465, 468 (1973) (Totten trusts invalidated only to extent necessary to make up husband's intestate share); In re Estate of Jeruzal, 269 Minn. 183, 195-96, 130 N.W.2d 473, 481-82 (1964) (approving of partial invalidity approach, but leaving further action to legislature). See also A. SCOTT, supra note 44, § 58.5, at 544-49 (approving of partial invalidity). The current trend seems to favor the partial invalidity approach under both the common law and statutory provision. See Annotation, Savings Account Trust--Rights of Spouse, 64 A.L.R.3d 187, 210-13 (1975). Nevertheless, no compelling reason exists for adopting this approach. In addition, this fragmented approach has been rejected by various jurisdictions. See, e.g., In re Estate of Halpern, 303 N.Y. 33, 40, 100 N.E.2d 120, 123 (1951) (Totten trusts either completely valid and not part of probate estate or completely invalid and part of probate estate); Whittington v. Whittington, 205 Md. 1, 14, 106 A.2d 72, 78 (1954) (same).

[FN94]. The A.B.A. superwill proposal provides that it shall have no effect on the augmented estate elective share provisions of the Uniform Probate Code or on that of any other elective share system. REVISED OUTLINE, supra note 10, at 2-3.

[FN95]. See supra notes 77-82 and accompanying text for a discussion of pretermitted heirs' inability to increase their
intestate share by recapturing nonprobate dispositions.

[FN96]. See supra note 81 for a discussion of the various types of pretermitted heir statutes.

[FN97]. This position is consistent with the A.B.A.'s superwill proposal. See REVISED OUTLINE, supra note 10, at 3.

[FN98]. This is the position adopted by the A.B.A.'s superwill proposal. See REVISED OUTLINE, supra note 10, at 3.

[FN99]. See supra notes 77-81 and accompanying text for a discussion of this point.

[FN100]. See 2 PAGE ON WILLS, supra note 3, § 21.1, at 345-46 (methods of revocation require testator to revoke will while testator alive).

[FN101]. See infra notes 104-07 and accompanying text for a discussion of the ability to revoke wills by the execution of subsequent documents.

[FN102]. See, e.g., Payne v. Payne, 213 Ga. 613, 616, 100 S.E.2d 450, 452 (1957) (actual destruction of will coupled with testator's desire to revoke document will revoke it, but no actual destruction where testator had thrown will in fire but wife had pulled it out and it was merely singed at edges); Donnelly v. Hendrix, 49 Tenn. App. 361, 369-70, 355 S.W.2d 116, 120 (1961):

The solemn and deliberate act of making and publishing a will, with all the formalities and requirements of the law, cannot be affected by verbal declarations, but there must be some act done plainly indicating an intention to revoke or annul, such as cancellation, destruction, and removal from the place of deposit.

Id. (emphasis added) (citation omitted). See generally 2 PAGE ON WILLS, supra notes 3, at § 21.4-21.14. Typical state statutes provide that a will may be revoked by 'burning, cancelling, tearing or obliterating' the prior will. See, e.g., ILL. REV. STAT. ch. 110 1/2, para. 4-7 (1987) (will may be revoked by burning, cancelling, tearing or obliterating it); MASS. GEN. LAWS ANN. ch. 191, § 8 (West 1958) (no will revoked except by burning, tearing, cancelling, or obliterating). The key to this mode of revocation is that the testator must have the requisite intent to revoke the will at the time he or she--or another at the testator's instruction--performs the physical act of destruction. See, e.g., Payne v. Payne, 213 Ga. 613, 615, 100 S.E.2d 450, 452 (1957) (All the destroying in the world without intention will not revoke a will; nor all the intention in the world without destroying; there must be the two.); 2 PAGE ON WILLS, supra note 3, § 21.24, at 382 (mere act of tearing, canceling, or destroying will not revoke will if done without the testator's intent to revoke it).

In addition, some states permit partial revocation by physical act. See, e.g., In re Ramthun, 249 Iowa 790, 795-96, 89 N.W.2d 337, 340 (1958) (whether former will revoked in whole or in part depends upon testator's intent gathered by acts purporting to cause revocation); In re Beale's Estate, 15 Wis. 2d 547, 559, 113 N.W.2d 380, 386 (1961) (written direction to modify will to change executor does not operate as complete revocation); U.P.C. § 2-507 (1983) (will or any part thereof is revoked by being burned, torn, cancelled, obliterated or destroyed). The prevailing rule, however, is that only the residuary or intestate estate may be increased through such partial revocations. See, e.g., Stevens v. Royalls, 223 S.C. 510, 516-17, 77 S.E.2d 198, 201 (1953) (testator's act in canceling words ineffective to increase life estate to fee). Moreover, some courts have held that a partial revocation cannot operate to increase the residuary clause, but additional property left by such revocations must instead pass intestate. See, e.g., Russell v. Tyler, 224 Ky. 511, 520, 6 S.W.2d 707, 711 (1928) (where testatrix tore one-fifth of one page from four page will leaving intact clear distribution of residuary estate, partial revocation did not augment residuary clause and additional property passed intestate).

