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Excusing Harmless Error In Will Execution: The Israeli Experience

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This article is a study of the harmless error rule curing the formal execution of wills in Israel. The Israeli rule has been persistently misunderstood in the English language literature. The article reports the author’s examination of the original Hebrew language sources. Despite the claim of American reformers that Israel possessed a successful harmless error rule, the Israeli will execution statute was construed by the courts to require strict compliance with certain will execution formalities. Recently, the Israeli will execution statute has been amended. The statute now requires strict compliance with the requirements that a proffered document be in writing and that it is presented by the testator as a will to two witnesses. All other will execution flaws can be cured if a court has “no doubt” that a proffered document was intended by the testator to be a will. A survey of the case law applying the new statute indicates that this rule, which amounts to a harmless error rule with threshold requirements, will generally protect the authentic testamentary intent of testators. American reformers who are frustrated with strict compliance with Wills Act formalities but fear the possible abuses of a harmless error rule can use the current Israeli statute as a model.

INTRODUCTION

Traditional Anglo-American Wills Acts, inspired by the English Statute of Frauds of 1677 and the Wills Act of 1837, require certain execution formalities before a document can be probated as a will. The will must be in writing, the testator must sign the will, and that there be an attestation and signature by a specified number of witnesses. The primary goal of those formalities is the assurance that the document “reflects the uncoerced
Requiring strict compliance with these execution formalities has led to unfortunate results in notorious cases in which obviously reliable wills were denied probate. Reform minded scholars have argued that strict compliance with Wills Act formalities often conflicts with achieving the goal of confirming that a document was meant to be a will. These critics have suggested that compliance with Wills Act formalities should only be required to the extent that those formalities serve the functional purpose of discerning whether the testator intended the document to be a will, and that therefore harmless errors should be excused.

Section 25 of Israel’s Succession Law, 5725-1965 was the first statute in the world to have enabled courts to cure execution errors that would have been fatal under a strict compliance standard, though the Israeli Supreme Court eventually construed the law to require strict compliance with some execution formalities. A recent 2004 amendment to Section 25 explicitly requires strict compliance with the requirement that a will be in writing and that it be presented before two witnesses, but that all other execution formalities could be dispensed with if a court has no doubt that the testator intended the proffered document to be a will. This paper will study the origins and evolution of Section 25 because that legal history might prefigure possible doctrinal shifts towards strict compliance in the American jurisdictions that adopt a harmless error rule in the execution of wills. Most significantly, the application of the current version of Section 25 of Israel’s Succession Law in the

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6 *See in re* Groffman, [1969] 2 All E.R. 108 (even though the court was “perfectly satisfied that the document was intended to be a will,” the document was not probated because the testator did not acknowledge his signature before both witnesses simultaneously); Stevens v. Casdorph, 508 S.E.2d 610 (W. Va. 1998) (refusing probate when the witnesses, bank tellers, did not actually see the testator sign the will, even though they knew that the wheel chair bound testator had come to the bank to execute his will).
8 Gulliver & Tilson, *supra* note 9, at 3; Langbein, *Excusing Harmless Errors, supra* note 9, at 7.
9 The Succession Law, 5725-1965, in Ministry of Justice, 19 L.S.I. 58, 63 Ch. 1, §25 (1965) (Isr.).
10 Langbein, *Excusing Harmless Errors, supra* note 9, at 48.
11 *See, e.g.*, Koenig v. Cohen, CA 86/79, [1981] 35 IsrSC 176; FH 40/80 Koenig v. Cohen [1982], 36(3) IsrSC 701 (*en banc* rehearing) (requiring a signature for a holographic will when there was no doubt in the circumstances that a note was intended to be a will).
courts will be examined because that statute can be a model for American policy makers who wish to avoid the often senseless results of strict compliance with execution formalities, but hesitate to entrust judges with the power to forgive all execution errors lest documents that were not intended to be wills be entered into probate. Robert Frost said that “writing free verse is like playing tennis with the net down.”\textsuperscript{13} If will execution can be analogized to tennis, the harmless error rule permits playing with the net down; in contrast, the current Israeli Succession Law authorizes a match with a low net. Though this paper will not be able to provide a definitive answer to the question of which set of rules are better, this paper will update the existing English language literature about an interesting overseas statute that non-dogmatically intermixes the strict compliance and harmless error approaches to will execution formalities.

Part I of this paper describes the major role Section 25 has played in the worldwide debate over the wisdom of granting courts the discretion to cure failings in the formal execution of wills. Part II recounts the genesis of the statute and how the Israeli Supreme Court construed the 1965 statute to not permit to cure the absence of certain fundamental will formalities; contrary to the impression of the current English language literature, this doctrinal development was not reversed by a statutory amendment. Part III brings American practitioners and scholars up to date on the significant amendment to Section 25 that was enacted in 2004.\textsuperscript{14} The revised Section 25 requires strict compliance with certain will execution formalities, but otherwise empowers courts to forgive defects if the court other execution formalities if the court has no doubt that the document reflects the testator’s genuine testamentary intent. Part IV will examine recent Israeli cases. This case law suggests that the current Israeli approach of a dispensing power with specified threshold requirements generally protects testamentary intent and provides a persuasive model for American reformers.

\textsuperscript{13} CLIFTON FADIMAN, THE AMERICAN TREASURY 847 (1955).
\textsuperscript{14} Id.
PART I: SECTION 25’S ROLE IN THE SCHOLARLY LITERATURE

Though there were calls to ease the requirement of strict compliance with will execution formalities in the mid-twentieth century, the modern American debate over strict compliance with those requirements began in earnest in 1975. In that year, Professor John Langbein proposed that common law courts should probate documents that suffer from execution formality errors so long as the documents were in “substantial compliance” with the functional purposes of the formalities. Langbein argued that the formalities of a written document and a signature of the testator are the most essential requirements, while attestation of witnesses should be less important.

A natural experiment soon followed when the Australian state of Queensland codified the doctrine of substantial compliance. Several years prior, the neighboring state of South Australia had taken a different route towards easing strict execution formalities. The South Australian law embodied a dispensing power which allowed judges to excuse execution errors so long as the court was “satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.” Unlike the substantial compliance rule in effect in Queensland, the South Australian dispensing power did not require courts to determine that the executed formalities substantially complied with the formalities’ functions.

In 1987, Langbein reported the results of the Australian experiment. He concluded that the Queensland substantial compliance doctrine was a failure because judges deemed innocent omissions not to be in substantial compliance with Wills Act Formalities. In Langbein’s opinion, Queensland judges improperly applied the substantial compliance provision to require “near perfect” compliance with will execution formalities.

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15 See, e.g., Gulliver & Tilson, supra note 9.
16 Langbein, Substantial Compliance, supra note 9.
17 Id. at 492-497.
21 Langbein, Excusing Harmless Errors, supra note 9, at 41-45.
22 See id. at 1.
Langbein approvingly observed a strikingly different trend emerge in South Australia. There, the dispensing power enabled South Australian judges to distinguish between documents that reflected testamentary effect and those that did not.\(^{23}\) After observing the Australian experiment, Langbein came “to prefer the dispensing power over substantial compliance as a legislative corrective.”\(^{24}\)

Though apparently no common law scholar knew it until 1979, another country had already adopted a dispensing power statute before South Australia.\(^{25}\) In 1965 Israel enacted Section 25 of the Succession Law, 5725-1965.\(^{26}\) It was the first statutory provision in the world to give courts a dispensing power to excuse flaws in Will Act formalities.\(^{27}\) Israel’s experience with the dispensing power has played a major role in the debate over whether to adopt the dispensing power in Anglo-American jurisdictions.

