ACCESS TO JUSTICE: WHAT TO DO ABOUT THE LAW OF WILLS

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Recently there has grown up an industry—drawn not just from the estate planning bar, but also from the broader financial press—all intent upon raising the hue and the cry with respect to online, do-it-yourself wills. This cautionary chorus has undertaken to chronicle the disasters that have resulted where laypersons attempt to assemble a will using one of the inexpensive programs that have appeared on the legal landscape over the last ten or fifteen years. The message is clear: when it comes to estate planning, the law is not congenial to lay-endeavors. But over much the same period of time, poverty lawyers and their kindred spirits in the academic bar have focused attention on the paucity of legal representation in civil law matters available to people of modest or moderate means—in the area of estate planning as well as otherwise. To ameliorate problems of access to justice, some have proposed expanding the opportunities for pro se representation so that the underrepresented can represent themselves. In light of this movement to expand pro se representation in civil law matters, the

possibility of making a will online without assistance (and cost) of counsel can only be taken as a positive development and any resistance embedded in the law viewed with a degree of skepticism and puzzlement that argues for legal change.[1] But furthermore, the normative imperative that would render the law more hospitable to the online, do-it-yourself will does not merely emanate from the access-to-justice movement. The law of wills itself harbors values with respect to testamentary freedom that mandate some sort of accommodation with an innovation that could empower significant numbers of people when it comes to directing the disposition of their property at death.

Any effort to improve the standing of these lay-created wills in the legal firmament must ultimately come to terms with the various ways in which these documents commonly run afoul of the law of wills—a notoriously technical and unforgiving area of the law. Two types of errors stand out as fundamental mistakes in the execution of the document and, where the language of the instrument is concerned, drafting errors, including the misuse of legal terms. This Article will later address the rigors of due execution, but suffice it for now to accept that they are gradually ameliorating in ways that can only facilitate the use of the online produced instrument. The language by which the testator would effectuate the disposition of assets is quite another matter, however. Where terms of art are used, intentionally or otherwise, canons of construction are still quite rigid so that, in the ordinary course, testamentary language can still be read consistently with stipulative meanings, whatever the now-deceased testator might

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1. These online products have proliferated and this growth has particular implications in the estate planning area. For example, LegalZoom alone claims to have served over one million customers in creating various types of estate planning documents. *LegalZoom Celebrates 10 Years*, Last Will and Testament, LEGALZOOM, https://www.legalzoom.com/articles/legalzoom-celebrates-10-years [https://perma.cc/PBQ5-KHDH] (last visited Sept. 20, 2015). Aside from the seeming convenience of the format, fees for a will generated online by the testator can be as little as $69, pennies on the dollar compared to the typical costs of a will produced by an attorney in a conventional law office setting. LEGALZOOM, http://www.legalzoom.com/personal/estate-planning/last-will-and-testament-overview.html [https://perma.cc/BTA2-SJEE] (last visited Aug. 30, 2015).

have actually meant. And where a term of art is missing, supplanted by a more casual phrase, courts have been known to deem the casual language inherently ambiguous and, accordingly, set it aside as ineffectual.[2]

Interestingly, however, there is buried in the law of wills an exception where the rigorous treatment of legal language is concerned. The law has long been known to treat wills produced without aid of legal counsel with a degree of interpretive generosity not shown to those prepared by an attorney. When a will is drafted by a layperson, courts have, at times, taken the liberty of looking beyond problematic language to attempt to construct the testator's meaning with greater nuance, often looking to the language of the larger will to shed light on meanings that are apparently idiosyncratic.

To date, however, no one has considered the appropriateness of extending this interpretive generosity to those wills created via online will-drafting programs. This may be because the online programs would seemingly disqualify their documents at the outset: while the online-created instrument is generated by a layperson interacting with a computer program, the platform claims to produce instruments with the integrity of professionally prepared work. In truth, however, these are lay-created documents and the websites are explicit that assistance of counsel is not part of the package. But further, consistent with the claim that the documents are on par with professionally prepared work, online-produced wills are printed and, under current law, must be attested (witnessed) to be validated. The attested will is the paradigmatic instrument produced by estate planning counsel. In contrast, the will that typically benefits from the exception is a holographic instrument, valid by virtue of being handwritten, and, most importantly, nearly always a lay-created instrument. But in this instance, the fact that the online-produced document is meant to be an attested will should be neither here nor there. The resultant document is still lay-created. The online-produced will has been created without assistance of counsel, which is the essential attribute supplying the fundamental rationale for applying the exception.

A normative bias in the law of wills would also support this legal posture of interpretive generosity, this largess, where the online-produced will is concerned. There is no denying that lay-drafted wills tend to be rife with testator's idiosyncratic language, legal terms misapplied, and even beneficiaries misidentified. The lay-drafted will, even one drafted online via a computer-assisted program, contrasts

2. *See, e.g.*, *Estate of Russell*, 444 P.2d 353, 355–56 (Cal. 1968) (where a playfully worded disposition to Chester H. Quinn and Roxy Russell is treated as void with respect to half going to Roxy Russell when extrinsic evidence reveals Roxy Russell to be a dog).

readily with the attorney-drafted, attested will, where unique property and bespoke plans are detailed in language the meaning of which is unmistakable to the initiated. Nonetheless, the fundamental guiding premise of testamentary freedom is that testators have a right to control what happens to their property at death. Viewed in light of the contemporary push to guarantee access to civil law powers and institutions, the online-produced instrument must be seen as the latest iteration of that aspect of the common law property right—dating from the end of the medieval era—that makes the freedom to transfer property (including transfer at death) integral to the right. This common law understanding is embedded in the enduring holographic will and operates as a normative force with respect to any regime that would resist the products of online self-help.

At the same time, however, the normative principal that would secure the right to make a will also vindicates the will well-made—that is, the attorney-drafted, bespoke will that, using lucid, albeit technical language, the meaning of which is unmistakable to the initiated, allows the testator to speak far into the future, long after death. The same vigorous right to transfer property at death that mandates an interpretive largess where lay-created instruments are concerned, at the same time necessitates that this generosity, if extended to online-created instruments, be circumscribed in its application so that interpretive largess does not jeopardize the discipline that undergirds the well-rendered, attorney-drafted instrument. The law of future interests is the crown jewel of the common law, and, as such, it represents the fruition of the right to control the disposition of property at death. Even as steps are taken to secure the rights of the underrepresented, case law whereby interpretive generosity is extended to lay-created wills cannot be allowed to subsume the law of attorney-created wills, thereby rendering ambiguous the very technical language—the terms of art—that are part and parcel of the law of future interests. The law must avoid the cumulative impact of ad hoc relief cognized into a body of case law that renders the language of all wills uncertain. The way to do this is to continue to limit the application of interpretive generosity to lay-drafted wills and to bolster this limitation by confining it to wills passing property not in excess of a certain economic value. Even as interpretive largess is extended to the online will, it must remain the exception and not the rule.

Part I of this Article places the online, do-it-yourself will in the context of the push to enlarge access to justice for people of poor or moderate means in civil law matters. Part I has three subsections. The first of these subsections examines the recent movement to expand pro se representation where sundry civil law rights are concerned. The second subsection explores the significance of pro se opportunities in non-litigious circumstances such as estate planning. The third

subsection considers what might be at stake for the poor and middle class in the right to dispose of property at death. Part II treats the online, do-it-yourself will and its tenuous position in the current law of wills. Part III makes the case that the online, do-it-yourself will is not so clearly an attested will but is a hybrid, with attributes of a holographic instrument also. This insight sets the stage for the later argument that an exception in the law with respect to the rigorous treatment of legal language—a kind of interpretive generosity—previously extended to the holographic will is appropriately applied to this newer vehicle created via self-help. Part IV sets out the rigorous standards for execution that any will—lay-drawn or otherwise—must surmount. This Part examines both the historic requirements for execution (many of which are still in play in some states) and recent reforms, building to the observation that the attested will and the holographic one, even though each is predicated upon a distinct legal ethos, are starting to merge. This observation invites use of standards heretofore applicable to the holographic will (standards like interpretive generosity) to the attested (or hybrid). Part V leaves behind the rigors for executing a will and turns to the other legal challenge for the person who would create a will without assistance of counsel—the canons of construction for testamentary language. If the rigors of execution have begun to ameliorate, the standards for interpreting legal language are still robust. Part VI examines interpretive largess as it has been applied to holographic wills and suggests that it be extended to the online, do-it-yourself will. Part VII acknowledges the potential that an expanded use of interpretive largess could have on the law of future interests and suggests ways to cabin it by embedding its application in a rigorous methodology and then limiting its application.