[FN103]. Some states provide by statute that, upon divorce, any extant will is revoked by operation of law. See, e.g., CONN. GEN. STAT. ANN. § 45-162 (West 1981) (if after making will testator divorced or marriage annulled or dissolved such divorce, annulment, or dissolution operates as revocation of will); GA. CODE ANN. § 113-408 (Harrison 1975) (in all cases total divorce subsequent to making of will shall be revocation of will). Other states provide that a divorce revokes only those provisions in favor of the ex-spouse. See, e.g., FLA. STAT. ANN. § 732.507(2) (West 1976) (all wills made by husband and wife whose marriage subsequently dissolved or who become divorced shall become void by means of dissolution of marriage or divorce as will affects surviving divorced spouse). ILL. REV. STAT. ch. 110 1/2, para. 4-7(b) (1987) provides:

No will or any part thereof is revoked by any change in the circumstances, condition or marital status of the testator, except that dissolution of marriage or declaration of invalidity of the marriage of the testator revokes every legacy or interest or power of appointment given to . . . the testator's former spouse in a will executed before the entry of the judgment of . . . dissolution.
Id. See also U.P.C. § 2-508 (1982) (if after executing will testator is divorced or marriage annulled, divorce or annulment revokes any disposition or appointment of property made by will to former spouse). The rationale behind these rules is that in some instances the testator may not remember or have the opportunity to change his will following a divorce, and the law presumes that the testator would not have intended the former spouse to take under the will. See, e.g., Caswell v. Kent, 158 Me. 493, 501, 186 A.2d 581, 585 (1962) (after divorce accompanied by property settlement, testator no longer owes or recognizes any legal obligation to former spouse). A divorced testator may, however, show a contrary intention in the terms of a subsequent will and thus circumvent the effect of such rules by providing for his or her ex-spouse. See, e.g., MASS. GEN. LAWS ANN. ch. 191 § 9 (West Supp. 1988) (divorce shall revoke disposition to former spouse unless will expressly provides otherwise); OR. REV. STAT. § 112.315 (1987) (unless will evidences different intent divorce revokes any provisions in will in favor of former spouse).

The common law rule applicable to the subsequent marriage of a testator is that the marriage revokes the will of a woman but not that of a man unless followed by the birth of issue. See, e.g., Pasucci v. Alsop, 147 F.2d 880, 881-82 (D.C. Cir. 1945) (articulating and applying common law rule in District of Columbia in absence of statute). This rule, however, has been changed by statute in many jurisdictions. See, e.g., GA. CODE ANN. § 113-408 (Harrison 1975) (marriage after execution of will revokes will in its entirety); ILL. REV. STAT. ch. 110 1/2, para. 2-8, 4-7 (1987) (will not revoked by subsequent marriage but unnamed spouse entitled to intestate share under elective share statute). See generally Annotation, Sufficiency of Provision for or Reference to Spouse to Avoid Lapse of Will By Subsequent Marriage, 97 A.L.R. 2d 1026 (minority of states, however, revival statutes that preclude revival in such circumstances unless the testator re-executes or provides otherwise); See generally Annotation, Implied Revocation of Will By Subsequent Marriage, 97 A.L.R. 2d 1026 (1964) (discussing various state statutes concerning subsequent marriages).

[FN104]. See, e.g., Rixman v. Clashman, 303 Ky. 416, 417-18, 197 S.W.2d 924, 925 (1946) (first will valid where proven that destroyed second will had existed, but not that it contained clause expressly revoking first will); Yates v. Jeans, 345 S.W.2d 657, 659 (Mo. Ct. App. 1961) (reaching same result on virtually identical facts); Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 72-73, 390 P.2d 657, 659 (1964) (codicil without revocation clause revoked prior will only to extent they were inconsistent); Bradshaw v. Bangley, 194 Va. 794, 799, 75 S.E.2d 609, 612-13 (1953) (two wills submitted to probate construed as one where second will did not explicitly revoke first). See generally, Annotation, Implied Revocation of Will By Later Will or Codicil, 59 A.L.R. 2d 11 (1958) [hereinafter 'Implied Revocation'] (effect of subsequent will or codicil on earlier testamentary instrument in absence of express revocation of earlier will).


