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Statutorily enacted estate planning forms: Development, explanation, analysis, studies, commentary, and recommendations

Beyer, Gerry Wayne, J.S.D.

University of Illinois at Urbana-Champaign, 1990

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STATUTORILY ENACTED ESTATE PLANNING FORMS:
DEVELOPMENT, EXPLANATION, ANALYSIS, STUDIES,
COMMENTARY, AND RECOMMENDATIONS

BY

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THESIS

Submitted in partial fulfillment of the requirements
for the degree of Doctor of the Science of Law
in the Graduate College of the
University of Illinois at Urbana-Champaign, 1990

Urbana, Illinois
UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

THE GRADUATE COLLEGE

MAY 1990

WE HEREBY RECOMMEND THAT THE THESIS BY

GERRY WAYNE BEYER

ENTITLED "STATUTORILY ENACTED ESTATE PLANNING FORMS: DEVELOPMENT, EXPLANATION, ANALYSIS, STUDIES, COMMENTARY, AND RECOMMENDATIONS"

BE ACCEPTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR

THE DEGREE OF DOCTOR OF SCIENCE OF LAW

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† Required for doctor's degree but not for master's.
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DEDICATION

TO MARGARET

With love and gratitude
ACKNOWLEDGMENTS

It would require at least five pages to individually thank all of the people responsible for making this dissertation a reality. There are, however, several individuals and organizations who deserve special recognition for their invaluable assistance and support.

Professor Eugene Scoles, for agreeing to serve as my thesis advisor and for sharing his wisdom and experiences with me; Professor Ralph Reisner, for his support of my application for admission to the University of Illinois J.S.D. program; Dean James N. Castleberry, Jr., for his efforts in helping me obtain research grants and sabbatical leave from St. Mary's School of Law in order to pursue this degree; Professor Aloysius A. Leopold, for his constant encouragement and counsel and for taking over many of my faculty-related responsibilities at St. Mary's while I was in residence at the University of Illinois; The American College of Probate Counsel Foundation, for their generous grant to fund the study reported in Chapter X and the surveys discussed in Chapter XII; Harold I. Boucher, for his undaunting support of statutory will research and assistance in obtaining the ACPC Foundation grant; John Bakke and Marshall Groce, for their support of my ACPC Foundation grant application; The Hugo Anton Engelhardt Law School Memorial Trust Fund, for its grant in support of statutory estate planning forms research; Professors Rodger Findley and Charles Tabb, for serving on my
dissertation final examination committee; Dr. Wayne Ferguson, Bruce Dean, and Bobbie Belzung, for their help in conducting the statutory will study; Ellen P. Kissling, for her highly competent and enthusiastic assistance in all areas of the dissertation preparation; Mark Shomaker, for his excellent proofreading skills; and Valerie Eiben, for her superb research assistance.

I also wish to thank my parents, relatives, friends, and students at St. Mary's University School of Law for their much appreciated patience and moral support.
Statutorily enacted estate planning forms are growing in popularity with state legislatures and the public. This innovative technique has the potential of bringing the benefits of estate planning to a broad range of individuals who, for various reasons, fail to prepare for disability or death. The goals of statutory forms are meritorious but use of the forms raises many real and imagined problems. This thesis attempts to place statutory estate planning forms in proper perspective.

The history of legal forms and the development of statutory estate planning forms are reviewed in Part One. The two major methodologies for statutory forms are analyzed: statutory provisions that may be incorporated by reference into independently prepared documents and fill-in-the-blank forms.

Part Two examines each type of estate planning document that has been the subject of statutory forms: wills (including testamentary trusts), inter vivos trusts, durable powers of attorney, self-designations of guardians, forms relating to critical medical decisions such as living wills and durable powers of attorney for health care, self-proving affidavits, anatomical gifts, and marital property agreements. For each type of document, the history and development of the forms are presented followed by an analysis of how well the form functions and recommendations for improving existing forms.
The effect of statutory estate planning forms is then examined from the perspective of the legal and non-legal communities in Parts Three and Four. A detailed critique of the policies supporting and opposing statutory forms is provided. To obtain data regarding the value of statutory forms, two studies were conducted. The first study was designed to test the effectiveness of the forms by having groups of individuals with varying educational backgrounds complete form wills. The participants were extensively interviewed and the documents carefully reviewed. This study found that there is widespread approval of statutory forms but that the forms did not contain sufficient opportunity for individualization and were often inaccurately completed. The second study was designed to ascertain the reaction of the legal profession by surveying estate planning practitioners and probate judges in states with statutory will forms. Most respondents disapproved of the forms, believed they were in need of extensive revision, and felt that their impact on the legal profession would be limited.

Part Five contains the author's predictions and recommendations. The author believes that there will be an increase in the number of statutorily enacted estate planning forms which will be followed by increased albeit improper use and resulting unanticipated consequences.

The concluding recommendations are based on two premises. First, that the goals of statutory forms are meritorious and, second, that there are valid arguments against statutory
forms. Improved forms need to be developed to provide inter alia greater opportunity for individualization while increasing the use of terminology and formats that improve the average person's ability to understand and complete the form properly. The resulting forms then need to be evaluated to determine if the benefits of the technique are worth the inevitable risk of misuse or abuse.