I. ENLARGING ACCESS

A. Recent Movements

The estate planning universe is generally thought to be the province of specially-trained legal counsel wielding arcane terminology on behalf of well-heeled clients who are intent upon the special privilege of securing their respective dead hands far into the future. Considered in this context alone, the advent of the computer-assisted, lay-created will would be momentous, portending the transformation of this area of the law from an elite universe to one by and for everyone. If this change were not in and of itself significant, however, the advent of a more readily available will acquires an even deeper social meaning when it is considered in light of the larger movement to render sundry civil law institutions more accessible (and ultimately more relevant) to the poor and to the those of moderate means. Particularly relevant to

the do-it-yourself will is the movement to broaden the scope and otherwise facilitate pro se representation in civil law matters.[3]

This movement to make civil law institutions more accessible began several decades ago when poverty lawyers and their allies in the academic bar began to draw attention to the paucity of legal representation for people of modest or moderate means in civil law matters.[4] This concern produced a number of proposals by which to ameliorate the problem of access to justice.[5] "Civil Gideon" would afford the poor and middle class a right to representation at public expense in civil matters similar to the constitutional guarantee to counsel in criminal matters recognized in *Gideon v. Wainwright*.[6] As the dominant strategy here, however, the need to guarantee civil plaintiffs a competent lawyer with time to investigate, research, and try their cases would constitute a considerable challenge. Subsequently, another, arguably more pragmatic, approach to the problem emerged. Instead of guaranteeing counsel, this second approach would expand the opportunities for and improve upon the practicalities surrounding pro se representation so that the underrepresented can represent themselves.[7]

Those pressing for pro se reform recognize that, while pro se representation may be predicated upon a simpler incentive structure, still, few courts are set up to cope with a substantial pro se docket. The law and procedures in courts must be simplified if pro se representation is to become a ready option for those of modest or moderate means. But to date, little progress has been made with respect to pro se reform.

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3. *See infra* Part II.

4. *See infra* Part I.B.

5. DUKEMINIER & SITKOFF, infra note 22, at 45–46.

6. 372 U.S. 335 (1963). *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 20–23 (2004); Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227 (2010).

7. The idea would be—as per the ABA Section of Real Property, Trust and Estate Law, Preliminary Commentary of ABA Task Force on Do-It Yourself Estate Planning (2011)—to "provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody." Barton, *supra* note 6, at 1229 (citing Howard H. Dana, Jr., *Report to the House of Delegates*, A.B.A. 1 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.authcheckdam.pdf [https://perma.cc/D3TC-U9RB]). For those advocating pro se reform, the concern is that, with respect to the criminal justice system, *Gideon* itself, while a noble idea, has proven a disappointment. Those attorneys remain so underpaid and overburdened that acquittals and actual trials remain few. In the words of one critic, *Gideon* has amounted to little more than "high-minded rhetoric with a shameful lack of substance." *Id.* at 1233. By the same token (so the argument goes), if civil *Gideon* became a reality, it is unlikely that civil plaintiffs would be guaranteed a competent lawyer with time to investigate, research, and try their cases.

The suggestion is that, where this larger movement to improve access to civil law institutions is concerned, the fundamental impediment to reform is the bar itself. The bar has reason to see the law and procedures remain resistant to litigation pro se. It is not that members of the bar count on or covet the modest fees attendant upon representing the poor or even the middle class. What is really at stake are the fees flowing from the more prosperous clients. The claim is that, if representation pro se became accessible and effective, wealthier clients might also avail themselves of it in simpler matters and the low-hanging fruit of legal practice would vanish.

B. Testamentary Privileges

This broader drive to render civil law institutions more accessible to the poor and near-poor provides a normative frame in which to consider the online, do-it-yourself will. Yet, neither Civil Gideon nor the push for pro se reform is much focused on the availability of legal advice to poor and middle class people in situations that are non-litigious. Neither tack in pursuit of reform focuses on those situations where access to legal knowledge is integral to legal planning—that is, to structuring one's life through the exercise of fundamental autonomy under the civil law. The need to draw aspects of life within the ambit of the law of wills is one such situation.[8]

Where the law of wills is concerned, in realizing a testator's wishes for the disposition of her estate at death, there are several distinct occasions when this testator (or her executor) might benefit from relevant legal knowledge. Only one of these situations—the probate of a will—is possibly litigious in and of itself. But, in recent years, probate has been stepped down so that the paradigm case is no longer presumptively adversarial (Probate in Solemn Form), to become in the ordinary course an administrative procedure (Probate in Common Form). And at least some probate courts would appear to be ahead of the curve here, as now in many states pro se representation is not uncommon. Lines can be long and clerks can be terse but, when families come forward to probate a will, forms are available and essential legal information can be had. Most importantly, no one is surprised when the layperson comes in seeking assistance with the mechanical aspects of probate.[9] If the will is admitted to probate, clerks

8. *See* RHODE, *supra* note 6, at 80, 82, 100; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 227–29 (1990).

9. *See* N.C. ADMIN. OFFICE OF THE COURTS, ESTATE PROCEDURES FOR EXECUTORS, ADMINISTRATORS, COLLECTORS BY AFFIDAVIT, AND SUMMARY ADMINISTRATION 1 (2014); *FORMS – Surrogates Court Forms: Probate Forms*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/forms/surrogates/probate.shtml

can also assist with the next stage—settling the estate. Given that settling the estate occurs subject to judicial supervision, it should come as no surprise that court clerks are again ready with various types of assistance—forms on which to inventory the estate, information as to the mechanics of public notice to creditors, or directions as to changing title to property, etc.[10]

But currently, where legal assistance is least available and remains most necessary is in taking the first step to subject a person's affairs to the law of wills—that is, in creating the will itself. The legal universe has been quite resistant here: a person who wants to dispose of her estate using a will is hard-pressed not to seek out an attorney with particular expertise in estate planning, first to draft the will and then to supervise the process of attestation. Admittedly, in those states that recognize the holographic will, it represents a second avenue by which to die testate. But while the holographic will avoids the historically picayune requirements of attestation, such self-help risks ambiguities in drafting likely to render probate only a prelude to a construction proceeding where, absent some measure of interpretive largess, meanings ascribed to language within the instrument are likely to be governed by canons anticipated by few laypersons.[11] Those who hope to make the law of wills more accessible simply by easing the procedures surrounding probate should take heed.

C. A Meaningful Right for the Poor

For many people, will-making seems most naturally the province of the affluent. It is intuitive: wills are made by people who have wealth in excess of what they need, who can complete their lives with

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[https://perma.cc/R832-XNCG] (last updated Oct. 10, 2013); *FORMS – Surrogates Court Forms: Small Estate Forms*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/forms/surrogates/smallestate.shtml [https://perma.cc/86MR-7KWV] (last updated Oct. 10, 2013) (the small estates forms are available only for estates of no more than, depending upon date of death, $20,000 or $30,000 of personal property).

10. Note, however, that, in settling an estate, the value of mere legal information—as distinct from advice—may only take the executor so far. Settling even a small estate can involve paying taxes (income, if not estate) and distributing property to beneficiaries pursuant to the will. Court supervision notwithstanding, self-help here occurs against the backdrop of fiduciary liability so that mistakes can be costly. When decisions become controversial, the fact that they were made under advice of counsel is one of the few defenses. *See, e.g.*, DEBORAH L. JACOBS, ESTATE PLANNING SMARTS 59 (2013); Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES.COM (Sept. 7, 2010, 9:50 AM), www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html [https://perma.cc/MG6E-2MJ9].

11. *See, e.g.*, *Zhao v. Wong*, 55 Cal. Rptr. 2d 909 (Ct. App. 1996). *Aldrich v. Basile* also provides an excellent example of errors in usage of language made in the course of lay endeavors. 136 So. 3d 530 (Fla. 2014). *See infra* Part VI.

material resources to spare. Poor people by definition have less than they need to live, so at death they would plausibly have little to nothing to pass on. Indeed, even middle class people are not likely over the course of life to generate much of what might be termed an "operating surplus." And (so the argument would continue), people of little to no means have no need to avail themselves of the law of wills. What they have can descend pursuant to the intestacy statute which is, after all, drafted so as to reflect the desires of the average testator.

If this is the case, then, while the advent of the computer-assisted, lay-created will may portend the emergence of a new era of accessibility for the poor and the near-poor, the question is what meaningful effect redounds to these people when they are secured in the right to make a will. While access to many areas of the civil law is highly consequential for those of little means, the suggestion that poor people are effectively excluded from an important and empowering legal domain if they do not have access to the primary vehicle of estate planning—the will—could appear oxymoronic.

But it is not. There are families with little to no income (and poor prospects of improving earning ability) who own a modest home or a small farm fortuitously acquired in an earlier generation. In the face of income precariousness, this kind of capital asset can provide a modicum of stability by guaranteeing members a place to live. The family improves its chances of hanging on to this asset, however, if the property is carefully husbanded between generations. For example, in the hands of a disabled family member (who inherits the property courtesy of the intestacy statute), the property can disqualify the recipient from aid; indeed, the sale of the property could even be required in order to maintain eligibility for aid, depriving the family of a source of stability going forward.[12] Further, the property can descend (again via the intestacy statute) to multiple owners, complicating the title and substantially increasing the transaction costs of liquidating the asset if the time was ripe.

In another example, the middle class family that, against the odds, generates a modest operating surplus can potentially better its circumstances by carefully husbanding this accumulation over several generations. Just as the right of bequest is used by the affluent, a will can be used as a tool of private ordering, to ensure that money flows to family members whose circumstances do not jeopardize it or, in the alternative, flows to those who actually need it.