Judge I.S. Shilo of Tel-Aviv wrote an assessment of the Israeli provision for the British Columbia Law Reform Commission. Shilo observed that after the passage of Section 25 litigation decreased. Shilo believed that the law discouraged challenges to defectively executed wills that reflected testamentary intent.\(^{28}\) This empirical assessment neatly dovetailed with a theoretical prediction Langbein had made independently.\(^{29}\) Anticipating the argument that a curing doctrine would encourage increased litigation by enabling more suspect wills to enter probate, Langbein had argued that parties would stop challenging “harmless defects” because potential litigants would anticipate the judicial curing of those defects.\(^{30}\) Langbein later cited the Australian and Israeli experiences to argue that American jurisdictions should adopt the dispensing power.\(^{31}\)

\(^{23}\) *Id.* at 8-41.
\(^{24}\) *Id.* at 7.
\(^{25}\) *Id.* at 48.
\(^{26}\) 19 L.S.I. 58.
\(^{27}\) Shmuel Shilo, *Commentary to the Succession Law*, 1965 (Sec. 1-55) 227 (1992) [Heb.] (hereinafter “Shilo, *Commentary*”); Langbein, *Excusing Harmless Errors, supra* note 9, at 48 (Israel enacted in “1965 a statute that has the main attributes of the…dispensing power.”).
\(^{28}\) Letter from Judge I.S. Shiloh, Tel Aviv, to the British Columbia Law Reform Commission (Oct. 18, 1979), quoted in Langbein, *Excusing Harmless Errors, supra* note 9, at 50.
\(^{29}\) Langbein, *Substantial Compliance, supra* note 9, at 525-26; Langbein, *Excusing Harmless Errors, supra* note 9, at 48, 51; Langbein, *Defects of Form, supra* note 9, at 64 (“Exactly the latter point has been made by an Israeli judge”).
\(^{31}\) Langbein, *Excusing Harmless Errors, supra* note 9, at 48. Langbein’s approval of the Israeli statute is qualified for reasons that will be discussed *infra* in Section III of this paper, but he largely considers Section 25 to be “a success.” *Id.* at 50.
Following Langbein’s lead, the Uniform Probate Code [UPC] and the Restatement (Third) of Property [Restatement] have adopted the dispensing power under the title of a “harmless error” rule. Similarly, the official comments of the Restatement and the UPC describe the Israeli statute and the similar South Australian statute as codifying harmless error rules that cure technical faults in wills. Both comments urge American states to follow the example of these foreign jurisdictions by adopting a harmless error rule.

In order to dispel concerns that the harmless error rule would increase the amount of probate litigation, both the Restatement’s and the UPC’s official comments place great stress upon Judge Shilo’s view that the Israeli statute had decreased the incentive to challenge wills with mere technical flaws. Australian and Israeli decisions also bolstered the proposition that a harmless error rule would allow courts to excuse flaws in attestation.

Those requirements do not have much functional weight. Courts were much more wary of excusing the failures of a testator to sign his or her purported will.

Much of the international evidence that has played such an important role in the movement to adopt the

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32 Langbein was the associate reporter for the Restatement (Third) of Property: Wills and Donative Transfers, a Uniform Law Commissioner from Connecticut, and a member of the drafting committees for the Uniform Probate Code. Langbein, Curing Execution Errors supra note 9, at 28, n.1.

33 “Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.” UNIF. PROB. CODE § 2-503 (1990, as amended 1997), 8A U.L.A. 146 (2008) (hereinafter “UNIF. PROB. CODE § 2-503”).

34 “A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.” RESTATEMENT, supra note 5, § 3.3.

35 RESTATEMENT § 3.3, supra note 5; UNIF. PROB. CODE § 2-503, supra note 34.

36 RESTATEMENT, supra note 5, § 3.3 cmt. b (“Experience in these jurisdictions [in Australia, Canada, and Israel] appears to show that the statutes have worked well.”); UNIF. PROB. CODE § 2-503, supra note 34, cmt.

37 Langbein, Curing Execution Errors, supra note 9; RESTATEMENT, supra note 5, § 3.3, cmt. b; UNIF. PROB. CODE § 2-503, supra note 34, cmt. (citing LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON THE MAKING AND REVOCATION OF WILLS 46 (1981) (quoting Letter from Judge I.S. Shiloh, supra note 29)). See Langbein, Curing Execution Errors, supra note 9, at 30 (the comments of the UPC and the Restatement both claimed, based in part on Judge Shilo’s report, “that a main lesson of the experience abroad was that the harmless error rule did not breed litigation.”).

38 Langbein, Excusing Harmless Errors supra note 9, at 20.

39 UNIF. PROB. CODE § 2-503, cmt., supra note 34 (“Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement.”).
harmless error rule in the 1980s and 1990s is dated and no longer necessarily true. In 2007, Stephanie Lester
updated the literature regarding the Australian experience by extensively analyzing recent cases and statutory
amendments. This paper further clarifies and updates the English language literature on Israel’s experiences
easing the formal will execution requirements. Indeed, the pro-dispensing power literature of the 1980s and
1990s description of Israel as a dispensing power jurisdiction was incomplete when written. Judicial
interpretation of that statute resulted in the creation of a rule more similar to Queensland’s stringent substantial
compliance than to the flexible harmless error rule applied in South Australia.

This study is now especially timely. In 2004, Israel amended its Succession Law in a way that seems to
blend the harmless error rule and a “near perfect” version of the substantial compliance rule:

Probating a Will even if there is a Fault or Lack in its Form:
(a) If the fundamental parts of a will are present, and the Court has no doubt that the
will represents the true and free wishes of the testator, the Court may, in a reasoned judgment,

40 Stephanie Lester, Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless
41 Doron Menashe first brought the 2004 revision to the attention of English speaking scholars. Doron Menashe, The Validation
Most of the relevant Israeli cases, statutes, and legislative commentary cited and discussed in this paper have not been officially
translated. The material that has been translated is only available in short excerpts. In order to overcome these obstacles I read the
Hebrew sources in the original.

Unless otherwise noted, the translations provided in this paper are my own. The official reporter of the Israel Supreme Court will
be cited as “ISrSC”; the official reporter of District court decisions will be cited as “ISrDC”; the official reporter of family court
decisions as “ISrFAM”. “CA” signifies a civil appeal, while “FH” signifies an en banc hearing of the Israeli Supreme Court. The
citation of Israeli materials generally follows the template provided by the ISRAEL LAW REPORTS [2005] (2) ISRLR, Citation Note,
Though those sources do not suggest a way to cite Family Court cases, I have cited those cases in a way that logically follows those
authorities’ template.

The Restatement Reporter’s Note does acknowledge that the’ Australian, Canadian, and Israeli statutes “differ in detail.”
RESTATEMENT, supra note 5, § 3.3, cmt. b. However, the Note goes on to assert that the “predominant rule” of those jurisdictions is
that documents that were not in compliance with will act formalities are treated as if they were in compliance “if the proponent
establishes (usually by a higher than normal standard of proof) that the decedent intended the document to constitute his or her will.”
Id. Likewise, a comment to the UPC strongly implies that Section 25 of the Israeli statute is similar to the South Australian dispensing
power Section 2-503 of the UPC. UNIF. PROB. CODE § 2-503, cmt., supra note 34 (“Experience in Israel and South Australia strongly
supports the view that a dispensing power like Section 2-503...”).

It is perhaps unsurprising that Section 25 would not be fully understood by scholars who could not read Hebrew. Language
barriers have hampered the previous studies of Section 25 made by American and Canadian scholars. See LAW REFORM COMMISSION
OF BRITISH COLUMBIA, supra note 38, at 45 (cautioning that “any legal analysis of the Israeli law is somewhat difficult owing to the
lack of source material and the necessity of relying on the opinions of our correspondents”); Langbein, Excusing Harmless Errors,
supra note 9, at 49, n.241 (Langbein relied upon an Israeli correspondent to keep him up to date with Israeli case developments and
relied upon translators in order to work with the sources).
43 See Langbein, Excusing Harmless Errors, supra note 9, at 1.
grant probate thereof, notwithstanding any defect with regard to an element or procedure
detailed in Sections 19, 20, 22, 23, or with regard to the capacity of the witnesses, or due to
the absence of one of these elements or procedures.

(b) In this section, “the fundamental parts of a will” are:
   i. In a handwritten will, as detailed in Section 19—the entire will is in the testator’s
      handwriting;
   ii. In a witnessed will, as detailed in Section 20—the will is in writing and the testator
      brought it before two witnesses;
   iii. In a will made before the authority, as detailed in Section 22—the will was voiced
      before an authority, by the testator himself;
   iv. In an oral will, as detailed in Section 23—the will was voiced by the testator himself,
      before two comprehending witnesses, while he was on his deathbed or when he considered
      himself, justifiably considering the circumstances, to be facing death.\textsuperscript{44}

Section 25 now requires strict compliance with formalities deemed by the statute to be “the fundamental
parts of a will.”\textsuperscript{45} A written document and two witnesses are deemed by the statute to be the fundamental parts
of an attested will.\textsuperscript{46} The fundamental part of a holographic will is deemed by the statute to be an entirely
handwritten document.\textsuperscript{47} One must strictly comply with these requirements. All other will execution
formalities are deemed not to be fundamental parts of a will.\textsuperscript{48} The statute allows courts to apply a harmless
error rule to these non-fundamental parts of a will.\textsuperscript{49} The heavy burden of proof and the strict compliance requirement for the fundamental parts of a will amount to significant threshold
requirements before the dispensing power can be exercised.

Indeed, the new Section 25 seems to embody a new threshold requirement model of the dispensing
power. The provision’s merger of the dispensing power and strict compliance may disappoint purist advocates
of the harmless error rule. Still, the Israeli provision is just one of a growing number of jurisdictions, now

\textsuperscript{44}1930 S.H. 313, §25 (Amendment No. 11, March 2, 2004), \textit{unofficially translated in Menashe, Validation of Flawed Wills, supra}

\textsuperscript{45}1930 S.H. 313, §25 (Amendment No. 11, March 2, 2004).