The author hopes this thesis will be of benefit to the public, state legislatures, and the legal scholar. The author welcomes the opportunity to discuss these matters with interested readers.
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PART ONE
INTRODUCTORY MATERIALS

CHAPTER I
INTRODUCTION

A. THE OBJECTIVE OF ESTATE PLANNING

"Death, as the Psalmist saith, is certain to all, all shall die."²

Death is inevitable.³ One of the most difficult of life's responsibilities is admitting mortality and realistically dealing with death and the dying process.⁴ Attempting to cope with one's prospective death raises many questions. The most significant of these are:

1. How can I not exist and give up life experiences?
2. Is there life after death and what will happen to me if there is an afterlife?
3. What will be the disposition of my body?
4. Who will care for my loved ones?
5. How will my family and friends deal with the sorrow of my death?
6. Who, if anyone, will complete my plans and projects?
7. Will dying be painful?⁵
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Some of these questions cannot be resolved during life - for example, nothing can be done to continue earthly experiences after death and details of afterlife are vague. Fortunately, however, concrete steps may be taken during life to assist individuals in resolving many of these questions.

Estate planning is a process by which individuals make comprehensive arrangements for their property and personal needs which will remain in effect during disability and after death. The ultimate goal of estate planning is to ascertain and effectuate the intent of each individual to the fullest extent possible within legal bounds. Giving individuals tremendous control over the ultimate recipients of their property, the management and use of their property, the tax consequences of their death, the persons to be appointed as guardians of their children, and the disposition of their bodies helps relieve the apprehension of death. In addition, individuals who have planned their estates become "more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop."  

B. FAILURE TO PREPARE ESTATE PLANS

1. Consequences of Dying Without an Individualized Estate Plan

Individuals must take the initiative to acquire comprehensive estate plans, either by themselves or with the aid of an attorney, if they desire to have their intent carried out upon death and procure the other benefits of
estate planning. Failure to take affirmative estate planning steps may have unwelcome consequences. Instead of acquiring a plan customized to meet specific needs and circumstances, generic plans may be imposed on individuals and their families.

The most commonly imposed plan is set forth in each state's intestacy or descent and distribution statute. Intestate succession laws provide recipients for property not governed by a valid will or will substitute. These statutes attempt to do what persons would have done with their estates, had they taken the time to consider and properly formalize their desires, by granting inheritance rights to the surviving spouse, children, and other relatives and listing people to serve as managers of property and guardians of children. These legislatively mandated plans are based on the presumed intent of the average person, not the actual intent of the decedent. Accordingly, these schemes often fail to carry out anyone's true desires; they merely represent a "guess" based on an assumption, supported by public policy, that the decedent would have wanted his property to pass to particular individuals and have certain people serve as executors and guardians. No room exists for the introduction of evidence to show that the decedent actually intended otherwise.

The intestacy statutes apply only to the deceased's probate estate, i.e., property subject to administration. Thus, many of an individual's assets are not included in the probate estate, such as trusts, multiple-party bank accounts,
and life insurance. These will substitutes are potentially powerful estate planning techniques. Unfortunately, they are frequently used in a haphazard manner with little or no thought given to a comprehensive plan. Instead, will substitutes are used or acquired primarily for other reasons; their estate planning function is secondary. For example, joint bank accounts with rights of survivorship may serve as an easy method of transmitting wealth to a surviving spouse. When such accounts are opened, however, the primary concern is usually with the ease of paying bills and making deposits. In a like manner, consider employer-supplied retirement and pension plans. These plans are supplied as an incident of employment and death beneficiary designations are made by most employees without appreciating the impact these contractual arrangements may have on their estate plans.

2. Failure of Most Individuals to Have Estate Plans

Debate exists as to whether intestate succession is a matter of legislative grace or a natural right. The majority view is that positive law grants individuals the right to control the disposition of property with wills and will substitutes. Although state legislatures have granted all competent adults residing in the United States extensive power to control their estates by using wills and will substitutes, most individuals fail to prepare comprehensive estate plans. In fact, the majority of Americans die without even a simple will. There are several reasons why most
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individuals forego the significant benefits of estate planning.

3. Reasons Individuals Fail to Prepare Estate Plans

a. Unaware of Importance

Many individuals are naive about the critical importance of estate planning. They either do not know what will happen to their estates during incompetency and upon death or operate under incorrect assumptions about what will occur. Non-legally trained individuals, as well as some attorneys, often fail to appreciate the estate problems they have and the possible solutions. As one commentator noted: "it has been one of the surprises of my life to observe that a man who has accumulated his wealth through ability and foresight will often be found to have been astonishingly neglectful in providing for those he leaves behind."