Finally, and more generally, making a will can be an exercise in aspects of fundamental humanity. Transfers of property at death are the

12. Use of disclaimers or renunciations to redirect the flow of assets so that they do not flow to the recipient of Medicare or Medicaid and jeopardize the recipient's entitlement is not always successful. *See Troy v. Hart*, 697 A.2d 113 (Md. App. 1997).

legal and economic expression of mortality. For the family, the shift of property at that time is not just an economic transition but an emotional one. Because the will speaks from the grave and represents the personal choices of the testator, it has about it the aspect of a dying statement, a swan song, and the transfer of items of property pursuant to it take on aspects of metaphor, especially where the property transferred is of largely sentimental value. Transfers pursuant to the intestacy statute arguably lack this intimacy and resonance. For this reason, the exclusion of the poor and middle class from the law of wills is a significant and unjustifiable deprivation.[13]

II. AN INTERNET SOLUTION?

Estate planning is only one of many fields in the financial services industry that have seen the emergence of online, do-it-yourself products in recent decades. These providers would support individuals as they set about to prepare their own income tax returns, form corporations or business partnerships, and indeed create their own wills and trusts.[14] These online providers include the widely-advertised LegalZoom as well as Lawdepot, RocketLawyer, Nolo, Corporate Filing Solutions Made Easy, and others.[15] However, where the online, do-it-yourself will is concerned, there has been a veritable call to arms. The expressed misgivings echo broad and deep. Not only have several journalists from the financial press made exposing the pitfalls of online, do-it-yourself wills their special mission,[16] but also, in 2010, the ABA

13. *See generally* HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012) (a study of how law and money foster relationships when it comes to inheritance).

14. *Preliminary Commentary of ABA Task Force on Do-It-Yourself Estate Planning*, A.B.A. SEC. REAL PROP. TR. & EST. L. 2, 4 (2011).

15. *Id.*

16. ELDERLAWANSWERS, *Letting a Computer Plan Your Estate: Is It Worth the Risk?* (May 28, 2013), http://www.elderlawanswers.com/letting-a-computer-plan-your-estate-is-it-worth-the-risk-8129 [https://perma.cc/X8BA-ZV3R]; Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, http://files.alicle.org/thumbs/datastorage/lacidoirep/articles/EPCMJ1108_Goffe_thumb.pdf [https://perma.cc/8CMH-L7SW]; Deborah L. Jacobs, *What Could Happen If You Write Your Own Living Trust?*, FORBES (Aug. 16, 2012, 5:57 AM), http://www.forbes.com/sites/deborahljacobs/2012/08/16/what-could-happen-if-you-write-your-own-living-trust/#68375578747b [https://perma.cc/5X5P-P4KR]; Deborah L Jacobs, *Google Takes Aim at Lawyers*, FORBES (AUG. 17, 2011, 5:43 PM), http://www.forbes.com/sites/deborahljacobs/2011/08/17/google-backing-of-diy-legal-forms-will-force-lawyers-to-lower-fees/#a1cbee33f6e9 [https://perma.cc/6NDG-5RY6] Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES (Sept. 7, 2010, 9:50 AM), http://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html [https://perma.cc/RG4H-435B]; Nathan

Section on Real Property Trust and Estate Law convened a task force to look into the problems attendant upon these new estate planning programs.[17] Chronicled errors include failure to execute the instrument properly, misuse of terms of art, and (related to the misuse of legal terms) failure to anticipate the prioritization of beneficiary claims as imposed by state law and embedded in the program.[18]

It is interesting to note, however, that, this hue and cry notwithstanding, there is to date precious little case law with which to establish that the public is ill-served by the online, do-it-yourself will. Where the law of wills is concerned, no case law has emanated from a probate or a construction proceeding that would validate particular expressed concerns. Indeed, at this point, the most powerful evidence against these wills is largely anecdotal, so that even the ABA Task Force takes as its point of departure information gathered informally.[19]

However, this silence in the case law does not entirely vitiate the complaints against these new products. Plausible explanations exist for the absence of litigation. There is the significant possibility that many of those relying on the online programs are either sufficiently impecunious or just too cost-conscious to approach the courts where there is need for post-mortem rehabilitation of online created instruments. Where a family has little money or is simply unwilling to spend money on legal proceedings, the will that fails the tests of due execution is unlikely to generate case law but will simply not be probated, leaving decedent's property to pass pursuant to the intestacy statute. And similarly, mistakes in drafting do not surface in construction proceedings. Parties on either side of an ambiguous testamentary provision not infrequently settle out of court. But further, cases may not have materialized because the industry has simply not matured sufficiently. Problematic instruments may exist, but they will only surface in years to come when testators have died.

But while there is to date no probate or construction proceeding to validate the particular concerns expressed by the bar and in the financial press, there are a few cases where would-be testators, still living but dissatisfied with online purveyors, seek to recover under a claim of unauthorized practice. These cases lend some measure of institutional resonance to the anecdotal evidence gathered by the bar

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Koppel, *The Dog Ate My Jury Summons*, WALL STREET J. (Oct. 10, 2011), http://www.wsj.com/articles/SB10001424052970203633104576621054290446610 [https://perma.cc/7AFP-YPE8]; Steve Leimberg, Can Husband Creat Irrevocable Trust for Benefit of His Wife and Visa Versa?, (Apr. 3, 2008), https://www.naepc.org/journal/issue05e.pdf [https://perma.cc/7H44-XVGY].

17. *See, e.g.*, *id.*

18. *Id.* at 16–19.

19. *Id.* at 16–18.

and journalists.[20] Even though these cases seek redress for deficiencies that surface prior to death when the testator can still correct the instrument, they have a certain salience when they are considered against the high-stakes backdrop of post-mortem immutability.

This poverty of cases treating online-created wills notwithstanding, cases from closely allied areas of the law suggest there are other reasons to anticipate that, when these wills surface, many of them will be deemed problematic. The online will is susceptible to many of the same hazards as the venerable do-it-yourself instruments of longstanding—the holographic will and (related to it) the stationary form.[21] Where the creation of a will has been concerned, self-help has long been an option (with attendant risks). Not only have holographic wills been possible in many jurisdictions,[22] but stationery stores have sold forms with pre-printed dispositive language (e.g., "I bequeath;" "I devise") and blank spaces for inserting descriptions of particular properties and names of beneficiaries.[23] Therefore, while to date there may be little case law centering on the online, do-it-yourself will, it is worth noting that, modernity notwithstanding, there is a continuing stream of cases centering on these traditional varieties of do-it-yourself wills, and in particular, the execution pitfalls[24] and drafting errors[25] that emanate from them. The only conclusion to be drawn from a review of these cases is that where the law of wills is concerned, self-help remains fraught.

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20. *See Janson v. LegalZoom.com, Inc.*, No. 2:10–4018–CV–C–NKL, 727 F.Supp.2d 782 (W.D. Mo. July 27, 2010); *LegalZoom.com, Inc. v. McIllwain*, No. CV–12–1043, 2013 Ark. 370 (Ark. Oct. 3, 2013); *Webster v. LegalZoom.com, Inc.* No. B240129, 2014 WL 4908639 (Cal. Ct. App. Oct. 1, 2014); *Litevich v. LegalZoom.com, Inc.*, No. X04HHDCV14055757S, 2015 WL 4570739 (Conn. Super. Ct. June 20, 2015); *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109 (N.D. Ohio July 19, 2012); *Bergenstock v. LegalZoom.com, Inc.*, No. 13 CVS 15686, 2015 WL 3866703 (N.C. Super. Ct. June 23, 2015); *LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11 CVS 15111, 2014 WL 1213242 (N.C. Super. Ct. Mar. 24, 2014); *LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11 CVS 15111, 2012 WL 3678850 (N.C. Super. Ct. Aug. 27, 2012).

21. Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93 (2006).

22. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 197–98 (9th ed. 2013).

23. *See, e.g.*, ENODARE, LEGAL WILL KIT: WILLS MADE EASY 92–95 (2011); DOUGLAS GODBE, THE WILLS AND TRUSTS KIT: YOUR COMPLETE GUIDE TO PLANNING FOR THE FUTURE 155–56 (2D. ed. 2006); AARON LARSON, WILLS AND TRUSTS KIT FOR DUMMIES (2008).

24. *See In re Estate of Chastain*, 401 S.W.3d 612 (Tenn. 2012).

25. Stationary forms also create a context in which drafting errors can make their way into the courts for judicial scrutiny. *See Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014).

Indeed, two recent cases illustrate this point. In both cases, the decedent avoided legal counsel and opted for a stationary form to dispose of property at death. *In re Estate of Chastain*[26] involved a question of due execution.[27] On the form, at the end of the dispositive and administrative language, there was no line for the testator's signature, although lines for witness signatures were included.[28] The witnesses signed the will, but with no obvious place for the testator to sign, he proceeded to sign only the attached self-proving affidavit, where a line designated for the testator's signature was included.[29] The Tennessee Supreme Court took a hard line and held the will unsigned and thus invalid.[30] According to the court, a testator's signature on the affidavit alone was insufficient and this was the result even though the affidavit stipulated that the attached document was intended by the testator to be his will.[31]

The second case, *Aldrich v. Basile*,[32] differed from *Chastain* in that the will in *Aldrich* was deemed valid and admitted to probate.[33] The issue in *Aldrich* was rather the language of disposition; in particular, the absence of a residuary clause ("All the rest, residue or remainder of my estate I devise and bequeath . . .") rendered the will ineffective to dispose of any property acquired after the date the will was signed and not specifically devised or bequeathed in the instrument.[34] We will return to *Aldrich* later in this Article. Suffice at this point to note that the Florida Supreme Court construed the document in terms of longstanding and very conservative canons of construction, effectively refusing to read into the will any unexpressed or inexplicit dispositive language.[35] In the face of a recalcitrant court, the property in question passed by intestacy.[36]

Of course, connected to the underlying rationale for these online platforms are the purveyors' suggestions that this new iteration upon testamentary self-help avoids many of the pitfalls associated with the holographic will and the stationary form. This implication is part and parcel of the claim that, while generated by a layperson interacting with a computer program, these online programs produce documents that

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26. 401 S.W.3d 612 (Tenn. 2012).