[FN106]. See, e.g., In re Westerman's Will, 401 Ill. 489, 490, 82 N.E.2d 474, 475 (1948) (will executed by testatrix revoked by subsequent will by same testatrix, but under different name, where second will recited, 'hereby expressly revoking any and all other wills, codicils, or testaments by me at any time heretofore made'); Estate of Campbell, 46 Wash. 2d 292, 296, 280 P.2d 686, 688 (1955) (later will revoked prior will where later will provided: 'I . . . do hereby make and declare this, my Last Will and Testament, and do hereby revoke any and all testamentary dispositions herefore to me made'). The only requirement is that the second will be a valid testamentary document. See, e.g., In re Harchuck's Estate, 139 Conn. 549, 554, 95 A.2d 566, 568 (1953) (second will with express revocation language did not revoke prior will where second will not witnessed according to state law requirements).

[FN107]. See, e.g., In re Estate of Decker, 194 Colo. 143, 145, 570 P.2d 832, 834 (1977) (finding total revocation of first will where second will disposed of testator's entire estate); Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 72-73, 390 P.2d 657, 659 (1964) (codicil without revocation clause revoked prior will only to extent they were inconsistent); See generally Implied Revocation, supra note 104, at 34-63.

[FN108]. For the majority position, see CAL. PROBATE CODE § 6123 (West Supp. 1988) (will is revoked unless evident from circumstances of revocation of second will that testator intended first will to take effect); IND. STAT. ANN. § 29-1-5-6 (Burns 1972 & Supp. 1988) (revocation of second will does not revive first will unless it appears by terms of revocation that testator intended revival); WIS. STAT. ANN. § 853.11(6) (West 1971); U.P.C. § 2-509 (1982) (first will revoked unless evident from circumstances of revocation of second will that testator intended first will to take effect). A substantial minority of states, however, revived statutes that preclude revival in such circumstances unless the testator re-executes or republishes the first will. See, e.g., FLA. STAT. ANN. § 732.508 (West 1976) (revocation of later will does not revive former will); N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (McKinney 1981) (revocation of later will does not revive prior will); ILL. REV. STAT. ch. 110 1/2, para. 4-7(c) (1987) (revoked will not revived other than by re-execution). In the few states without revival provisions, American courts have been faced with choosing between two conflicting common law position. According to one authority:

The rule in the English common law courts was that a first will which had not been physically destroyed but had been
revoked by a second will was revived by the revocation of the second will. The ecclesiastical courts held that a will of personal property was only revived if the testator's intent, as gleaned from all the circumstances, favored revival.

E. CLARK, L. LUSKY & A. MURPHY, supra note 77, at 347. Some of these states have chosen automatic revival as prescribed by the common law courts. See, e.g., Whitehill v. Halbing, 98 Conn. 21, 25, 118 A. 454, 455 (1922) (effect of destruction of second will revives first will). Others have chosen the ecclesiastical rule, under which revocation occurs only if the testator so intended. See, e.g., In re Gould's Will, 72 Vt. 316, 319, 47 A. 1082, 1083 (1900) (revival depends upon testator's intention at time of destruction of later will).

[FN109]. See, e.g., IND. STAT. ANN. § 29-1-5-6 (Burns 1972 & Supp. 1988) (revocation of second will does not revive first will unless such was testator's intent); KAN. STAT. ANN. § 59-612 (1983) (revocation of second will does not revive first unless it was testator's intention to revive first).

[FN110]. See, e.g., In re Estate of Boysen, 309 N.W.2d 45, 47 (Minn. 1981) (by enacting U.P.C., legislature meant to permit examination of all matters relevant to testator's intent); WIS. STAT. ANN. § 853.11(6) (West 1971) (proof of testator's statements at or after act of revocation admissible to establish intent); U.P.C. § 2-509 (1982) (circumstances of revocation of second will and testator's contemporary and subsequent declarations admissible to show intent).

[FN111]. See, e.g., In re Cable's Will, 213 A.D. 512, 513, 210 N.Y.S. 187, 190-91 (republication of former will in codicial also revived two prior codicils that were part of first will); N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (McKinney 1981) (revival of prior will may be effected by republication of such prior will). See also Annotation, Codicil as Reviving Revoked Will or Codicil, 33 A.L.R. 2d 922 (1954) (general discussion of republication and its requirements).