\textsuperscript{46}Id. at §25(b)(iii) (the fundamental parts of an attested will are that “the will is in writing and the testator brought it before two

\textsuperscript{47}Id. at §25(b)(ii) the fundamental part of a holographic will is that “the entire will is in the testator’s handwriting”).

\textsuperscript{48}Id. at §25(a).

\textsuperscript{49}Id.
including California, Colorado and Virginia, which have eased strict compliance requirements but have also adopted strict compliance threshold elements. Two of these American statutes require, in most situations, that the testator sign the document before the harmless error rule can be applied.\textsuperscript{50} The recent Israeli decisions applying the dispensing power with threshold requirements can shed light on whether this recent American statutory trend is wise at a time that American state courts have not had an opportunity to interpret the new statutes. However, these recent decisions cannot be understood outside the context of the pre-2004 evolution of section 25 that will be explored in the next part.

\textbf{PART II: THE GENESIS AND EVOLUTION OF THE PRE-2004 SECTION 25}

Some of the English language literature is under the misimpression that the original Israeli law has a robust dispensing power rule directly derived from Jewish law. American and Canadian observers were struck by the claim of drafters of the original Israeli statute empowering courts to cure execution formalities that they were inspired by the traditional Jewish religious-legal doctrine that “it is a mitzvah (commandment or good deed) to fulfill the wishes of the deceased.”\textsuperscript{51} However, it is important to understand that traditional Jewish law only vaguely inspired the original Israeli statute’s dispensing power feature. That law, also known as the Halakha, (a Hebrew word that literally means, “to go” or “the path”), is a body of ritual and civil law derived from the Bible and from Rabbinic traditions. The Halakha’s law of inheritance is framed by the Hebrew Bible (Torah)’s parentelic system of succession which only permitted sons to inherit land.\textsuperscript{52} The Hebrew Bible also

\textsuperscript{50} See COLO. REV. STAT. §15-11-503(2) (2008) (requiring testator’s signature as a threshold requirement for the harmless error rule except when the will is not signed in a switched spousal will case); VA. CODE ANN. §64.1-49.1 (2008) (requiring testator’s signature as a threshold requirement for the harmless error rule except when the will is not signed in a switched spousal will case and when the self-proving affidavit was signed instead of the will); \textit{but see} CAL. PROB. CODE § 6110(c)(2) (2008) (instituting a clear and convincing evidence of testamentary intent threshold requirement before an execution error can be cured).


\textsuperscript{52} Shmuel Shilo, \textit{Succession}, in THE PRINCIPLES OF JEWISH LAW 446 (Menachem Elon, ed., 1975) (hereinafter “Shilo, Succession”). The Biblical source for this law is found in the book of Numbers:

“If a man dies and leaves no son, turn his inheritance over to his daughter. If he has no daughter, give his inheritance to his brothers. If he has no brothers, give his inheritance to his father's brothers. If his father had no brothers, give his inheritance to the nearest relative in his clan, that he may possess it. And it shall be unto the children of Israel a statute of judgment, as the LORD commanded Moses.”
required that a father’s firstborn son inherit a portion equal to the shares of two ordinary heirs. Originally, wills were unknown to traditional Jewish law. A testator was generally prohibited from devising property to a beneficiary who would not inherit under the mandatory default rules of Biblical law. However, the Rabbis of the Talmudic era (100-600 C.E.) developed several countervailing rules to provide flexibility to testators.

The most important liberalizing doctrine was that “it is a mitzvah to fulfill the wishes of the deceased.”

The term mitzvah has multiple meanings that blend into each other depending on the context. The literal meaning of the word is “commandment.” Usually the commandment is referring to a divine command expressed in the Bible, but it also can connote a good deed that is not tied to any specific religious requirement. The Talmudic passages discussing the “mitzvah to fulfill the wishes of the deceased” do not mention the scriptural source for the mitzvah. This probably indicates that the Talmudic Rabbis thought that the mitzvah, though having some legal force, was not a formal divine command. In Talmudic literature, the phrase “it is a mitzvah to fulfill the wishes of the deceased” is not a general ethical injunction or specific law.


See generally Shmuel Shilo, Wills, in THE PRINCIPLES OF JEWISH LAW 454 (Menachem Elon, ed., 1975) (hereinafter “Shilo, Wills”) (testators are allowed to give outright gifts before death, give gifts before death while retaining the usufruct during life; bequeath while critically ill; and bequeath in the contemplation of impending death).

Babylonian Talmud, Tractate Kethuboth 69b-70a, translated in Samuel Dachies, Israel W. Slotki, Kethuboth: Hebrew-English Edition of the Babylonian Talmud 69b-70a (Isidore Epstein, ed. 1971) (explaining that if a decedent directs a stipulated sum of money a week, the beneficiaries can only receive the stipulated amount, even though the beneficiaries require more for their maintenance, because it is a “mitzvah to carry out the wishes of the deceased”); Babylonian Talmud, Tractate Gitten, 14b-15a, translated in Maurice Simon, Gitten: Hebrew-English Edition of the Babylonian Talmud 14b-15a (Isidore Epstein, ed. 1977) (holding that if A says to C to take a sum of money to B, and A dies before C delivers the money to B, C should then deliver the money to B rather than A’s estate because it is a “mitzvah to carry out the wishes of the deceased”).

Dukeminier, et al., supra note 52, at 235, n.20; Law Reform Commission of British Columbia, supra note 38, at 44, n.104.

This ethical obligation could have been derived in a broad sense from Jacob’s burial instructions to his sons. Genesis 49: 29-33.
requiring the fulfillment of any wishes of the deceased. The term refers to a specific legal device that acts in practice like a type of will. The phrase probably should be translated non-literally but more accurately as “a will produced by the duty to maintain the decedent’s words.”

The passages in the Talmud referring to the mitzvah to carry out the wishes of the deceased do not clearly explain the doctrine. The resulting ambiguity produced conflicting views among the medieval authorities over its scope. There were two main schools of thought regarding the scope of the mitzvah to carry out the wishes of the deceased. Both severely limit the situations in which a will is formed by the duty to maintain the decedent’s words. The first school held that a will not in accordance with the Biblical inheritance scheme is only legally binding when the testator, during her lifetime, placed the property in the hands of a trustee, and then commanded the trustee to convey it to the intended beneficiaries. The adherents of this view apparently thought that the testator’s firm testamentary intent could not be established unless the testator deposits the property with a trustee.

The other well-established view held that a will is only produced by the duty to maintain the decedent’s words if the decedent personally charged the people who would have been the intestate heirs to fulfill his requests and they did not protest. The supporters of this view may have reasoned that the will produced by the duty to maintain the decedent’s words can only overcome the usual course of succession if the heirs, bound by

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59 Shilo, Wills, supra note 56, at 458 (citing TOSAFOT, BAVA BATRA 149a)

60 See ISRAEL MISRAD HA-MISHPATIM, A SUCCESSION BILL FOR ISRAEL: TEXT AND EXPLANATORY NOTES 67 (Harvard Law School-Israel Cooperative Research on Israel’s Legal Development trans., 2d ed. 1961) (1952) (hereinafter, ISRAEL MISRAD HA-MISHPATIM, SUCCESSION BILL FOR ISRAEL”) (translating the phrase as “a will because of the duty to maintain the decedent’s words.”).


62 Shilo, Wills, supra note 56, at 458. See also ASHER GULAK, 3 YESODOT HAMISHPAT § 60, at 126-127 (2d ed.1967-1968) (1922-1923) [Heb.].

63 Jacob Tam, (France, 1100-1174), Tosaphoth s.v. V’ha, Gitten 13a; Shilo, Wills, supra note 56, at 458 (citing Yom Tov ibn Abraham Asevilli, (Spain, ca. 1270-ca. 1342), SHE’ELOT U-TESHUVOT, Responsa no. 54 (1982) (hereinafter “Resp. Ritva”); YAAKOV BEN ASHER (Spain, 1270-c.1340), ARBA’AH TURIM, TUR CHOSEN MISHPAT, § 242, para. 2; JOSEPH KARO (Palestine, 1488-1575), SHULCHAN ARUCH, CHOSEN MISHPAT, § 242, para. 2 (1565). See generally GRUNFELD, supra note 62, at 48.

64 GRUNFELD, supra note 62, at 49.

65 Shilo, Wills, supra note 56, at 458 (citing Resp. Ritva, supra note 64) (explaining view of Aaron ha-Levi of Barcelona (1235 – c. 1290)); GRUNFELD, supra note 62, at 48.
Biblical law, implicitly abandon their rights. The most authoritative commentators agree that the intended beneficiaries of the decedents only have an enforceable right under these two circumstances.