27. *Id.* at 617.

28. *Id.* at 614–15.

29. *Id.* at 615–16.

30. *Id.* at 622.

31. Note that recently the law is not entirely unyielding on this point. *See In re Will of Ranney*, 589 A.2d 1339, 1339–40 (N.J. 1991).

32. 136 So. 3d 530 (Fla. 2014).

33. *Id.* at 532–33.

34. *Id.* at 531.

35. *Aldrich*, 136 So. 3d at 537.

36. *Id.*

have the integrity of professionally prepared work.[37] By simplifying language and framing testators' choices, creators of these online platforms try to bring to the resulting document discipline and an overall coherence that earlier self-made wills have often lacked.[38]

Nevertheless, for testators hoping to rely on the online instrument, the problem of ambiguous or misused language remains, along with other drafting challenges. Online, the would-be testator assembles the document section by section, answering successive questions about his or her estate planning desires—dispositions of tangible personal property and real estate, gifts to charity, and transfers to children (outright or in trust). In this process, the platform seeks to avoid the problems of earlier self-help vehicles by replacing arcane legal terms of art with layman's language.[39] For example, "residuary legatees" become "primary beneficiaries." But further, given some sets of desires, the platform makes a determination as to an optimal arrangement and the final configuration of the estate then reflects this determination, whether it accords with the testator's desires or not. In one instance, the program mechanically placed a bequest to children in a credit shelter trust.[40] Initially the testator had confidence that whatever the provision entailed, it was consonant with his family's interest and comported with his desires for them as beneficiaries of his estate, that is, until he spoke with a lawyer who apprised him of the difference between receiving property outright and receiving it in trust.[41]

There are still other challenges when making a will. The law prioritizes the claims of beneficiaries with respect to the estate, so that some categories of beneficiaries are satisfied first and others are satisfied only after other beneficiaries and the debts of the estate are paid.[42] So, for example, while testators often intend that those designated "primary beneficiaries" take the bulk of the estate, what testators often do not know is that transfers to residuary legatees occur net of decedent's debts and the debts of the estate (including taxes). Further, even if denoted "primary beneficiaries" within the platform,

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37. *Supra* note 14.

38. *See* LEGALZOOM, http://www.legalzoom.com [https://perma.cc/PR5G-TCQY] (last visited Aug. 30, 2015).

39. *Id.*

40. Class Action Complaint for Violation of Ohio Revised Code 4705 and R.C. 1345 ¶ 17–19, *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109 (N.D. Ohio July 19, 2012).

41. *Id.* (a testator discovered that the online platform had concluded from information he had provided about his family that a credit shelter trust benefiting his children would be in order and, without presenting him with the pros and cons of such a provision and allowing him to elect it, the platform mechanically included the trust in the finished will).

42. *See* UNIF. PROB. CODE § 3-902 (UNIF. LAW COMM'N 2010).

these transfers also occur only after transfers to other beneficiaries. This prioritization of claims is embedded in the platform where fundamental choices govern and constrain subsequent choices. This prioritizing between beneficial transfers is not something many users are likely to anticipate. To the untutored, each designated transfer can appear to be a discrete, free-standing element. But the interaction between the sections—the effect of one decision on others—is pervasive throughout the will. In short, the resulting document may be coherent as a matter of law, but the interaction of sections may be such that the outcome is not what the testator wanted. All of this means that, even though a "document assistant" may stand at the ready to review for spelling, grammar, and overall consistency, the finished document may not work out to be an accurate rendering of the testator's desires.[43]

III. THE ONLINE, DO-IT-YOURSELF WILL—ATTESTED OR HOLOGRAPHIC?

While the online, do-it-yourself will likely confronts significant legal challenges, the same law of wills harbors an approach for the post-mortem rehabilitation of at least some aspects of these wills, especially where they run afoul of the interpretive canons long used to apprehend testator's meaning. Such an avenue of relief is important because it can preserve access to this area of the civil law for many people who cannot afford a lawyer. But before we examine this avenue of relief, we must acknowledge this more forgiving approach emanates from the law of holographic wills—and the online, do-it-yourself will is almost certainly not a holographic will, but is rather an attested one.

There are reasons that the do-it-yourself platforms look past the holographic will—the age-old, quintessential do-it-yourself handwritten, unattested instrument, the solo proposition of longstanding—to instead facilitate the creation of an attested will, with its demanding requirements for execution. While the holographic will may have appeal for the person looking to go it alone in the creation of a will, the handwritten, unattested will is not valid in all states[44] and, where it is accepted, under current law, it is not without its own particular technical requirements that go to its validity (the handwriting requirement being one of them).[45] But perhaps more importantly, these platforms claim to produce instruments with the integrity of professionally prepared work (even though the websites are explicit that assistance of counsel is not part of the package). So, consistent with the

43. Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 28 (2011).

44. DUKEMINIER & SITKOFF, *supra* note 22, at 197.

45. JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 254 (3d ed. 2007).

claim that the documents are on a par with professional work, these programs produce wills that are printed and must be attested to be validated, the type of will typically drafted by estate planning counsel.

For anyone schooled in the law of wills, however, the thought of taking standards traditionally associated with the holographic will and applying them to the attested variety is a radical idea. Historically, in the law of wills, method of execution has been key. But before an avenue of relief emanating from the law of holographic wills is rejected out of hand, first consider that the distinction between the attested and the holographic will is ever so slowly eroding—a point to which we will return momentarily.[46] But second, note that the online, do-it-yourself will is itself a hybrid with some attributes of the attested will and others of the holographic instrument. As such, it can be rendered subject to the law governing the attested will for some purposes and subject to the law governing the holographic will for others. Strictly speaking, the online platform facilitates the creation of attested wills, wills that must be witnessed. But like the holographic will, the online-created instrument is usually created without assistance of legal counsel. Therefore, where due execution is concerned, the online-created will is appropriately governed by the law of attested wills; its postmortem validity as a testamentary instrument is established by the fact that the testator's signature was witnessed when it was rendered. On the other hand, where interpretive canons long used to apprehend testator's meaning are concerned, and where those canons recognize a principle of interpretive largess with respect to lay-created (typically holographic) wills, then the instrument can be appropriately subjected to those canons, notwithstanding that it is attested.

IV. LEGAL CHALLENGES—HISTORIC RIGORS CO-EXIST WITH RECENT AMELIORATIONS

A. Historic Rigors

In this era, both the attested will and the holographic will remain subject to demanding standards where both due execution and drafting considerations are concerned. And this is the case despite recent efforts to lessen the severity of certain of these standards with reference to both types of will. If both types of will must meet demanding requirements, however, there is no doubt that the attested variety bears the heavier burden. But even the holographic will comes into existence consistent with testator's intent only subject to specified standards.

46. *See infra* Part IV.

1. DUE EXECUTION—ATTESTED WILL

To the untutored eye, the classic common law requirements governing the creation of an attested will are so arcane as to be—at least in this era—implausible. Even a lawyer left to instincts honed in another area of the law would likely sail past a summary statement of those directive details required for due execution, confident that such requirements must either be a complete misstatement of the law or be merely advisory—something desirable in the ideal but too impractical to be required in the ordinary course. And if a lawyer would find these requirements farfetched, a layperson naïve even to the ordinary rigors of the law is likely to be even more befuddled when confronted with such steps.[47]

A brief summary of the fundamental requirements of due execution will go some distance in substantiating this point. As any commonplace law school wills and trusts casebook instructs, due execution of an attested will begins with the testator's signature.[48] This requirement should be relatively uncontroversial in the annals of the private law, as virtually any contract or other private law document acquires legal force by being signed by its creator or creators.[49] But in addition to the testator's signature, an attested will requires at least two people to witness the signing.[50] This, too, would seem plausible enough—and indeed easy enough to perform—until we appreciate that under the common law a will has been "witnessed" only if the "presence requirement" has been met: that is to say, a witnessed will requires not only that the witnesses observe the testator sign, but also that the testator observe the witnesses sign and, further, that the witnesses observe each other sign. In short, the three people must act in close proximity, both in time and space, indeed in near concert.[51] If witnesses sign separately or if the ritual unfolds seriatim, for example, with the testator acting alone, in one room of a house, and the witnesses sign a few minutes later, in other rooms, even if these other rooms adjoin the room where the testator signed, the legal standard will have been transgressed—and the will fails.[52] Similar problems would result if, for

47. *See, e.g.*, John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975).