[FN112]. 2 PAGE ON WILLS, supra note 3, § 23.1, at 572. Page, for example, describes the effect of republication as follows: 'Republication . . . [causes] the will to be construed during the construction stage of administration as though it had been executed at a later date than the date of original execution, such later date being the date of republication.' Id. For a description of the effect of republication in the case law, see White v. Conference Claimants Endowment Comm'n, 81 Idaho 17, 27-29, 336 P.2d 674, 680 (1959).

[FN113]. 2 PAGE ON WILLS, supra note 3, § 23.6, at 580.

[FN114]. Id. Ordinarily, intent to republish is not an issue because the will has been re-executed in its entirety or a codicil is executed that expressly provides that the will is to be republished. Although the courts do not speak of an intent to republish as a requirement, in such cases that intention is certainly manifest. The issue of intent has arisen, however, when a codicil refers to the revoked will but does not expressly provide that it is to be republished. In re Campbell's Will, 170 N.Y. 84, 86-87, 62 N.E. 1070, 1070-71 (1902) (title given instrument, subject matter, circumstances of preparation, and testatrix's intent to abandon second will reestablishes earlier will). In some jurisdictions, the mere reference to the earlier will is sufficient to republish the will without further proof. See, e.g., Newhall v. Newhall, 280 Ill. 199, 204, 117 N.E. 476, 477 (1917) (sixth and final codicil described original will and previous codicils such that there could be no mistake of identity, and sixth codicil ratified, confirmed and published will and codicils). Some jurisdictions, however, provide by statute that the mere reference to an earlier, revoked will in a subsequent codicil is insufficient to republish the will unless the intention to revive the will is also shown. See Delly v. Seaboard Citizens Nat'l Bank, 202 Va. 764, 767, 120 S.E.2d 457, 459 (1961) (Virginia's revival statute requires codicil to establish affirmative intent to re-establish will to which codicil refers). Where the language of the document is unclear as to the testator's intent, or is challenged as incorrect, a common issue is whether extrinsic evidence is admissible to demonstrate the testator's intent. Where it is alleged that the testator had a different intention from that expressed in the codicil, courts generally admit extrinsic evidence to demonstrate this contrary intent. See, e.g., Fuller v. Nazal, 259 Ala. 598, 606, 67 So. 2d 806, 813 (1953) (extrinsic evidence admitted to demonstrate intention to republish when second codicil ambiguous as to testator's intent to either republish first will or confirm earlier revocation of first will that had been revoked by first codicil); In re Estate of Croft, 713 P.2d 782, 785-86 (Wyo. 1986) (extrinsic evidence to demonstrate that republication reference to will dated 'April 16, 1982' actually referred to will dated 'October 26, 1981'). See also GA. CODE ANN. § 113-403 (Harrison 1983) (republication may be proved by parol evidence).

[FN115]. See supra notes 101-03 and accompanying text for a discussion of the methods of revocation for wills.

[FN116]. See supra notes 108-14 and accompanying text for a discussion of the necessity of clear testamentary intent. If, for example, the revival issue arose in the context of a revocation of a superwill that had changed or modified nonprobate assets, the intent issue should arguably be governed by the state's relevant revival statute. If republication were alleged, the intent
necessary to achieve a reinstatement of the original nonprobate dispositions could be ascertained by the principles discussed in supra note 114.

[FN117] See supra note 110 and accompanying text for a discussion of the required showing of intent to revive a prior will in jurisdictions permitting the introduction of circumstances surrounding the destruction of a subsequent will.

[FN118] Litigation over the testator's intent to revive would be reduced significantly by applying a blanket rule for revival that required intent to revive a previously existing disposition of a nonprobate asset to be demonstrated only by the language of the revoking instrument. Nevertheless, such a narrow rule would be undesirable because it would preclude revival in those jurisdictions currently allowing a broader showing of the testator's intent to revive.

[FN119] According to one recent text, the pour-over will has been sanctioned by statutes in virtually every jurisdiction in the United States. E. CLARK, L. LUSKY & A. MURPHY, supra note 77, at 322, see, e.g., FLA. STAT. ANN. § 732.513 (West 1976) (valid devise can be made to trustee if trust evidenced by written instrument in existence at time will made or subscribed concurrently with will); GA. CODE ANN. § § 108-1001 to -1005 (Harrison 1979) (devise or bequest to trustee permitted if trust identified in will and if trust terms set forth in separate written instrument executed before or concurrently with will); ILL. REV. STAT. ch. 110 1/2 para. 4-4 (1987) (testator may bequeath or appoint real and personal estate to trustee of trust evidenced by written instrument in existence when will made and identified in will); N.J. STAT. ANN. § 3B:4-1 to 4-6 (West 1983) (valid and enforceable devise can be made to trustee of trust as identified in will and if terms of trust set forth in separately written instrument executed before or concurrently with testator's will); U.P.C. § 2-511 (1982) (devise or bequest may be made by will to trustee if trust established or to be established by testator if trust identified in will and terms set forth in separate instrument).