There was a more liberal position that would require the intestate heirs selected by Biblical law to transfer the property in all circumstances to the beneficiaries intended by the decedent. That school of thought did not gain wide acceptance. Even this liberal third position which imposed a duty on the intestate heirs did not provide any enforceable remedy to the intended beneficiaries. Therefore, if the heirs of the decedent sold the property to a third party there was no remedy at law. The command by the decedent to give the property to the intended beneficiaries does not obligate third parties. Ultimately, the principle that it is a “mitzvah to carry out the wishes of the deceased” derived its main power from moral suasion rather than legal force. Most significantly, the doctrine was never traditionally conceived as a roaming commission to cure to implement the testamentary intent of the deceased regardless of the technical flaws in a will.

After the birth of Zionism, some members of that movement sought, for nationalistic reasons, to create a secular Jewish law governing social relations based upon the sources and principles of Halakha. Some adherents of this Zionist Mishpat ha-Ivri (which literally means Hebrew Law) movement attempted to use the

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66 But see GRUNFELD, supra note 62, at 49 (suggesting that the followers of this second school wanted to determine “upon whom the duty falls to carry out the wishes of the testator, and whether he is able to do so. Hence the stress on the instruction rather than the deposit.”).

67 GULAK, supra note 63, at § 60 at 127, n.3 (citing SHABBATAI HA-KOHEN (Poland, 1621-1662), SIFTHEI KOHEN, CHOSHEN MISHPAT, § 242, para. 2, sm. para. 4 & YESHOSHUA FALK KATZ (Poland, 1550-1614), SEFER ME’IRAS EINAYIM, CHOSHEN MISHPAT, § 242, para. 3, sm. para. 8).

68 Shilo, Wills, supra note 56, at 458 (citing MORDECHAI BEN HILLEL (Germany, c. 1250 – 1298), MORDECHAI BAVA BATRA no. 666 (hereinafter “MORDECHAI”) (held that a decedent’s children were obligated to fulfill the decedent’s wishes when the decedent, whose children were from an earlier marriage, directed that his estate should go to the second wife, and after her death to his children). This view is not mentioned in GULAK, supra note 63.

69 Shilo, Wills, supra note 56, at 458 (citing MORDECHAI, supra note 69, at no. 666); GULAK, supra note 63, at § 60, 127, n.4 (citing MOSES ISSERLES (Poland, c.1520-1572), DARKHEI MOSHE, CHOSHEN MISHPAT, § 242, sm. para. 5 (1593); MOSES ISSERLES, MAPPAH, CHOSEN MISHPAT, § 242, para. 2 (1571) (if the heirs sell the property, what they “did, they did”, and the court will not provide a remedy for the intended beneficiaries).

70 GULAK, supra note 63, at 127 (“But a will always has ethical value, both in regard to monetary manners and regard to other manners, and also in a place that no court will enforce the will, as an ethical obligation falls upon the heirs to fulfill the wishes of the decedent”) (my translation).

71 See Bernard S. Jackson, Mishpat Ivri, Halakha, and Legal Philosophy: Agunah and the Theory of “Legal Sources, 1 JSIJ 69, 83 (2002) (“it is the nationalist agenda of the mishpat ivri movement which itself generates the theoretical model used to describe Jewish Law”); MENACHEM ELON, IV JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Ha-Mishpat Ha-Ivri, translated by Bernard Auerbach and Melvin J. Sykes) 1588 (1994) (hereinafter “ELON, JEWISH LAW”).
actual doctrines of Jewish law and to adapt them to modern life. Others viewed Jewish law as just another possible source of law, on an equal footing but no better than other foreign sources of law.\footnote{Elon, Jewish Law, supra note 72, at 1589, 1589, n.26.}

During the Mandate period of British rule over Palestine, Ottoman law was binding. All questions not dealt with by Ottoman law were resolved based on English common law and equity.\footnote{Id. at 1612.} Shortly before Israeli independence there was much excitement among Zionist lawyers about proposals to base the law of the new state on Jewish law.\footnote{Id. at 1612-1618.} Because none of these plans was well developed before the declaration of statehood in 1948,\footnote{Id. at 1618.} the pre-independence system of law continued in the new country.\footnote{Section 11 of the Law and Administration Ordinance, 1948, discussed in Elon, Jewish Law, supra note 72, at 1620.}

In 1952 the Israeli Ministry of Justice presented for public debate and translated into English a draft Israeli Succession Bill with commentary.\footnote{Israel Misrad ha-Mishpatim, Succession Bill for Israel, supra note 61.} The draft bill was the first product of the Zionist effort to create an indigenous Israeli civil law inspired by Jewish law.\footnote{See Elon, Jewish Law, supra note 72, at 1671-1690 (discussing draft bill).} The drafters of the draft bill did not intend to codify traditional Jewish law (or in the terminology of the commentary, “Hebrew law”). Instead, they looked to it for general inspiration. They gave it greater, though not decisive weight, over the many foreign inheritance laws that they examined and synthesized. The drafters cast out rules that they perceived to be overly technical or out of step with modern society.\footnote{Introduction, Israel Misrad ha-Mishpatim, Succession Bill for Israel, supra note 61, at 1. The drafters “considered Hebrew law to be” their principal source but neither a conclusive nor an exclusive one.” Id. Nor did they attempt to adapt traditional Jewish law to modern conditions through “legal fictions.” Id.}

Though a revised Bill was officially introduced into the Knesset, which is the Israeli Parliament, in 1958 along with a corresponding new legislative commentary,\footnote{Hatzaat Hok ha-Yerusha, 5718-1958, H.H. 212 (hereinafter “1958 Legislative Commentary”).} the bill did not pass until 1965.\footnote{Elon, Jewish Law, supra note 72, at 1672.} A major point of
contention throughout the extended public debate over the bill was the role of Jewish law in the statute. However, the 1952 draft bill’s dispensing power provision was enacted without any pertinent changes.

Israel’s Succession Law authorizes specific requirements for four different modes validating a testament as a will: Section 19 provides for holographic wills, Section 20 provides for attested wills, Section 22 provides for wills authenticated before a notary, and Section 23 provides for oral wills. The original 1965 version of Section 25 allowed a court to probate a will that had a “defect” in the formalities required by those provisions as long as the court had “no doubt” about whether the document is genuine. The text was succinct:

Where the Court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in Sections 20, 22, 23, or the capacity of the witnesses.

Though Jewish law’s role in the original Section 25 dispensing power provision was not mentioned in the text of the statute, the commentary on the dispensing power section of the draft statute makes it clear that the drafter’s interpretation of Jewish law influenced the provision. The drafters acknowledged that Jewish law “requires painstaking adherence to certain formula.” Still they stressed that Jewish law had developed a counterweight to that formalism with the concept of a will produced by the duty to maintain the decedent’s words. Nonetheless, the drafters certainly did not claim that the dispensing power embodied in the bill interpretation faithfully reflected Jewish law as traditionally understood. Instead, they sought to derive broad principles from both Jewish law’s formalism and it’s supposed, if not actual, dedication to the doctrine that it is a mitzvah to carry out the wishes of the deceased.

Indeed, it appears that the true source of the dispensing power section of the draft statute was a postulate

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82 Id.
83 19 L.S.I. 58, at §25.
84 19 L.S.I. 58, at §19, §20, §22, §23.
85 19 L.S.I. 58, at §25.
86 Id.
87 Id.
88 ISRAEL MISRAD HA-MISPATIM, SUCCESSION BILL FOR ISRAEL, supra note 61, at 67.
similar to Langbein’s later premise that testamentary freedom is the foundation of wills law. Like Langbein, the authors of the draft Israeli Succession Bill commentary believed that will formalities have no “absolute value in themselves.” Therefore, they reasoned, there was “no reason to attach excessive importance to particular forms.” Though the drafters realized that the statutory dispensing power provision was unprecedented, they felt that this new departure was justified. They argued that will formalities only exist to assure “the authenticity of the decedent’s will and of guarding against forgeries and fraudulent designs.”

The Israeli Supreme Court invoked the *mitzvah* to fulfill the wishes of the deceased in an early landmark interpretation of the original Section 25. They described it as the major ‘guide-line’ of the law of wills. However, the Court did not link that guideline to any of the specific doctrines of the traditional concept. Instead, it explained that guideline to mean that “[w]here the intent of the testator is expressed in a will, and no doubt exists as to the genuineness of the will, then his intentions should be ascertained… in order to uphold the wishes of the deceased and not to frustrate them merely for formal defect.” Given this commitment to giving effect to the testator’s substantive wishes without regard to technical formula, it is ironic that the Supreme soon construed Section 25 to require a substantial compliance rule.