48. UNIF. PROB. CODE § 2-502 (UNIF. LAW COMM'N 2010). *See also* DUKEMINIER & SITKOFF, *supra* note 22, at 148–50.

49. And that signature is advisedly placed on the will itself and not merely on the attached self-proving affidavit. *See In re Estate of Chastain*, 401 S.W.3d 612, 613 (Tenn. 2012). *But see In re Will of Ranney*, 589 A.2d 1339, 1339–40 (N.J. 1991).

50. UNIF. PROB. CODE § 2-502(a)(3)(A) (UNIF. LAW COMM'N 2010).

51. There are two tests with respect to the presence requirement: "conscious presence" and "line of sight." *See* DUKEMINIER & SITKOFF, *supra* note 22, at 159–60.

52. *In re Groffman*, [1969] 2 All ER 108 at 111–13 (Eng.).

example, the signing were to occur around various areas of a relatively open business floor, but where the parties could not actually see each other signing.[53]

But even if a testator and witnesses manage to meet the presence requirement, there is another doctrine—the interested witness doctrine—that can also challenge common sense ideas about due execution. At one time, to allow a beneficiary under the will to witness the document could vitiate the will in its entirety, absent disinterested witnesses of a sufficient number to satisfy the statute. In more recent times, the common law has simply purged the interested witness of his or her interest in excess of what this person would have taken in intestacy. Overall and in general this makes for a less draconian outcome in that the will stands and all transfers but the disposition to the interested party remain intact. But if the interested party is not a family member and thus would not take under the intestacy statute, the interested witness still loses out entirely.[54] And it is easy to see how the uninitiated might run afoul of the interested witness doctrine; kith and kin are not infrequently near to hand when it is time to execute a will and are accordingly asked to serve as witnesses. Unfortunately, those same people are often quite naturally beneficiaries of the will.

2. DUE EXECUTION—HOLOGRAPHIC WILL

Although the holographic will is recognized only in about half of the states in the United States,[55] where it is recognized, it is the quintessential solo creation, requiring for its genesis only a would-be testator equipped with pen and paper. Still, however, this testator must navigate a narrow channel: witnesses are not necessary, but there are other requirements if the law is to recognize the writing as a will. Most importantly, not only must the instrument be signed by the testator somewhere on the paper, but also, in the classic formalization, one hundred percent of the document must be in the testator's handwriting.[56] These are simple enough requirements but it is still easy to get into the weeds. Challenges have been mounted with respect to instruments bearing a date stamp or other printed words such as the testator's name or monogram,[57] or indeed "Last Will and Testament."[58]

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53. *Stevens v. Casdorph*, 508 S.E.2d 610, 611–13 (W. Va. 1998).

54. And what goes up can always come down. There are rules that govern the revocation of a will and indeed the revival of a revoked will. *See* UNIF. PROB. CODE § 2-507 (UNIF. LAW COMM'N 2010). For revival of a revoked will, *see* UNIF. PROB. CODE § 2-509 (UNIF. LAW COMM'N 2010).

55. DUKEMINIER & SITKOFF, *supra* note 22, at 197.

56. DUKEMINIER & SITKOFF, *supra* note 22, at 207–08.

57. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2(a), illus. 1 (AM. LAW INST. 1999).

Admittedly, such instruments have often survived, especially when the handwritten portions of the document are deemed sufficient unto themselves.[59] But the fact that such challenges are mounted is evidence that a spirit of formalism still informs the law governing even the holographic will.

B. Reform—Proving the Writing as a Will

If both the attested will and the holographic will have long been subject to exacting standards where execution is concerned, for both types of will the rigors are gradually abating. This attenuation of standards should facilitate lay-endeavors with respect to estate planning in general and the lay-produced, online-created instrument in particular. Interestingly, however, as the relevant law abates its rigors, the two types of wills start to converge, at least where the fundamental aspects of execution are concerned. As this happens, it becomes easier and more justifiable to recognize the online, do-it-yourself will as a hybrid and then to subject this hybrid to standards of interpretation previously applied to holographic wills, even though the online will is not typically conceived as a handwritten instrument.

1. ATTESTED WILL

Over the last several decades, the Restatement and the Uniform Probate Code (UPC) have made efforts to bring the law of wills into the modern era, making it more accessible for general practitioners as well as the public. Under the UPC, gone is the presence requirement as well as the interested witness doctrine, making due execution of an attested will far less of a trap for the uninitiated.[60] Further, two additional doctrines—Substantial Compliance[61] and Harmless Error[62]—have gained a degree of currency in some states, empowering courts to grant relief where some enduring requirement of due execution has

58. *See id.* § 3.2(a), illus. 3.

59. Courts have been known to ignore the typewritten words or phrases either on an "intent" theory or a "surplusage" theory, the rationale being that the handwritten portions of the instrument are sufficient unto themselves. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2(b) (AM. LAW INST. 1999). *But see In re Estate of Thorn*, 192 P. 19, 22 (Cal. 1920) (holographic will is invalid when the name of home is stamped in two places on document). *See also* Jeffrey J. Lux, *Determining Testamentary Intent in a Holographic Will by Referencing Typewritten Language? Not in Nebraska: An Analysis of the Nebraska Supreme Court's Ruling in* Estate of Foxley v. Hogan, 33 CREIGHTON L. REV. 199, 228–32 (1999).

60. For the elimination of the presence requirement, *see* UNIF. PROB. CODE § 2-505(b) (UNIF. LAW COMM'N 2010).

61. *See generally* Langbein, *supra* note 47.

62. *See* UNIF PROB. CODE § 2-503 (UNIF. LAW COMM'N 2010).

gone awry. For example, where the testator or the witnesses fail to execute the will but sign the self-proving affidavit (a separate document attached to the will that aims to simplify probate by letting the witnesses "pre-testify" that the testator properly executed the will).[63]

While these reforms have hardly been adopted in all jurisdictions,[64] there is a discernable trend. The strict formalism of the attestation ritual appears to be attenuating. To create an attested will, under the amended requirements, there is no more a requirement of all hands on deck; witnesses can sign later and, under some new statutes, they can sign not just later but also separately.[65] In short, as the doctrine of Substantial Compliance suggests, while some percentage of the classic elements of due execution are required with respect to any attested will and no one supposes that some requirements are not more essential than others, these amendments do suggest that an "attested" will can be valid even without the two witnesses present together with the testator. Indeed, under certain reformed statutes, a will can now be valid with only one witness.[66]

2. HOLOGRAPHIC WILL

Just as the legal rigor attendant upon the execution of an attested instrument has abated somewhat in the last several decades, so have the requirements for a holographic will become less rigid. The cases that have moved the law here arise from courts' seeking to probate mis-executed stationary store form wills as holographic wills. The pre-printed form available traditionally at a stationery shop (or in recent times more likely as part of a kit purchased at a bookstore) contemplates attestation, the only available method of execution, given that a holographic will had to be entirely in the testator's handwriting and the stationery form includes pre-printed text. As we can anticipate with the online, lay-created will, laymen trying to use the stationery form have been known to afoul of the requirements for witnessing a will. When this has happened, beneficiaries have asked the court to admit the writing to probate as a holographic will.[67] When courts began to grant relief, they did so at first only where enough of the document was in the testator's writing that the disposition (including words of

63. *See In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991).

64. *In re Estate of Chastain*, 401 S.W.3d 612, 622 (Tenn. 2012).

65. *See* UNIF. PROB. CODE § 2-502(a)(3) (UNIF. LAW COMM'N 2010).

66. *See* UNIF. PROB. CODE § 2-502(a)(3)(B) (UNIF. LAW COMM'N 2010). Note that the solitary witness was a notary public or "other individual authorized by law to take acknowledgements." *Id*. *See also* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1026–27 (1992).

67 *In re Estate of Thorn*, 192 P. 19 (Cal. 1920).

transfer) could be apprehended without recourse to the printed text.[68] Eventually, however, at least some courts have admitted instruments where the printed text was necessary to make sense of the handwritten language as a will.[69]

C. An Intersection on the Horizon

To date, liberalized standards for proving a will, whether the instrument be attested or holographic, prevail only in a minority of jurisdictions and there they are used to grant relief only on a few fact patterns.[70] In this era, in a majority of jurisdictions the law with respect to proving a will remains unforgiving. Nevertheless, to the extent various changes constitute a trend away from formalism and rigidity, they bode well not only for lay-endeavors in estate planning (including the online, do-it-yourself will), but also for much of the estate planning work product of the practicing generalist. If this trend comes to fruition, then in time to come, the attorney or would-be testator who ignores some particular nicety otherwise essential to proving a will can reasonably anticipate the operative jurisdiction will find legal justification to admit the instrument to probate nevertheless.

But something else appears to be happening in this surrender of formalism and rigidity: the stark contrast between the witnessed will and the holographic one is abating. The two avenues to testation under the common law are becoming more alike. Indeed it could be said they are collapsing into each other. Today the attested will still has its genesis in a concerted exercise involving testator and witnesses, the witnesses on board to authenticate the testator's act. At the other end of the spectrum, the holographic will comes into being in a solo enterprise, the law relying on the testator's handwriting to authenticate his expression. As the future unfolds, however, and at one end of the spectrum over-looked or misapplied elements of attestation are commonly forgiven and at the other end the "holographic" will encompasses increasing amounts of printed text, it is easy to foresee a day when a printed text signed by a testator acting without witnesses will suffice to create a will.