[FN120] Statutes regarding testamentary additions to trusts specifically provide that changes to the trust subsequent to the execution of the devise may be made without altering the bequest in any way. Thus, if the trust is revoked or terminated before the death of the testator, the devise will lapse. See supra note 119 for examples of statutes regarding testamentary additions to trusts.

[FN121] See, e.g., GA. CODE ANN. § § 113-614, 113-615 (Harrison 1983) (executor must present will for probate as soon as practicable after death of testator, and, if executor cannot or will not do so, interested person has right to do so); ILL. REV. STAT. ch. 110 1/2, para. 6-3(a) & (b) (1987) (executor must present will for probate within 30 days after acquiring knowledge that he or she has been named executor; court may commence probate 30 days after testator's death if no petition filed).

[FN122] A related issue is the effect of an invalidated superwill on prior nonprobate dispositions. If a superwill disposing of certain nonprobate assets is held to be invalid because, for example, it is based on some mistaken assumption of the testator, should the original disposition of the nonprobate assets be reinstated? This situation is similar to that of the testator who executes a subsequent document that purportedly revokes a prior will but that cannot be given effect because of some type of invalidity. If the subsequent instrument is, in itself, invalid or defectively executed, any revocation clause of the earlier will contained in the subsequent document also will fail, and thus the prior will presumably will stand. 2 PAGE ON WILLS, supra note 3, § 21.59, at 459. Nevertheless, sometimes only certain provisions of a subsequent will are ineffective or some type of physical mutilation of the first instrument occurs in conjunction with the invalid second instrument. In these instances, courts sometimes invoke the doctrine of dependent relative revocation to enforce the terms of the prior will. See 2 PAGE ON WILLS, supra note 3, § 21.57, at 458 (dependent relative revocation may be used where testator revokes prior will believing later instrument effective). See, e.g., LaCroix v. Senecal, 140 Conn. 311, 317-19, 99 A.2d 115, 118-19 (1953) (dependent relative revocation invoked to sustain gift in will subsequently revoked in codicil that reaffirmed gift but was void as to gift because of interest of subscribing witness); Carter v. First United Methodist Church, 246 Ga. 352, 355-56, 271 S.E.2d 493, 497-98 (1980) (first will revived because partial revocations by physical acts conditioned on mistaken belief in validity of second will, which was written but unsigned and unwitnessed at time of testatrix's death); In re Smalley's Estate, 131 N.J. Eq. 175, 179-80, 24 A.2d 515, 518 (1943) (relying on doctrine to uphold prior will that had been revoked by tearing off signature, where testator though she had valid second will at time of mutilation, but it was set aside as product of undue influence). The doctrine also is applied when the second document explicitly recites a mistaken assumption that prompted its execution. See, e.g., Gillespie v. Gillespie, 96 N.J. Eq. 501, 511, 126 A. 744, 748 (1924) (clause revoking bequest to testator's employee where clause stated that bequest was being revoked because employee was dead, but, in fact, was alive, invalid); 2 PAGE ON WILLS, supra note 3, § 21.63, at 468-69 (general rule invalidates revocation if facts stating reason for revocation untrue and facts could not be determined by testator).
Under the doctrine, an act of revocation is conditional upon the validity of the subsequently executed document. 2 PAGE ON WILLS, supra note 3, § 21.57, at 447. In determining whether to apply dependent relative revocation in a given situation, courts attempt to effectuate the testator's presumed intent. Id. If a court is convinced that a testator would have preferred the initial will to be probated rather than having his or her property distributed through the laws of intestacy, the court generally will apply the doctrine. See, e.g., Denson v. Fayson, 525 So. 2d 432 (Fla. Dist. Ct. App. 1987) (reversing lower court's finding of revocation of earlier will for not considering dependent relative revocation, and, in particular, for findings on whether 'the testator would have preferred the earlier will to intestacy'); Carter v. First United Methodist Church, 246 Ga. 352, 355, 281 S.E.2d 493, 497 (1980) (matter turns upon intention of testator, and no mere presumption that testator would have preferred canceled will to intestacy allowed to defeat apparent intention) (quoting McIntyre v. McIntyre, 120 Ga. 67, 72, 47 S.e. 501, 504 (1904) (pencil lines and blank paper pasted over portions of will gave rise to presumption of intent to revoke and extrinsic evidence could support finding that testator no longer regarded instrument as his will even though new will not yet drafted)).