The Israeli Supreme Court in *Koenig v. Cohen* refused to probate a purported holographic will that lacked the testator’s signature and date because the Court read statutory term “defect” in a literal matter. The facts reported in the decision are tragic. A young woman who had been unable to secure a divorce from her abusive husband checked into a hotel room with her three year old daughter. The woman jumped out the window with her daughter, and the fall killed them both. A series of unsigned and undated notes in the woman’s handwriting were found in the hotel room, which directed her husband not to attend her funeral, and

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89 See Langbein, *Substantial Compliance*, supra note 9, at 491.
90 *ISRAEL MISRAD HA-MISHPATIM, SUCCESSION BILL FOR ISRAEL*, supra note 61, at 67.
91 *Id.* (“In foreign statutes we have found no provision comparable to the present one.”).
92 *Id.* at 66.
93 CA 869/77 Brill., IsrSC 32(1) 98 (Judge Haim Cohen), *translated in LAW REFORM COMMISSION OF BRITISH COLUMBIA*, supra note 38, at 45.
that her estate should go to her brothers rather than to her husband. The Court held that the statute could cure
defective formalities, but not the complete “omission” of a will formality. The court defined a formality that
was attempted but improperly executed as defective. In contrast, if there was no evidence of an attempt to
execute the formality, then the formality was deemed omitted.\footnote{FH 40/80 Koenig., 36(3) IsrSC at 708-709 (Justice Lewin).}
Because the Supreme Court ruled that Section 25 could only a “defect,” not the omission of a signature or date, the husband inherited his estranged wife’s

Langbein sharply attacked the \textit{Koenig v. Cohen} decision as “wrong” because the testamentary intent of
the women’s notes, which were written while contemplating her impending suicide, was undisputed.\footnote{Langbein, \textit{Excusing Harmless Errors}, supra note 9, at 49.}
He argued that “the only plausible object of the statute” was to enable courts to dispense with the requirements of a
signature and date in a holographic will in cases, such as this one, where the testator’s intent was clear.\footnote{Id. at 49-50.}
For Langbein, it was illogical to say that the complete omission of a will formality was “somehow more
fundamental than a mere defect” in a will formality.\footnote{Id. at 49.}

However, Dr. Shmuel Shilo has suggested that the distinction between defects and omissions could be
derived from the legislative history of the Israeli Succession Law, even though the \textit{Koenig v. Cohen} court did
The legislative commentaries on the original Israeli Succession Law explain
that the reference to “procedures” in the original Section 25 referred to the relatively inconsequential
requirements that an oral will must be presented before an authority, or that it be swiftly committed to
writing.\footnote{Id. at 92; 1958 Legislative Commentary, supra note 81.} Shilo drew the inference that though the drafters intended to allow the dispensation of technical
faults in the signature of the testator or of the witnesses that were similar in importance to the relatively
unimportant procedures, they did not intend to permit the probating a will completely lacking such central
elements of a will.\textsuperscript{102}

Regardless of the legislative intent, Langbein’s evaluation of the intellectual cogency of the \textit{Koenig v. Cohen} doctrine perhaps was uncharitable. The Court went beyond a spare, technocratic reading of the statutory provision. It infused the distinction between omissions and defects with a deeper rationale: courts could not cure a document that lacked an “essential component” of a will.\textsuperscript{103} That is to say, without the execution of these essential formalities, a document simply could not be a will. A reasonable policy concern that in the absence of these essential fraudulent documents would be entered into probate distinction possibly motivated the formalistic distinction between complete omissions and defects. Langbein has himself suggested that the lack of a testator’s signature should be fatal to a proffered will except in the most exceptional circumstances.\textsuperscript{104}

A few years after \textit{Koenig v. Cohen} the Knesset reacted to its sad facts by adding a new subpart that empowered courts to dispense with an “omission of a signature or date” in a holographic will.\textsuperscript{105} The legislative commentary explains that the amendment was intended to prevent further injustices in holographic will cases. The amendment made it possible for the courts, “even in the absence of a signature and a date, to probate the will as written if the court has no doubt as to the authenticity of the document and as to the testamentary intent of the testator, and there are special circumstances justifying such action.”\textsuperscript{106}

Soon after, Langbein made the reasonable inference that “the Israeli legislature amended section 25 in 1985 to sweep away the conceptual ground on which \textit{Koenig v. Cohen} rested.”\textsuperscript{107} Langbein made the reasonable inference that “the Israeli legislature amended section 25 in 1985 to sweep away the conceptual

\textsuperscript{102} Shilo, Section 25, supra note 101, at 93.
\textsuperscript{103} FH 40/80 Koenig., 36(3) IsrSC 701, 708.
\textsuperscript{104} See Langbein, \textit{Substantial Compliance}, supra note 9, at 492-497.
\textsuperscript{105} \textit{Probate of a Will despite Formal Defects or Lack of Compliance with Formal Requirements}: If the court has no doubt as to the authenticity of a holographic will and as to the testamentary intent of the testator, it may, in special circumstances, admit the will to probate even if the signature or date required by Section 19 is lacking” Succession Law (Amendment No. 7) 1985, 1985 S.H. 1140 (\textit{translated in ELON, JEWISH LAW, supra} note 72, 1876, n.204. \textit{See} Langbein, \textit{Excusing Harmless Errors}, supra note 9, at 50 (discussing 1985 amendment).
\textsuperscript{106} Explanatory Note to Bill No. 1653 of 1984, p. 84 (\textit{translated in ELON, JEWISH LAW, supra} note 72, at 1876, n. 204).
\textsuperscript{107} Langbein, \textit{Excusing Harmless Errors}, supra note 9, at 50.
ground on which [Koenig v. Cohen] rested."  

Justice (and later Israeli Supreme Court President) Aharon Barak made the same argument. Nonetheless, Langbein’s prediction that the distinction between defects and omissions had been eliminated was belied by the post-1985 Israeli cases.

Langbein made the reasonable inference that “the Israeli legislature amended section 25 in 1985 to sweep away the conceptual ground on which [Koenig v. Cohen] rested.” Justice (and later Israeli Supreme Court President) Aharon Barak made the same argument. Nonetheless, Langbein’s prediction that the distinction between defects and omissions had been eliminated was belied by the post-1985 Israeli cases which continued to apply the concept in non-holographic will cases. An Israeli Supreme Court panel had ruled that the amendment did not affect the Koenig v. Cohen doctrine in relation to non-holographic wills even before Langbein’s prediction appeared in print. Following a distinction first made in Koenig v. Cohen, the Court’s majority described certain formalities as ‘dynamic’ formalities that could possibly be dispensed with, and others as indispensable ‘static’ or “constitutive” formalities.

In practice, the 1985 amendment only swept aside the difference between an omission and a defect in the rare case of a holographic will. If the Knesset had intended to erase the distinction between will execution faults and lacks, it missed its mark. Indeed, the amendment actually implies approval of the omission/defect distinction in all non-holographic wills.

Before 2004 there was no clear consensus as to what were indispensable, constitutive will formalities.

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108 Langbein, Excusing Harmless Errors, supra note 9, at 50.
110 SHILO, COMMENTARY, supra note 28, at 243-4.
111 Langbein, Excusing Harmless Errors, supra note 9, at 50.
113 SHILO, COMMENTARY, supra note 28, at 243-4.
115 FH 40/80 Koenig., 36(3) IsrSC at 712 (Justice Lewin).
116 CA 284/84 Azriel, IsrSC 39(3) at 167 (Justice Lewin).
119 SHILO, COMMENTARY, supra note 28, at 234.
few years before Koenig, an Israeli Supreme Court panel wrote in Brill v. Attorney General that the distinguishing features without which “the will is not a will” were a command by the testator, two witnesses, and a written document. However, after Koenig v. Cohen the static formalities became ever more restrictive. In the 1980s and 1990s the courts came to use Section 25’s dispensing power only when the document was executed in a nearly perfect matter, much like the stringent substantial compliance standard of Queensland which came to require nearly perfect compliance with will execution formalities.

Indeed, before he switched his allegiance to the harmless error rule, Langbein suggested that Section 25 embodied a form of the substantial compliance doctrine. For instance, the failure of one of the two present attesting witnesses to sign a will was deemed by Supreme Court majorities to be a static formality, as was the failure of a testator to sign or date the document being offered as a non-holographic will. In a dissent, Justice Barak protested these developments. He argued for the application of the more permissive Brill doctrine. Barak’s position was that the original 1965 statute, even after the 1985 amendment, endowed courts with a broad dispensing power.

PART III: THE 2004 AMENDMENT TO SECTION 25

The Supreme Court majority’s distinction between faulty formalities and completely absent formalities provoked much academic criticism in Israel. It seemed illogical and inconsistent that omissions in formalities would be fatal for attested and notarized wills, but not for holographic wills. Though Professor Shilo believed that the statute compelled such a distinction, he argued that international experience showed the efficacy of a
The criticism bore fruit with the enactment of the 2004 amendment to Section 25. The amendment’s legislative commentary reveals the heavy influence of the judicial dissents and academic literature that called for a statutory amendment to empower courts to cure the complete lack of execution formalities. Responding to those analyses, the commentary states that the goal of the amendment was to extinguish the distinction between faulty formalities and the complete lack of formalities in all types of wills.