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68. *Estate of Carson*, 344 P.2d 612 (Cal. 1959).

69. *See* UNIF. PROB. CODE § 2-502(b) (UNIF. LAW COMM'N 2010). *See also* Bruce L. Stout, *Handwritten Wills May Be Valid If Certain Requirements Are Met*, 30 EST. PLAN. 174, 178 (2003).

70. The doctrine of Substantial Compliance has been confined by a number of courts to grant relief only under a few fact patterns. *See Snide v. Johnson*, 418 N.E.2d 656, 658 (N.Y. 1981) (a "switched wills" case where the court grants relief on what it describes as "narrow facts"). *See also In re Will of Ranney*, 589 A.2d 1339, 1334 (N.J. 1991). *But see In re Will of Ferree*, 848 A.2d 81 (N.J. Super. Ct. Ch. Div. 2003).

But this state of affairs is yet to be realized. At this stage of maturity, what is perhaps most important is the larger normative significance of the trend. Most importantly, the developments which are drawing the two types of wills together make it easier and less heretical to appropriate a standard generally associated with one type of will and apply it to the other, at least where a there is a principled basis for doing so. In short, in this era we are freer to take standards traditionally associated with the holographic will and apply them to the attested will, and vice versa.

Such innovative avenues of relief are important if the online, do-it-yourself will is going to make possible the voluntary disposition of property at death by an otherwise underserved constituency. And this innovation with respect to relief is relevant not just where the rigors of due execution are concerned but, perhaps more importantly, they also come into play with respect to dispositive language of the testamentary instrument. While standards for proving a will have begun to lessen their severity, authenticating the will is not the only challenge confronted by beneficiaries of a lay-drafted instrument. Once the will has been admitted to probate, the language of disposition comes to the fore. And testators operating alone commonly make drafting errors: they misuse legal terms,[71] they make mistakes in naming beneficiaries,[72] and they fail to address a multitude of default provisions embedded in the common law (and varying state by state) which can disrupt a plan of disposition substantially.[73] Unfortunately, little amelioration has occurred with respect to the canons of interpretation—as they are applied to wills—with one exception. Where the will has been produced without assistance of legal counsel, judges have been known to show the instrument a degree of interpretive generosity otherwise unavailable.[74]

The online, do-it-yourself will has yet to benefit from this exception, however, and indeed by some lights should not qualify. The will that has characteristically been shown this relief has been the holographic will, the testator's solo act created not just without

71. *See Estate of Russell*, 444 P.2d 353, 355–56 (Cal. 1968) (construing residuary bequest of valuable real estate to "Chester Quinn and Roxy Russell," Roxy Russell being a dog, as an attempt to transfer property to a dog, with the transfer thus failing so that it lapsed and passed by intestacy).

72. *Moseley v. Goodman*, 195 S.W. 590, 590–91 (Tenn. 1917).

73. Consider, for example, the most recent version of the Anti-Lapse Statute, governing the disposition of property when a beneficiary predeceases a testator. *See* UNIF. PROB. CODE § 2-603(b)(3) (UNIF. LAW COMM'N 2010). For the controversy surrounding it, see Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 654–55 (1993).

74. *Henry Griffith*, 7 So. 2d 560 (Ala. 1942).

witnesses, but most importantly without legal counsel. The online, do-it-yourself will is meant to be an attested instrument. But further, beyond the will being attested, the commercial platforms themselves would seemingly disqualify any will generated there as the platforms purport to produce a document with the integrity of professionally prepared work.

Here is where the erosion of the two types of wills realizes its ultimate normative import. The seemingly disappearing distinction between the attested will and holographic will invites a broader application of this interpretive largess. The legal magnanimity that heretofore has been used to salvage the holographic will can now be used to reform misused provisions appearing in the online, do-it-yourself will, notwithstanding that the latter is advertised as tantamount to an attested instrument. What matters is not whether the online, do-it-yourself will is attested. What matters is that it is prepared without assistance of legal counsel. In this way, it bears a significant feature in common with the holographic will and should get the benefit of the relief often shown the handwritten, unwitnessed will.

V. CANONS OF CONSTRUCTION

The rigid and esoteric requirements for proving a will are ripe for reform and, as we have seen, indeed that reform is underway. But even if the rigors of due execution are ameliorating, the canons of interpretation remain a significant challenge to laypeople and the general practitioner. The persistent challenge in the creation of a will resides in the disconnect between the canons of construction applicable to testamentary language and meanings (drawn from ordinary language) that the uninitiated can try to use in making a will pro se. In short, if a testator's desires are to be realized absent the guidance of skilled counsel, it is not simply a matter of meeting the requirements for proving a will. Once the will has been admitted to probate, the language of the instrument itself is subject to judicial interpretation and construction consistent with long-standing canons. And given these canons, there are a myriad ways for the language of a will to miscarry.

A. Longstanding Rules

These historic canons are particularly rigid where, knowingly or not, terms of art are employed, as terms of art here will be construed pursuant to the stipulative definitions operative in the law of wills. A bequest to my "heirs" disposes of property to the testator's heirs pursuant to the relevant intestacy statute, notwithstanding there are

other persons that the testator had in mind as recipient of his or her benefaction.[75]

But language can miscarry in other ways also. For example, language of disposition is necessary to effectuate a transfer of property—a point that would seemingly give rise to little controversy. But under the law of wills, the language of effective disposition is hardly intuitive. While nowadays it would be unlikely for a court to deem a "bequest" of real property unintelligible, real property being appropriately "devised" while only personal property is "bequeathed," the legal discipline that distinguishes between real and personal property remains sufficiently robust that casebooks still note the distinction.[76] Further, proscriptions with respect to language that is merely precatory provide another challenge. In a will, the seemingly deferential and indeed tactful "I would like" is generally deemed equivocal and thus ineffectual to transfer an interest, whereas the directive "I bequeath" succeeds as manifesting a requisite certainty.[77] But further again, beneficiary names lend themselves to confusion and even mistake.[78] And beneficiaries can predecease a testator creating a lapse and triggering gap-filling mechanisms in the law that, absent knowledgeable drafting, may not align with the testator's wishes.[79] Finally, property devised or bequeathed when the will is signed can be sold and not replaced, leaving the would-be beneficiary with nothing, which may or may not be consistent with what the testator actually wanted.[80]

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75. *See Mahoney v. Grainger*, 186 N.E. 86 (Mass. 1933) (construing bequests to "heirs at law" as a transfer to decedent's cousins—her heirs at law under state law—rather than to her aunt, her intended beneficiary per her attorney's notes).

76. DUKEMINIER & SITKOFF, *supra* note 22, at 43–44. *See also* VALERIE VOLLMER ET AL., AN INTRODUCTION TO TRUSTS AND ESTATES 1177 (2003).Recently, some draftspersons have side-stepped the niceties of "devise" and "bequeath," using the word "give" to effectuate a transfer, whatever the type of property. But still others point out that the term "give" has drawbacks as it bespeaks an act prior to death, not a testamentary act. And to construe a transfer as a gift could be advantageous to the recipient as property transferred prior to death often avoids shouldering a share of testator's debts—something a testamentary transfer is unlikely to do. See *Gruen v. Gruen*, which states that "[t]here is an important distinction between the intent with which an inter vivos gift is made and the intent to make a gift by will." 469 N.E.2d 869, 872 (N.Y. 1986). The former makes an irrevocable present transfer while the latter makes a disposition only effective after death. For liability for creditor's claims, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1 cmt. f (AM. LAW INST. 1999).

77. *See* Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN'S L.J. 1, 13–14 (2007).

78. *See In re Estate of Gibbs*, 111 N.W.2d 413 (Wis. 1961).

79. *See Ruotolo v. Tietjen*, 890 A.2d 166 (Conn. App. Ct. 2006).

80. *See In re Estate of Anton*, 731 N.W.2d 19 (Iowa 2007).

This rigid approach to the language of the will is crystallized in the deep resistance to the post mortem correction of mistakes and receives its ultimate expression in the "Plain Meaning" or "No Further Evidence" doctrine.[81] This rule prohibits a court from taking evidence as to the testator's meaning apart from its manifestation in the language of the will. The will alone speaks from the grave, so other evidence of the testator's plans or desires is inadmissible for purposes of interpreting the will.[82] Admittedly, over time, a number of de minimis exceptions to this rule have emerged.[83] But while auguring relief where some instruments are concerned, this short list of idiosyncratic holdings[84] has only made the law of wills more complex and, if possible, less accessible, both to the layperson as well as the practicing generalist.

In summary, at no point do courts allow that anything other than donor intent is relevant in interpreting the language of a will. Traditionally under the common law courts refuse to conjecture what a testator might have intended, but appropriately take a will on its face. When terms of art are used, they apply their stipulative meanings. When conventional terms or ordinary language appears, it is read consistently with dictionary meanings. "The will must be construed in accordance with what it says and not in accordance with what the testatrix intended or would have wished to say."[85] In summary, "with unexpressed intent the courts are not concerned."[86] And both lacunae in the will—property overlooked or standard provisions (like a residuary clause) omitted—as well as idiosyncratic applications of terms of art are instances of unexpressed intent which the traditional common law court will not rectify.