Arguably, the doctrine of dependent relative revocation could sustain prior dispositions of nonprobate assets where a testator subsequently modifies or revokes these dispositions through a superwill that later turns out to be based on a mistaken assumption of law or fact. Neverthelesss, the applicability of the doctrine is contingent upon circumstances that reflect the testator's intent to revive the previous dispositions. 2 PAGE ON WILLS, supra note 3, § 21.57, at 448-52. In the earlier discussion on the issue to revival, supra notes 116-18, it was observed that determining the testator's intent in these situations could result in undesirable delays in the distribution of the nonprobate assets. Therefore, rather than rely on dependent relative revocation to sustain the prior nonprobate dispositions, it would be preferable to provide that all prior dispositions of nonprobate assets remain in effect in the absence of a validly probated superwill. See supra notes 119-22 and accompanying text for a discussion of this point in connection with the revival of previously existing nonprobate dispositions.

Alternatively, a presumption could exist that prior dispositions of nonprobate assets are controlling unless it can be established through clear evidence that the testator intended to revoke these dispositions, regardless of the validity of the superwill. See infra note 127 and accompanying text for a discussion of this point. If such a presumption were adopted, the amount of litigation in this respect would be minimized by lawyers advising their clients that the superwill should be as unambiguous as possible regarding the testator's intent to revoke prior nonprobate dispositions.

[FN123]. See, e.g., Sonner v. Nall, 413 S.W.2d 334, 336 (Ky. 1967) (part of holographic will could be admitted to probate where other parts too vague to be enforced); Moore v. Jackson, 247 Miss. 854, 862, 157 So. 2d 785, 788 (1963) (recognizing general rule allowing partial invalidity); Beatty v. Richardson, 56 S.C. 173, 190-91, 34 S.E. 73, 79-80 (1899) (invalidity of devise of life estate to testator's mistress did not defeat remainders); Harrington v. Pier, 105 Wis. 485, 497, 82 N.E. 345, 349 (1900) (bequest in will to constitute part of the residuary estate invalid unless a contrary intent is shown).

Where undue influence or lack of capacity are involved with respect to a portion of the will, most courts hold that the rest of the will is valid if separable. See, e.g., Williams v. Crickman, 81 Ill. 2d 105, 115, 405 N.E.2d 799, 804 (1980) (perceiving 'no logical reason' for treating those portions of will alleged to be product of undue influence differently from other challenged portions). See also In re Estate of Klages, 209 N.W.2d 110, 113-14 (Iowa 1973) (allowing partial invalidity but with stricter limitations); In re George's Estate, 144 Neb. 887, 898-99, 15 N.W.2d 80, 87 (recognizing rule as set forth in Williams, supra), modified on other grounds, 144 Neb. 915, 18 N.W.2d 68 (1944). Some courts, however, invalidate the entire will in such cases. See, e.g., McCarthy v. Fidelity Nat'l Bank & Trust Co., 325 Mo. 727, 735, 30 S.W.2d 19, 21 (1930) (entire will void even though other beneficiaries did not participate in bringing undue influence to bear upon testator); State v. Horan, 21 Wis. 2d 66, 71-74, 123 N.W.2d 488, 490-92 (1963) (following, but criticizing, Wisconsin's rule of total revocation). Lack of testamentary capacity, in contrast, is almost always held to invalidate the entire will. See, e.g., In re Estate of Baker, 176 Cal. 430, 435, 168 P. 881, 882 (1917) (testator's insanity voided entire will). When an insane delusion is alleged, some courts have stated that partial invalidity is possible. See Estate of Hart, 107 Cal. App. 2d 60, 66, 236 P.2d 884, 888 (1951) (jury instructed that if portion of will product of insane delusion, that portion invalid but remainder of will must be upheld); Holmes v. Campbell College, 87 Kan. 597, 599-601, 125 P. 25, 26-27 (1912) (in dicta, court suggests that disposition of property resulting from insane delusion might invalidate only those portions of will affected).

[FN124]. See 6 PAGE ON WILLS, supra note 3, § § 54.1, 54.5-54.7 (explanation of doctrine of ademption).