The version of the 2004 amendment first introduced to the Knesset would have left to judicial discretion the establishment of the essential elements of a will that must exist before Section 25 could apply. However, during debate of the proposed bill it was suggested that it would be preferable for the statute to explicitly list the essential elements as the fundamental parts of a will. This would serve to close judicial debate over the question as to what are the essential elements of a will. The legislative commentary states that it intended to “anchor” the fundamental parts of a will to the Brill list of indispensable formalities. The commentary implicitly rejected the much more restrictive standard of later decisions. In those cases, courts had deemed the lack of a testator’s signature or even the failure of one of the two present witnesses to sign a document as fatal flaws. The final statute lists two fundamental parts of a witnessed will: a written document and the presentation of the document as the testator’s will before two witnesses.

Theoretically, the 2004 amendment of Section 25 ended the era of a full dispensing power in Israel. In practice, that power had never fully gotten from the Knesset into the courtroom. The 2004 amendment...

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128 SHILO, COMMENTARY, supra note 28, at 244.
130 Id. (citing CA 127/87 Bidichi., IsrSC 43(3) at 350 (President Barak, dissenting); Shachor, Probate of Will, supra note 119, at 549; SHILO, COMMENTARY, supra note 28, at 244.
131 Succession Law Bill Comment, H.H. 30, (No. 11), supra note 130.
132 Id.
133 Succession Law Bill Comment, H.H. 30, (No. 11), supra note 130 (citing CA 869/75 Brill., IsrSC 32(1) 98, 101).
135 §25(b)(2), supra note 14. The fundamental part of a holographic will is that it is completely handwritten by a testator. §25(b)(1), supra note 14. A notarized will must have the fundamental part of having been voiced by the testator himself before an authority. §25(b)(3), supra note 14. The fundamental part of an oral will is that the there be two witnesses, and the testator must be on his deathbed or justifiably consider himself to be on the brink of death. §25(b)(4), supra note 14.
expanded judicial discretion in some ways and limited it in others. In the place of *Koenig v. Cohen*’s formalistic omission/defect distinction, the 2004 revision of Section 25 substituted a two tiered hybrid system: First, the statute requires strict compliance with the listed fundamental parts of a will act formalities, but allows full dispensing power for less important formalities. The fundamental parts are conceived as safeguards necessary to establish true testamentary intent. The legislation makes a clear and explicit distinction between faults in the formal requirements found in section one, chapter three of the Succession Law and faults in the substantive requirements found in section two, chapter three of the Succession Law. An example of a substantive requirement of a will is the refusal to recognize an involuntary will produced by force, fear, or undue influence. Even within the formal requirements, courts have perceived a distinction between fundamental formalities that are “constitutive,” without which they cannot be considered a will, and essential “dynamic” formalities. If a constitutive formality is faulty or lacking, then it cannot be corrected. However, if a dynamic formality is faulty or lacking, then it can be fixed, in order to fulfill the goal of executing the will of the deceased.

Second, there is a very high burden of proof before a formal defect can be cured. Even if a document possesses the fundamental components of a will, it cannot be probated unless the court has “no doubt” that the “will represents the true and free wishes of the testator.” The truth of the will and the free will of the testator intertwine because a document is only valid a will if it is the product of the free will of the testator.

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138 NARKIS & MARCUS, supra note 11, at 51; CA 869/77 Brill., IsrSC 32(1) 98.
139 See §30, supra note 11.
141 §25, supra note 14.
142 FH 7818/00 Aharon., IsrSC 59(6), 713 (Justice Arbel). An Israeli Supreme Court opinion has recognized that the intent of the reform was to broaden the scope of Section 25 by abandoning the difference between an “omission” and a “defect.” Id. at 714-713. Israeli Supreme Court Justice Edna Arbel wrote an extensive dictum that emphasized that the 2004 amendment had established that the “free and true” will of the testator was fundamental. According to Justice Arbel, the wishes of the testator should not be sacrificed on the “alter of formal requirements.” FH 7818/00 Aharon v. Aharoni, [2005] IsrSC 59(6), 653, 713 (Justice Arbell). Nonetheless,
The Israeli Supreme Court in *Bargut v. Bargut* rejected Professor Doron Menashe’s proposal to adopt a clear and convincing evidence test regarding the authenticity of the will when there is a formal defect because the text of Section 25 itself requires the “no doubt” standard. Menashe had suggested the adoption of a clear and convincing evidence standard because the “no doubt” standard places too heavy a burden on the party attempting to probate a defective will. As the law now stands, the party attempting to nullify the will has the burden of proof when the will does not have a fault in its form. In contrast, when there is a defect in the formalities of a will, the burden of proof falls on the party attempting to probate the will. That burden must be borne beyond all doubt, and failing that, even a minor flaw cannot be cured. It is almost impossible to satisfy a real “no doubt” standard if it were to be applied in a rigorous manner.

However, Menashe himself has observed that pre-2004 Israeli courts in practice, if not in theory, have probated wills under a significantly more reasonable and lenient standard. *Bargut*, an oral (nuncupative) will case, is a prime example of how the recent post-2004 amendment Israeli courts have continued that trend. They continue to sensibly allow wills to be probated even when there is some, but not truly significant, doubt as to the even she recognized that the amended law places some limit upon the discretion of a judge to probate a will, though she thought those restrictions to be undesirable. *Id.* at 714. Overall, the 2004 amendment gave courts more discretion to deem a document to be a will if there was testamentary intent.

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143 CA 8991/04 Bargut., IsrSC 2006(4), 44.
145 Menashe, *Relaxed Formalism, supra* note 145, at 127-129. See also Langbein, *Defects of Form, supra* note 9, 62 (stating that Israeli “case law places upon the proponents of a defective instrument the burden of proving genuineness—and according to an unusually high standard of persuasion”).
148 CA 564/71 Adler v. Nesher, [1972] IsrSC 26(2) 745, 747 (the party seeking probate of a will despite faulty execution of formalities “must first prove positively its genuineness so that there is a complete confidence that the entire document presented as a will is genuine. Any doubt in this regard works against it and prevents its admittance into probate”, quoted in Langbein, *Defects of Form, supra* note 9, at 62).
149 CA 869/77 Brill., IsrSC 32(1) 98, 101.
150 Menashe, *Relaxed Formalism, supra* note 145, at 119, 131, n.32.
Shortly after the passage of the 2004 amendment to Section 25, one Israeli Family Court Judge warned that the new Section 25 “raises many questions.”\textsuperscript{152} The Amendment certainly raised some questions that should interest American lawyers: How would courts interpret the threshold requirement that a document possess the essential components of a will before it could be probated? Would the overarching requirement that the court have no doubt that the document reflects testamentary intent limit the discretion of courts in practice? The essential question is whether a dispensing power bounded by threshold requirements strikes the right balance between forgiving harmless errors and safeguarding testamentary intent from deceit or misunderstanding.

Even though the revised Section 25 is still relatively young, a significant amount of evidence on how courts operate under a dispensing power with threshold requirements already exists.\textsuperscript{153} In order to draw upon this

\textsuperscript{151} Section 23 of the Israeli Succession law allows for nuncupative wills when the testator reasonably believes herself to be on the brink of death. 19 L.S.I. 58, at §23(a). Nuncupative wills are not known in the United States because they are considered to have insufficient safeguards against abuse, even in the best of circumstances. Some American courts have held that attesting witnesses must sign a will during the lifetime of a testator even when the controlling statute does not require that the witnesses to sign in the presence of the testator because of the danger of fraud. See In re Estate of Saueressig, 136 P.3d 201 (Cal. 2006); In re Estate of Royal, 826 P.2d 1236 (Colo. 1992). However, other American courts have probated documents that were signed by witnesses after the death of the testator. See In re Estate of Miller, 149 P.3d 840 (Idaho 2006); In re Estate of Jung, 109 P.3d 97 (Ariz. App. 2005). Bargut, may have relevance to jurisdictions following that more liberal rule.

In Bargut, the testator, an Argentinean citizen of Christian Arab origin, had requested that the witnesses, who also were Christian Arabs, to come to her house in Argentina to hear her will read. She died a few days later. CA 8991/04 Bargut., IstrSC 2006(4), 44, at Justice Rubinstein’s Op. para. 32. The testator stated orally that her brother’s children should inherit land she owned in Israel in front of two witnesses. Id., at Justice Rubinstein’s Op. para. 2. However, the witnesses did not submit a written version of the will to an Argentinean notary until almost two years after the testator’s death. Id. This memorandum stated that even though age had weakened the testator, she had retained command of her mental capacities. The witnesses claimed that the testator said her wishes first in Arabic and then repeated them in Spanish. An Israeli trial judge examined the witnesses in Syrian Arabic, and concluded that their story was trustworthy. Id. The will was improperly executed because Section 23(b) requires that a nuncupative will be presented in written form before an official as swiftly as possible. 23(b), supra note 11. Other relatives of the testator challenged the proffered will. After deciding that Israeli law controlled the inheritance of the disputed land, a unanimous Court panel probated the will. Based on the circumstances, the panel found that there was “no doubt” that the proffered will reflected testamentary intent. The Court was able to cure the failure to submit the will to an official as soon as possible because the statute did not list that requirement as a fundamental component of a will. CA 8991/04 Bargut., IstrSC 2006(4), 44, at Justice Rubinstein’s Op. at para. 31. Despite the Court’s protestations, the failure of the witnesses to submit the nuncupative will to a notary for almost two years must have raised doubt about the will’s validity. Nonetheless, the Court probated that will because the evidence supporting the truthfulness of the will was convincing.