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81. *See Flannery v. McNamara*, 738 N.E.2d 739, 742 (Mass. 2000); *Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933).

82. The case law is unequivocal: The traditional common law court refuses to conjecture as to what a testator might have intended. The will must be construed in accordance with what it says and not in accordance with what the testatrix intended or would have wished to say. *See Wolfe v. Hatheway*, 70 A. 645, 647 (Conn. 1908); *Comstock v. Comstock*, 63 A. 449, 451 (Conn. 1906).

83. *See In re Estate of Cole*, 621 N.W.2d 816 (Ct. App. Minn. 2001) (illustrating the exception for latent ambiguities); *Moseley v. Goodman*, 195 S.W. 590 (Tenn. 1917) (illustrating the personal use exception); *Arnheiter v. Arnheiter*, 125 A.2d 914 (N.J. 1956) (illustrating *falsa domonstratio non nocet*).

84. To list a few: latent (as opposed to patent) ambiguity; "personal usage exception," "*falsa demonstratio nun nocet*," "detail of identification," etc. For a discussion of the latent ambiguity and "*falso demonstrario nun nocet*" exceptions, see *Perkins v. O'Donald*, 82 So. 401, 405 (Fla. 1919). For a discussion of the personal usage execution, see *Ayres v. Weed*, 16 Conn. 291, 300–01 (1844).

85. *Birge v. Nucomb*, 105 A. 335, 336 (Conn. 1918).

86. *See id.* at 336. *See also Wolfe*, 70 A. at 647; *Comstock*, 63 A. at 451.

B. Correcting Mistakes?

The good news is that the No Evidence Rule is starting to yield, with the Restatement[87] and the Uniform Probate Code[88] again leading the way, by empowering courts to correct mistakes in drafting. The bad news is that, in the face of an error, the new standard requires clear and convincing evidence of the testator's actual intention and, further, similar evidence that the language of the will was the product of mistake of law or fact, either in expression or inducement. What would rise to the level of clear and convincing evidence? In the few cases where mistakes as such have been corrected, the evidence of testator's actual intent has been substantiated with the attorney's notes or with the terms of an earlier will. The earlier will would have been attorney-drafted, similar to the instrument in question and the will the instrument in question would otherwise supersede. To date, applications of the doctrine would suggest that it is better calculated to correct errors made by an attorney rather than a testator acting alone. This is welcome news to the generalist who finds himself in over his head in the law of wills. But otherwise, the need to produce clear and convincing evidence is likely to frustrate the granting of relief where no lawyer has been involved.

VI. INTERPRETIVE LARGESS—EXTENDING THE DOCTRINE

If the newly-cast doctrine of mistake seems poorly calculated to address drafting errors made by a lay-person, there is buried in the law another avenue of relief, a doctrine of interpretive generosity that, interestingly, is directed specifically at the lay-drafted instrument. Not every court is inclined to interpretive generosity, however, whatever the genesis of the instrument. But others take the position that, "when the instrument on its face shows that it was written by an inexperienced or illiterate person, it should be construed more liberally than if it had been drawn by an expert."[89] The instrument that has commonly benefited from this generosity has been the holographic will, the characteristic product of self-help. But there is no reason why other lay-drafted testamentary instruments should not merit the same legal largess, including those that are attested—such as the online, do-it-yourself will.

Within the doctrinal rubric of interpretive generosity, the analysis begins like any construction proceeding, by paying homage to the

87. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 1999).

88. UNIF. PROB. CODE § 2-805 (UNIF. LAW COMM'N 2010).

89. *In re Estate of Lampkin*, 21 Cal. Rptr. 513, 514 (1962).

lodestar of donor intent.[90] With any will, the inquiry into intent is appropriately centered on the language the testator used. Where the instrument is lay-drawn and the doctrine of interpretive generosity is employed, however, the inquiry is appropriately (as one court has put it) open-textured.[91] "The rule for the ascertaining of testator's intention or the means and method by which it is obtained are variable and depend upon no absolute and fixed standard. . . . "[92]

Only where language in a will has a "fixed and universal meaning, and [is] of such common understanding as to exclude the hypothesis that another and distinct meaning was intended," does interpretive generosity require such language to stand on its own.[93] When meaning ceases to be obvious, however, the ultimate goal becomes to arrive at what was apparently or presumably in the testator's mind at the time of making his will.

> All other considerations are subordinate to that and to effect it; punctuation, spelling, construction, the rules of grammar, the literary meaning of words, verbal niceties, may all be disregarded, while on the other hand consideration may be given to the effect of common usage on language, and to the testator's mental capacity, education, habits, and environment.[94]

A court can inquire into the context of the will (including the circumstances surrounding the testator at the time the will was made), the value and extent of the testator's property, any particular purpose for a given transfer, the relationship between the testator and any beneficiary, and any other consideration likely to lend insight into testator's true intent.[95] As for terms of art, where they appear in a lay-drafted instrument, recognition of stipulative meanings (as understood by well-schooled practitioners) is only the first layer of inquiry.[96] Where the will is lay-drafted, any inquiry into the meaning of terms of art must allow for idiosyncratic usage.

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90. *Perry v. Bulkley*, 72 A. 1014, 1017 (Conn. 1909).

91. *Union & New Haven Trust Co. v. Ackerman*, 158 A. 224, 226 (Conn. 1932); *Wolfe*, 70 A. at 647.

92. *Blessing v. Johnson*, 61 S.W.2d 635, 636 (Ky. Ct. App. 1933).

93. *Id.*

94. *Buchwald v. Buchwald*, 199 A. 795, 798 (Md. 1938).

95. *See In re Estate of Northcutt*, 107 P.2d 607, 610–11 (Cal. 1940). As declared by CAL. PROB. CODE § 21122 (West 2015-16), technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.

96. *In re Estate of Northcutt*, 107 P.2d at 610–11.

Extending the doctrine of interpretive largesse beyond the traditional and fairly uncommon holographic will to all lay-drafted wills, including the online, do-it-yourself will, augurs a significant impact on the larger law of wills—a point to which we will return momentarily. But for people of modest or moderate means, who are constrained to embark upon a journey into the law of wills without assistance of expert counsel, this doctrine makes the right of disposition at death not just accessible but—perhaps more importantly—meaningful, in that the disposition effected by the law is more likely to approximate the testator's intent. This is the case especially if the court can approach the lay-drafted instrument—language included and language omitted—with common sense, ready to locate the will in the totality of relevant facts and circumstances. Admittedly, this "open-textured" approach is unavoidably ad hoc and the outcome difficult to predict, at least as a matter of law. But where the underrepresented are concerned, to take the alternative route and impose the canonical rigors of will construction on lay-drafted instruments risks results that are downright perverse. A recent Florida case provides a powerful illustration of this point.

Aldrich v. Basile concerned a will produced pro se and executed in 2004.[97] The testator did not turn to an online, do-it-yourself instrument but rather used a stationary form.[98] Guided by the form, the testator set forth a number of assets, including a house, its contents, a Fidelity rollover IRA, a United Defense Life Insurance policy, an automobile, and all her bank accounts at M&S Bank—virtually everything of value she owned at the time.[99] She bequeathed these items to her sister, but directed that if her sister did not survive her, the items were to go instead to her brother.[100] The will contained no other dispositive provisions.[101]

Three years later, the sister died and, as it worked out, left cash and land to the testator.[102] The sister who was to be the testator's beneficiary instead became her benefactor.[103]

In 2009, the testator herself passed away.[104] With the testator's sister dead, the brother then, as per the terms of the will, became the substitute beneficiary.[105] But the question was whether the assets

97. 136 So. 3d 530, 531 (Fla. 2014).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 532.
105. *Id.*

inherited from her sister—which were not mentioned in her will—passed pursuant to it to her brother, or whether they passed free of the will to her intestate heirs.[106]

Unfortunately, the stationary form lacked a residuary clause—a provision that follows upon the listing of specifically bequeathed or devised property and disposes of anything remaining, the "rest, residue and remainder" of the testator's estate.[107] Absent such a provision, the will that the testator assembled did not dispose of the property received from her sister, at least not per the letter of the law.[108]

The court took a hard line and offered a classic analysis consistent with the four corners doctrine.[109] Even though her brother was the sole surviving devisee under the will, without a residuary clause or general devise, only the property specifically referenced in the will passed to him.[110] As the Florida court explained, "[a]ny other interpretation of the testator's actions would require this Court to rewrite the will to include provisions regarding property for which the testator made none."[111] The court refused "to speculate that the testator intended for her sole devisee to have more than she specifically listed in her will, despite language in the will indicating the opposite."[112] Even though her brother was (after her sister died) the sole beneficiary under the will, without a residuary clause or some such language of general disposition, only the property specifically referenced in the will passed to the brother.[113] The assets inherited by the testator from her sister passed to her intestate heirs.[114]

The court took this position in the face of a 2008 writing in which the testator appeared to attempt a codicil to her will.[115] The paper (which was found with the will) read "This is an addendum to my will dated April 5, 2004. Since my sister . . . passed away, I reiterate that all my worldly possessions pass to my brother . . . ."[116] Because the paper was not signed, however, it could not be probated as a holographic codicil.[117] Neither did the court treat this writing as

106. *Id.*
107. *Id.* at 531–32.
108. *Id.* at 534–35.
109. *Id.* at 535.
110. *Id.*
111. *Id.* at 537.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 533.
116. *Id.*
117. *Id.*

evidence of intent under the 2004 instrument and use it to glean any insight into the disposition there.[118]

The concurrence in *Aldrich* describes the case as a cautionary tale, a classic admonishment with respect to the pitfalls of testamentary self-help.[119] Had the Florida court granted this will a special status as a lay-drafted instrument, however, then an open-textured approach consistent with interpretive generosity would have allowed the court to construe the will together with the attempted codicil to conclude that this testator wanted all of her property, including that inherited from her sister, to go to her brother. Even though the codicil was not executed and thus was not effective to transfer property at death, as a writing it nevertheless bore an evidentiary salience, especially given that, at the time she made the will, if her sister did not survive her, the testator wanted her brother to have everything of value she had then. The attempted codicil supports the contention that at the testator's death, she continued in the desire that her brother receive everything she had.