[FN125]. See, e.g., In re Hobson's Estate, 456 A.2d 800, 802-03 (Del. Ch. 1982) (testator's sale of land prior to death adeemed devise of property in will; money received for property would pass by intestacy); In re Kreitman's Estate, 68 Ill. App. 3d 523, 527, 386 N.E.2d 650, 652-53 (1979) (specific legacy found to be adeemed where it provided that it was given to beneficiary in memory of testator's departed wife and, between execution of will and testator's death, testator donated amount of legacy to beneficiary in memory of departed wife). In determining whether a particular asset has been adeemed, courts generally do not focus on the testator's intent. All that matters is whether the property in question is part of the testator's
estate at the time of his or her death. See, e.g., Hobson's Estate, 456 A.2d at 802 (rule of ademption does not depend on apparent intention of testator); In re Estate of Jones, 472 So. 2d 1299, 1301-02 (Fla. Dist. Ct. App. 1985) (under probate code, testator's intent regarding ademption irrelevant); In re Estate of Reposa, 121 N.H. 114, 115, 427 A.2d 19, 19 (1981) (ademption not a question of intention). Some courts, however, have repudiated ademption by extinction and now embrace evidence of testator's intent. See Newbury v. McCammant, 182 N.W.2d 147, 151 (Iowa 1971) (ademption inapplicable where property bequeathed disposed of but evidence indicated similar property to be substituted in its place); Douglas v. Newell, 719 P.2d 971, 976, 980 (Wyo. 1986) (repudiating ademption by extinction as defeating testator intent and finding no ademption where property was sold but testator intended beneficiary to have proceeds from sale of property). Both cases drew strong dissents.


[FN127] See, e.g., Samford v. First Alabama Bank, 431 So. 2d 146, 150 (Ala. 1983) (ademption applies only to specific legacies).

[FN128] See, e.g., McGee v. McGee, 122 R.I. 837, 842, 413 A.2d 72, 75 (1980) (principle of ademption by extinction refers only to specific devises and bequests and is thus inapplicable to demonstrative or general testamentary gifts). According to one authority, 'a demonstrative bequest is one of a certain amount or quantity to be satisfied primarily out of a certain fund or particular property, but, if this is impossible, payable generally from the estate.' E. CLARK, L. LUSKY & A. MURPHY, supra note 77, at 359.

[FN129] This position is in accord with the ABA position, which provides that 'changes of beneficiary designations, and any other changes with respect to the disposition of nonprobate assets subsequent to the execution of a Superwill, would supersede the provisions of the SuperWill.' See REPORT TO MEMBERS, supra note 10, at 4.

[FN130] See supra note 128 and accompanying text for a discussion of demonstrative bequests.

[FN131] For a clear articulation of the criteria used by courts in determining the nature of a legacy, see McGee v. McGee, 122 R.I. 837, 842-43, 413 A.2d 72, 75 (1980) (specific legacy must be definite thing, capable of being designated and identified). See also 6 PAGE ON WILLS, supra note 3, § 48.3, at 11-12.

[FN132] See supra note 67 and accompanying text for a discussion of this point.

[FN133] See supra notes 86-90 and 93-97 and accompanying text for a discussion of this point.

[FN134] In Illinois, for example, an individual seeking to contest a will has six months from the time the will has been admitted to probate to file a petition to contest the will's validity. ILL. REV. STAT. ch. 110 1/2, para. 8-1. Thus, any payments to the beneficiaries of the nonprobate assets designated in the superwill would be delayed by the period of probate, a six-month claims period, plus the amount of time it takes to litigate the will contest. Other states have similar provisions. See, e.g., OHIO REV. CODE ANN. § 2107.76 (Anderson Supp. 1987) (four-month period).

[FN135] See, e.g., In re Estate of Fehling, 34 Colo. App. 445, 448, 528 P.2d 407, 409 (1974) (probate court could revoke order approving report irregularly made in connection with distributee's action to obtain his legacy). In some jurisdictions, statutes of limitations exist limiting the time a case can be reopened. See, e.g., IND. STAT. ANN. § 29-1-1-21 (Burns Supp. 1988) (court may vacate or modify orders, judgments or decrees for illegality fraud or mistake within one year after discharge of personal representative upon final settlement); MD. EST. & TRUSTS CODE ANN. § 5-304(b)(3) (1974) (administrative probate may be set aside and judicial probate instituted if within eighteen months of decedent's death court finds fraud, material mistake or substantial irregularity in prior proceeding). See generally Kwall, supra note 66, at 305-10 (discussing retained jurisdiction in probate).