\textsuperscript{152} Estate File, (Fam.Ct. T.A.-Ja.) 11632/99 Weizmann Institute., ISRfAM 2004(2) 440, at Judge Shochet’s Op. para. 5(h)).

\textsuperscript{153} §25(a), supra note 14. However, a word of caution is necessary. Any evaluation of the revised Section 25 based solely on the reported cases, as this one will be, must be missing a major part of the story. The decisions discussed in this section will certainly not
material, I searched with the aid of an Israeli search engine Takdin Online. I sought Israeli Supreme, District, and Family court decisions on whether to cure will execution formalities under the current version of the 2004 amendment.\footnote{154} Seven relevant cases were discovered. None of these cases have yet been officially translated into English. The cases will be analyzed with accounts of their facts detailed enough to allow the reader to come to her own judgment about the appropriateness of the decisions rendered by the Israeli courts.

The trend of these recent Israeli cases appears to be generally sound. By pruning back the number of indispensable fundamental elements of a will, courts have been able to cure defective, yet likely, authentic documents. At the same time, the requirement that the court have “no doubt” about the authenticity of the document has prevented probate in some cases. Caution is needed. There are hints in the extant cases that some the defective wills that have been probated under the revised Section 25 might be the products of trickery. However, it appears that the new Section 25 is working well over all. The cases seem to show that the revised statute has encouraged courts to probate incorrectly executed proffered wills as long as the courts did not suspect that their defects were the product of indecisiveness, possible duress or undue influence.\footnote{155} In most of these recent Israeli cases the new Section 25 was invoked in the midst of a wills contest in which the proffered will was not only being challenged due to claimed defects or omissions of formalities, but also for substantive

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\footnote{154} Takdin Online, available at http://www.takdin.co.il/searchen/searchForm.aspx (last visited Feb. 10, 2009). Specifically, I conducted the following search: In the full text query box, I placed the key Hebrew phrase of the 2004 amendment of Section 25 that has been translated in this paper as “fundamental parts of a will”: "מרכיבי היסוד בצוואה". The search was limited to cases that used that term from March 23, 2005 to April 20, 2009. I chose March 23, 2005 as the starting date because on March 22, 2005 the Israeli Supreme Court discussed the 2004 amendment in extensive and influential dicta. FH 7818/00 Aharon., [2005] IsrSC 59(6), 653. I also omit from the following discussion an Israeli Supreme Court case dealing with a nuncupative will discussed above, supra note 109 and surrounding text, because it is of limited relevance to an American audience. Bargut v. Bargut, CA 8991/04, IsrSC 2006(4), 44. Based on the cases cited in the opinions I have read, I believe that the query conducted produced the relevant case law. The results of this case survey were probably not biased, even if some relevant cases were omitted.

\footnote{155} Cf. Unif. Prob. Code § 2-503, cmt., supra note 34 (claiming that the harmless error rule embodied in UPC § 2-503 “permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery—in other words, that the defect was harmless to the purpose of the formality”).
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reasons. These include a lack of testamentary capacity due to language barriers, undue influence or fraud. The cases indicate that the parties contesting a will can apparently be relied upon to bring to light doubts about suspicious wills, while still allowing the court to probate documents whose faults are merely formal.

_Estate of the Deceased R.C. v. S.B.C._ is an example of a court applying the new Section 25 and refusing to probate a will that lacked a properly executed signature. The case demonstrates the merits of the current version of Section 25. Most of the evidence supported the court’s refusal to probate the proffered document. In _R.C._, the youngest daughter of nine siblings contested the proffered will of her Moroccan immigrant father. She instead sought to probate an earlier will that bequeathed the father’s apartment to her.\(^{157}\) In July of 2002, the testator had neglected to sign the document proffered by her siblings during the ceremony in which he presented the document as his will to the attesting witnesses. This ceremony took place on a Thursday. The testator eventually did sign the document on the following Sunday, but not in the presence of witnesses.\(^{158}\)

The daughter who contested that document asserted that her siblings exerted undue influence on their father.\(^{159}\) The court found that the claim was not credible. The daughter had been present at the signing ceremony, but she did not protest until after her father had died more than a year later in November 2003.\(^{160}\) Her weak explanation was that she did not want to parade the family’s “dirty laundry” in front of the witnesses.\(^{161}\) The contesting daughter herself admitted under cross-examination that her father did not sign that document before the witnesses because the people present forgot to ask the testator to sign.\(^{162}\) The court credited the evidence that showed that the father signed the will after one of his children pointed out the error.\(^{163}\) Moreover, the court believed the testimony that claimed that the 2002 will reflected the testator’s true

\(^{156}\) Estate File, (Fam.Ct. Jm.) 40180/05 Estate of the Deceased R.C., IsRFAM 2007(1), 324 (Judge Cohen).

\(^{157}\) _Id._ at paras. 1-2, 7.

\(^{158}\) _Id._ at paras. 3-4.

\(^{159}\) _Id._ at para. 10.

\(^{160}\) _Id._ at paras. 1, 8.

\(^{161}\) _Id._ at para. 62.

\(^{162}\) _Id._ at paras. 44-45.

\(^{163}\) _Id._ at paras. 45-46.
testamentary intent.\textsuperscript{164} The court’s evaluation of the evidence left it with no doubt that the will proffered by the other siblings was authentic, and it there allowed the proffered will into probate.\textsuperscript{165}

In contrast, the facts of one surveyed case, \textit{Estate of Yrimi v. Vilnsik (Hasia) and Sisters},\textsuperscript{166} suggests that a document that was probated even though there should have been a great deal of doubt about testamentary intent. In \textit{Estate of Yrimi} the proffered document was a notarized will. The document bequeathed a quarter of the testator’s financial property and her apartment to a charitable institution. Three daughters received the remainder.\textsuperscript{167} Two of the daughters contested the will; they claimed their mother did not understand the nature of her actions. They asserted the director of the beneficiary charity had exercised undue influence on their mother.\textsuperscript{168} The daughters’ claims were initially rejected by the trial court.

After that judgment was rendered in the Family Court, the daughters contesting the will discovered evidence that the medical certification of the testator’s condition at the time of attestation which had had been presented to the trial court had been forged. The daughters then sought to reopen the case before a District Court that had appellate jurisdiction.\textsuperscript{169} The District Court was not willing to reopen the trial court’s findings regarding the testator’s medical state.\textsuperscript{170} The litigating daughters also now argued that the proffered document had a formal fault: the testator did not orally convey her will before the notary, as required by the formal rules of notarized wills. Rather, she instructed the notary to draft a will according to her wishes.\textsuperscript{171} Even though an apparently fraudulent signature should have presented grave doubt as to the authenticity of the will, the court’s evaluation of all the evidence and the strong testimony in favor of the proffered document led it to conclude that there was “no doubt” as to the authenticity of the will.\textsuperscript{172} The other threshold requirement was fulfilled because

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} at paras. 49-50.
\item \textsuperscript{165} \textit{Id.} at para. 66.
\item \textsuperscript{166} (Hi.) 14394/07, \textit{Estate of Yrimi.}, 2008(2) IsRDC 13109, at paras. 1-3 (Judge Sharon-Natanel).
\item \textsuperscript{167} \textit{Id.} at para. 3.
\item \textsuperscript{168} \textit{Id.} at para. 4.
\item \textsuperscript{169} \textit{Id.} at para. 6.
\item \textsuperscript{170} \textit{Id.} at paras. 28-29.
\item \textsuperscript{171} \textit{Id.} at paras. 14, 31.
\item \textsuperscript{172} \textit{Id.} paras. 28, 33. The attorney, who had notarized the will, had authenticated the testator’s signature on every page of the
\end{itemize}
the document will possessed the essential component of a notarized will: the testator presented the will before a notary. I believe that the District Court should have not cured the execution defects because the new evidence certainly cast some doubt on the authenticity of the proffered document.