VII. INTERPRETIVE LARGESS AND THE ESTATE PLANNING BAR—RESERVATIONS

There is no doubt that, when courts employ interpretive largess, they effectively suspend the no further inquiry rule. Where a will is subjected to this more generous standard, it is not just the will alone—the "plain meaning" of what can be gleaned from the "four corners" of the instrument—that speaks from the grave, but other materials serving various and sundry purposes during the testator's life can come in as aids to lend meaning to testamentary language used or indeed omitted. And this openness occurs without a requirement that evidence introduced be clear and convincing or indeed without imposing any evidentiary standard whatsoever. If the question is whether interpretive generosity entails any alternative legal methodology—some sort of alternative discipline to be employed in construing the lay-drafted will—the answer is no, at least none to date.[120]

Interpretive largess thus invites courts to set aside long held precedents that make for predictable legal outcomes in favor of a smorgasbord of ad hoc approaches to discerning donor intent. As a radical departure from a highly developed legal regime, interpretive

118. *Id.* at 536.

119. *Id.* at 538 (Pariente, J., concurring).

120. "[W]here a will is drawn by one learned in the law and skilled in the use of its terminology the words employed will ordinarily be given their accustomed technical meaning, but where it is drawn by a layman the language used may be given the meaning it would commonly have to a person in his situation." *Buchwald v. Buchwald*, 199 A. 795, 798 (Md. 1938).

largess is certain to be controversial. And application of this approach to donor intent beyond the holographic instrument to any and all wills spawned in self-help is likely to be met with resistance, especially in the estate planning bar. In *Aldrich*, the Real Property Probate and Trust Section of the Florida Bar, in an amicus brief, took the same tough line as the Court—that absent a general bequest in the will, there was no indication of testamentary intent with respect to the after-acquired property.[121] Per the Florida Bar, property inherited from the sister appropriately passed by intestacy. The genesis of the will in untutored self-help was accorded no legal import.[122]

The position of the Florida bar would appear to bespeak the claim of many in the larger access-to-justice movement—that a fundamental impediment to expanding access to civil law institutions is the bar itself.[123] The bar has a particular reason to see that the law and procedures remain resistant to litigation pro se.[124] It is not (so the argument goes) that members of the bar count on or covet the modest fees attendant upon representing the poor or even the middle class. What is really at stake (the argument continues) are the fees flowing from the more prosperous clients.[125] The claim is that if representation pro se became accessible and effective, wealthier clients might also avail themselves of it in simpler matters and the low-hanging fruit of legal practice would vanish.[126]

Any discomfort in the estate planning bar with respect to interpretive largess might be seen as of a piece with this general resistance to expanded opportunities for representation pro se. But whatever the reasons for which the larger bar might resist expansion of representation pro se, it is doubtful that members of the estate planning bar in particular fear that wealthier clients will in significant numbers be inclined to secure their estates to their progeny via LegalZoom or other stratagems of legal self-help. This is because, when employed correctly, the law of future interests can achieve extraordinary tax savings for very wealthy families, especially if the law is used to exploit far into the future certain taxpayer-friendly provisions of the federal estate and gift tax. Indeed, in addition, these same structures often provide asset protection for these families. But key to these advantages are multi-layered plans realized by means of sophisticated

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121. Amicus Curiae Brief of the Real Property Probate & Trust Law Section of the Florida Bar (supporting the decision under review) at 6–8, *Aldrich*, 136 So. 3d 530 (Fla. 2014).

122. *See Aldrich*, 136 So. 3d at 533.

123. Barton, *supra* note 6, at 1268.

124. *Id.*

125. *Id.*

126. *Id.*

and highly complex provisions in wills and other estate planning documents. And given the extended time horizon that is integral to such planning, structures are inevitably bespoke, drafted mindfully, in ways that are likely to work for a given family over multiple generations. Needless to say, creation of such long-term strategies entails not only considerable technical expertise, but also extensive attorney-client consultation.

Thus, whatever the resistance of the larger bar to the expansion of opportunities for litigation pro se, there is another (and better) reason for the estate planning bar to resist the expansion of interpretive largess, at least in its present form.[127] These practitioners have no interest in seeing the law of future interests erode, disintegrating through the application of interpretive largess into a collection of ad hoc holdings. The law of future interests is not only their stock-in-trade. To the extent that their more affluent clients come to them seeking the full realization of their soon-to-be dead hands (often in complex strategies that operate across multiple generations of a family), these attorneys utilize the law of future interests—a language that renders the right to transfer property at death in myriad shapes and forms. Moreover, these attorneys need courts that understand and embrace this language standing at the ready, prepared to enforce the rights and obligations expressed in the present but meant to operate in the future—indeed possibly in perpetuity.

Therefore, for those who appreciate that the law of future interests can make for the realization of testamentary freedom on an extraordinary scale, there are good reasons to resist the expanded application of an ad hoc approach to testamentary intent such as interpretive largess. At the same time, however, the needs of people of modest means endure. The access-to-justice movement is correct: the law as it stands does not serve them. Currently, a law that in its complexity and rigor brilliantly facilitates the needs of the very affluent effectively places the right of testation beyond the reach of people of more moderate means.

If the misgivings of the estate planning bar have merit, the way forward is to ignore these misgivings, at least initially, and extend

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127. However, much of the law of wills has in recent decades been subjected to the liberalizing efforts of the authors of the Restatement and the UPC, note that, to date, this has had only a modest impact on what the estate planning bar thinks is necessary to draft and execute a will properly. And their conservatism is not unjustified. Because testators tend to be peripatetic, at least while living, no one can be certain where a person may be domiciled at death—and what law a particular court might apply to determine the validity and meaning of the will. This uncertainty means that, so long as the rigid and unforgiving elements of the common law are still in place in any state (as they remain to date), then the estate planning bar continues to prepare for the rigors of the old school.

interpretive largess beyond the holographic will so that it is applicable to any lay-created testamentary instrument. That being said, if interpretive largess is to be extended in some ways, it must be circumscribed in others. As an approach to uncovering donor intent, the application of interpretive largess must be limited so that the law of future interests is left intact even as the right of testation is made meaningful to the less affluent.

A comprehensive exploration of the possible ways to circumscribe interpretive largess so that it does not jeopardize the law of future interests is beyond the scope of this Article. However, an obvious constraint would restrict the approach to probate estates of a certain size and smaller, precluding the use of the approach in the construction of wills transferring property valued in excess of some statutory amount, perhaps $250,000 (to be adjusted over time). Limiting application of the approach in this way could also restrict the force of any precedent that emerges applicable only to estates falling under the statutory amount. On the other hand, wills transferring property valued in excess of $250,000 would be subject to the full rigor of the law, whether or not the instrument was the product of self-help. For the testator who dies with a probate estate in excess of the stipulated sum, this person would take the voyage without assistance of counsel at his or her own risk.

Once interpretive largess is restricted to probate estates of modest size, then this approach to the construction of wills can develop into a mature legal doctrine. Commentators and courts can develop an alternative legal methodology—including evidentiary standards—appropriate to the construction of lay-drafted wills. Short of the realization of a mature methodology (or perhaps alongside it), the law could simply embed in interpretive largess certain legal preferences with respect to the construction of ambiguous language—e.g., a preference in favor of present interests and against future interests; and perhaps a presumption against inter vivos gifts and in favor of testamentary transfers.[128] In all events, such preferences should be developed with an eye to the time horizons appropriate to smaller sums of money.

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128. For a lay-drafted instrument that is ambiguous as to whether the language is means to affect an immediate transfer (a gift) or a testamentary one, see *In re Estate of Sargavak*, 216 P.2d 850, 851–52 (Cal. 1950); *In re Estate of Golder*, 193 P.2d 465, 466–67 (Cal. 1948); *In re Estate of Spitzer*, 237 P. 739, 741–42 (Cal. 1925); *In re Estate of Taylor*, 259 P.2d 1014, 1017–18 (Cal. Ct. App. 1953); 1 PAGE ON THE LAW OF WILLS § 5.14, at 204; W. E. Shipley, *Admissibility of Extrinsic Evidence Upon Issue of Testamentary Intent*, 21 A.L.R.2d 319, 324, 326 (1952).