[FN136] The constructive trust is not a true trust but rather a remedial device available to prevent unjust enrichment in a variety of situations. 5 A. SCOTT, supra note 44, § 462.1, at 3415-16. The trust is imposed by law, and, under it, the legal title holder who acquired title inequitably is made an involuntary trustee of the property and the equitable owner is made the beneficiary of the trust. Id. The trustee's sole duty is merely to transfer the trust res to the beneficiary. See E. CLARK, L.
The reason the constructive trust theory is needed to allow recovery from the initial distributees in the situation discussed in the text is that the probating of the second will does not, in itself, affect the final court decree that actually distributed the property of the testator's estate according to the earlier will. See, e.g., In re Cecala's Estate, 404 Cal. App. 2d 526, 534-35, 232 P.2d 48, 53 (1951) (admission of later will to probate gave devisees and legatees basis for suit in equity against devisees and legatees who held property under earlier will which had been probated). Thus, the initial distributees remain the legal title holders, as opposed to the equitable ones. Id. The establishment of the new will creates a cause of action in equity against those who took under the first will. Id. In equity, the initial distributees become trustees for the new beneficiaries because they are holding property under a decree to which they are not entitled. See also Cousens v. Advent Church of Biddleford, 93 Me. 292, 294, 45 A. 43, 44 (1899) (second will must be considered for probate even though first will had been probated and beneficiaries under second will would have remedy against initial distributees).

[FN137]. Depending on the situation, the beneficiaries of a constructive trust could be those individuals designated in a prior disposition of the nonprobate assets, or perhaps the individuals designated in a subsequently executed superwill discovered after the first superwill was probated.

[FN138]. See supra note 136 and accompanying text for a more complete discussion of constructive trusts.

[FN139]. See infra note 140 for a discussion of cases providing such protection.

[FN140]. In Connecticut Gen. Life Ins. v. First Nat'l Bank, 262 N.W.2d 403 (Minn. 1977), the deceased had established a life insurance trust naming his ex-wife and children as beneficiaries. Id. at 404. Subsequent to the creation of the trust, the decedent executed a will that purported to revoke all existing wills and trusts and leave his assets to his new wife. Id. The decedent's new wife claimed that the First National Bank of Minneapolis, trustee of the life insurance trust, should have paid the proceeds of the trust over to her. Id. The court rejected her claim that the subsequent will revoked the life insurance trust on the theory that the creation of the trust constituted an inter vivos transfer and could only be revoked by a written instrument executed by the donor and delivered to the trustee during his lifetime. Id. at 405. The court recited the following policy as a justification for its decision:

The trustee would wish to know of any major change in its duties; revocation or amendment of the trust would constitute as major a change as an increase or decrease in the number of trustees. . . . [C]hanges which do not substantially increase the duties and responsibilities of the trustee may be made unilaterally by giving written notice, but the trustee must concur in substantial increases in its duties.

Id. at 405-06.

See also Simmons v. Foster, 622 S.W.2d 838, 843 (Tenn. Ct. App. 1981) (court dismissed action brought by executor of estate against bank for wrongful payment of proceeds from joint checking account to survivor of account, stating that statute governing joint bank accounts relieved bank of any liability to third party for paying funds to person shown on records as joint holder).

[FN141]. See supra note 140 for a discussion of related cases.

[FN142]. The ABA proposal has adopted this position. See REVISED OUTLINE, supra note 10, at 3.

[FN143]. The ABA proposal suggests that beneficiaries under the superwill should be given three years from the testator's death to recover the nonprobate asset, or the proceeds of its sale, from the prior beneficiaries. REVISED QUTLINE, supra note 10, at 4.

[FN144]. See, e.g, Eckland v. Jankowski, 407 Ill. 263, 268-69, 95 N.E.2d 342, 345 (1950) (title of bona fide purchaser of land from supposed heir after closing of estate held superior to that of devisee under subsequently discovered will); Matthews v. Fuller, 209 Md. 42, 48, 120 A.2d 356, 359 (1956) (public policy in favor of prompt probate of wills as support); Simpson v. Cornish, 196 Wis. 125, 154, 218 N.W. 193, 204 (1928) (policy of free alienation of property in support of favoring bona fide purchaser).

[FN145]. Eckland v. Jankowski, 407 Ill. 263, 268-69, 95 N.E.2d 342, 345 (1950) (no actual or constructive notice as to contents of will because will discovered several months after conveyance of real estate by heirs); Simpson v. Cornish, 196 Wis. 125, 154-57, 218 N.W. 193, 204-05 (1928) (acquired title founded upon decree at intestacy and final decree of
distribution, thus defendants were bona fide purchasers).

[FN146]. The ABA proposal adopts this provision by providing express protection for bona fide purchasers in this situation. REVISED QUTLINE, supra note 10, at 4.

[FN147]. UNIF. PROBATE CODE § 2-506 (1982). The commentary to § 2-506 notes that 'the purpose of this section is to provide a wide opportunity for validation of expectations of testators.' U.P.C. § 2-506 comment (1982).

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