Reassuringly, Estate of Yrimi seems to be an exceptional case. The Israeli court generally appear to not to be probating proffered documents when the surrounding circumstances indicate that the document probably does not reflect true testamentary effect. The threshold requirement that the court have “no doubt” about the authenticity of the proffered document seems to largely bar probate when the evidence produced by a will contest has cast doubt on whether the documents reflect testamentary intent. For example, in A.S.Y. v. H.S a disinherited daughter successfully contested an attested will. The proffered document had serious execution flaws. The testator did not sign the proffered will in the presence of witnesses. The hearing and sight of the testator were severely impaired at the time he supposedly made his testament. The testator also did not fully comprehend Hebrew. Though a translator helped the lawyer explain the provisions of the will to the testator, the actual words of the will were not translated for the testator, as was required by controlling precedent. Also, the surrounding circumstances were suspicious. After the completion of the purported will, the testator also orally designated that a certain beneficiary should inherit a gold ring setting. The court believed that designation indicated the testator did not believe that the document was a complete disposition of his property. Though the formal flaws of the lack of translation and signature before two witnesses were theoretically not fatal to the proffered will, the court did not probate the document because the evidence and

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173 Id. at paras. 33-34.
175 Id., at para. 48.
176 Id., at para. 42.
177 Id., at para. 44.
178 Id., at paras. 44-45.
179 Id., at para. 50(d).
circumstances presented substantial doubts as to its authenticity.\textsuperscript{180}

*Estate of the Deceased Blank v. Blank and Siblings*\textsuperscript{181} and *Estate of the Deceased Evdalnvi Maier v. Chaim Leah*\textsuperscript{182} are additional cases in which the court did not cure the document’s technical faults. The evidence in each of these cases indicated that the proffered document was likely the product of fraud or undue influence.\textsuperscript{183}

In an additional surveyed case the Beersheba Family Court deciding not to probate a document which had technical flaws when the evidence presented failed to meet the threshold requirement of convincing the Court that the document reflected true testamentary intent.\textsuperscript{184} These cases indicate that the revised section 25 allows the probate of authentic documents that have formal flaws, while it generally has prevented the probate of suspicious documents.

There should be some concern from another front. Some Israeli judges might be moving in the dangerous

\textsuperscript{180}Id., at para. 51.


\textsuperscript{183}In Estate of the Deceased Blank v. Blank and Siblings, the elderly testator and his wife were Holocaust survivors and members of the Ger Hasidic community. The testator’s first will gave his entire estate to his wife if she survived him, and if she did not, to the Ger seminary and synagogue in exchange for memorial prayers. Estate File, (Fam.Ct. Hi) 4720/04, Estate of the Deceased Blank., IsRFAM 2007(4) 548, at paras. 1-3. The proffered, latter, will was made while the testator’s wife was still alive. It disinherited his aged wife and their religious community and gave the entire estate to a middle-aged man. That man, who was not related to the testator, had become close to the testator a few years prior to the testator’s death at age 86. Id. at paras. 3, 9. The testator, though mentally sound, had lost the physical ability to care for himself in his last years. The middle-aged had helped the testator with many activities that otherwise would have been impossible, such as attending the Ger synagogue. The proffered will had two major formal execution errors. First, the testator did not present his signature before the witnesses, though the witnesses claimed that he had orally presented the document as his will. Second, the purported will’s beneficiary admitted that added the document’s date only after it had been signed by the testator. Id. at para. 8. The court refused to probate to the purported will. Id. at Judgment. Though Section 25 could have cured these execution faults, the Court suspected that the testator had been the victim of undue influence. The granting of the testator's power of attorney to the middle-aged man the day after the execution of the second will was suspicious. Worse, the middle-aged man then used the testator’s bank account for his own benefit. The Judge claimed that she could not probate the will with its faulty formalities because she had some doubt about the authenticity of the will. Id. (citing C.A. 77/464 Dohan v. Azilai, [1979] 33(2) IsrSC 16; SHOCHET, supra note 148, at 85). However, this purported will probably would not have been probated under a more lenient clear and convincing evidence test either.

In Estate of the Deceased Evdalnvi Maier, a similar case, a Court refused to probate the incorrectly executed purported will of a childless 93-year old Arabic speaking Moroccan immigrant. The contested will was executed only two months before the death of the testator. The proffered document suffered from several errors in execution formalities. Though the testator was not fluent in Hebrew, the document was not translated for him until it was already completed. One of the witnesses signed the will before the testator did. The testator never even declared that the document was his will. These formal flaws could have been cured if the Court had no doubt of the authenticity of the will. Nonetheless, it refused to do so because the circumstances suggested a classic case of undue influence. The circumstances, as revealed by a wills contest, indicated that the beneficiary of the proffered will, a 50-year-old man who was not related to the testator, had exercised undue influence on the testator. Estate Matter, (Fam.Ct. T.A.) 02701/01, Estate of the Deceased Evdalnvi Maier., IsFAM 2007(1), 26. Three months before the testator’s death, the beneficiary of the disputed will began visiting the testator and helped him with everyday activities such as cleaning and bathing. Id. at para. 9(b).

\textsuperscript{184}Id.
direction of probating non-will documents that direct the inheritance to the beneficiaries likely intended by the testator, even though the proffered document was not intended by the testator to be a will. In the United States an example of this misapplication of the Harmless Error rule is *In re Estate of Kuralt*, in which the Supreme Court of Montana upheld the finding of a trial court that a document was a holographic will based upon extrinsic evidence.\(^{185}\) In *Kuralt* there was convincing evidence that the testator wanted his girlfriend to inherit the property. Still, the letter itself was likely not intended to be a will.\(^{186}\)

One Israeli judge, a member of a Haifa District Court panel, seems to have made a similar mistake in the case of *Plonit v. Almonit*.\(^{187}\) In that case, the testator was a widower who had lived with his girlfriend for 15 years. Section 55 of Israel’s Succession law provides that an unmarried couple who is living publicly together shall inherit from each other, except as provided in a will implicitly or explicitly.\(^{188}\) The widower and his girlfriend entered into a contract with each other which provided that neither would inherit from each other than as provided by will. Upon the death of the widower without a will, the girlfriend claimed a share of the estate upon the basis of intestacy. Three of the decedent’s daughters claimed that the contract was effective will. Chief Judge Shtemer observed that the contract possessed the fundamental elements of a will; there were two witnesses (the girlfriend and the lawyer) and it was a written document. Moreover, there could be no doubt that the document reflected the testator’s intent to disinherit the girlfriend. The purported will, however, had a formal fault because the testator did not present the document as his will. Chief Judge Shtemer would have ruled to cure that formal fault, because it is not a fundamental element of a will.\(^{189}\) Shtemer’s approach would have jettisoned the wise requirement that the testator intend the proffered document to be a will. Two other judges on the panel disagreed with that approach. They felt, soundly, that the contract could not be probated as a will under Section 25, because the parties intended to create a contract, and not a type of will as recognized by

\(^{185}\) 303 Mont. 335, 15 P.3d 931 (Mont. 2003).

\(^{186}\) DUKEMINIER ET AL., *supra* note 52, at 250.


\(^{188}\) §55, *supra* note 7.

\(^{189}\) Fam. App. (Dist.Ct. Hi.) 603/06, Plonit., IsrFAM 2007(2), 10008, at Chief Judge Shtemer’s op. para. 25.
Fortunately for the daughters, one of those judges concurred with the Chief Judge Shtemer’s decision to disinherit the girlfriend because he thought the contract was intended to be an implicit will under the specific statutory terms of section 55. Eventually the District Court’s decision was appealed to the Supreme Court and a settlement was reached in which the disputed portion of the estate was split in half between the daughters and the girlfriend. This doctrinally inconclusive result means that Kurati’s ghost may yet haunt the Holy Land. If they are not wary, Israeli courts might eventually attempt to enforce the testator’s true testamentary intent even when the proffered document was not intended to be a will.

CONCLUSION

Section 25 of Israel’s Succession law has played a major role in the world-wide debate over the wisdom of empowering courts to cure failings in the formal execution of wills. However, in the past, language barriers have hampered the American literature’s discussion of the curing of execution errors in Israel. This paper has sought to clarify the origins and application of the original Israeli statute. Most importantly, the paper brings the English speaking audience up to date on a major emendation of Section 25 and its preliminary aftermath in the courts. A major American textbook describes that Amendment to be a retreat from a harmless error rule. However, though the 2004 Amendment officially ended Israel’s experiment with a statutory dispensing power, the new law actually gave courts more power to cure incorrectly executed will formalities. The revised section 25 embodies a dispensing power with threshold requirements provision. The preliminary results from the Israeli courts appear to show that the revised section 25 is a reasonable compromise between the extremes of senseless formalism and unbounded and unpredictable judicial discretion. The recent Israeli cases indicate that judges applying a dispensing power with threshold requirements will, in most cases, arrive at results that

193 DUKEMINIER, ET AL., supra note 52, at 263.
reasonably protect the authentic will of the testator. American reformers who are frustrated with strict compliance with Wills Act formalities but fear the possible abuses of a harmless error rule should follow Israel’s lead.