Even persons who have made estate plans may not realize the necessity of periodically reviewing them. Common changes in circumstances often impact the effectiveness of once satisfactory plans. Many people fail to recognize that events such as births, deaths, adoptions, changes in property owned, marriages, divorces, estate and tax law amendments, and changes in the state of domicile may cause significant distortion in estate plans and be followed by the frustration of expectations.
b. Indifference

Apathy is a contributing factor to why some individuals die without preparing estate plans. Believing that "you can't take it with you," some people voluntarily forego arranging for distribution of their property. These individuals may realize the importance of estate planning but simply do not wish to take advantage of their ability to exercise dead-hand control over assets, the naming of fiduciaries, and other matters for which advance planning is available.

c. Cost

Obtaining a comprehensive and integrated estate plan is often an expensive process, particularly when extensive use is made of legal counsel. Although some attorneys will provide simple form wills for one-hundred dollars or less, the fees for complete estate plans often run into the thousands of dollars because of the substantial amount of time involved. These expenses place individualized estate plans out of financial reach for many people and increase the reluctance of those with sufficient resources to incur the cost.

d. Time and Effort

Preparation of a comprehensive estate plan requires significant time and effort. Many people are unwilling or unable to devote time to estate planning matters when the pressures of work and family are more immediate.

Even in a simple estate, a significant investment of time is necessary. The following scenario illustrates the time
required. An initial meeting is held with the client which permits the attorney to gather the necessary information to begin work on the estate plan. Additional information is frequently needed from the client, either because the client does not have all of the necessary information and documents or has not organized them in a usable form. Also, the client may need to ponder and decide on various aspects of the plan.

At the second meeting, the attorney and client review a rough draft of the will and other estate planning documents and engage in a more detailed discussion of possible options. For simple estates, this meeting may be the one at which estate documents are signed and other aspects of the plan finalized. For more complex estates, additional meetings may be necessary. If the client's transportation and waiting time are included along with preparation and meeting time, it becomes apparent that estate planning requires individuals to sacrifice sizeable blocks of time and expend considerable effort.

Procrastination is common among individuals who are interested in estate planning and willing, at some point, to go through the process. There is a "natural preoccupation . . . with the accumulation and present enjoyment of their estate and from the illusion of continued life." Because urgency is typically not present, it is very easy to postpone making a will and taking other estate planning steps.
e. Complexity

Estate planning is a complex process which continues to grow in intricacy. For example, relevant tax laws constantly change, the availability of will substitutes grows, the nature of assets change, and the needs of clients and their families expand. Most people do not view this complexity as a stimulating challenge; rather, it tends to discourage them from making estate plans.

f. Lack of Property

Lack of property is a commonly cited reason for failure to have an estate plan. Many people are apparently unaware that there are other reasons to have estate plans besides to designate the recipients of property. Even for small estates, especially if there is a spouse and children, it is important to prevent intestacy so the surviving spouse's ability to deal with household items and other property is not subject to claims of the children. Other significant benefits include the nomination of guardians for minor children upon the simultaneous death of the parents or upon the death of the surviving parent, the ability to control the use and disposition of life insurance proceeds, and the selection of an agent to make property and health care decisions during incompetency.

g. Admission of Mortality

In the past, many people believed that they would not live long after executing a will, even if they were then in
good health. For many, this belief persists today. Thus, individuals procrastinate the preparation of estate plans as a conscious or unconscious defense against admitting mortality. 

"[P]ersonal death is a thought modern man will do almost anything to avoid," and it is easy for individuals to elude such thoughts by postponing (usually indefinitely) the estate planning process.

C. POSSIBLE METHODS OF ENCOURAGING ESTATE PLANNING

Although the advantages of estate planning are great, most people fail to prepare estate plans for reasons ranging from financial to psychological. Many state legislatures have recognized the problems that ensue when their citizens lack estate plans. For the most part, legislative efforts have not been intended to impose limitations but rather to make estate planning techniques "more effective as a means of accomplishing individually formulated objectives." These legislative responses encompass different forms.

1. Expansion of Governmentally Imposed Estate Plans

Many legislatures react to the failure of their citizens to make estate plans by expanding the default estate plan, i.e., the estate plan imposed on individuals who fail to create their own. Some jurisdictions have revised intestate distribution schemes to reflect a more modern view of how property should descend. Others have provided greater latitude to will substitute devices such as multiple-party
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bank accounts, joint and survivorship property, and retirement benefits.

Some of these revisions represent significant progress towards carrying out the individual's intent. For example, Texas recently enacted a simplified procedure for spouses to hold community property in survivorship form. Prior to this change, Texas law mandated a complicated two-step process; failure to demonstrate technical compliance with the precise requirements resulted in the invalidation of the survivorship feature. Changes to intestacy statutes and to other state and federal statutes, however, mandate dispositions that accord with the deceased's presumed, instead of actual, intent. Such changes reflect the government's paternalistic approach in deciding what a person would have intended based upon what society believes the intent ought to have been.

2. Enactment of Statutory Estate Planning Forms

An innovative approach being taken by an increasing number of jurisdictions is to supply, by statute, forms for wills, trusts, powers of attorney, and other estate planning devices, along with instructions for their completion. Like the liberalized provisions regarding will substitutes, statutorily enacted estate planning forms theoretically permit more people to create individualized plans to carry out their articulated intent.
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D. SCOPE OF DISSERTATION

This dissertation provides a comprehensive treatment of statutorily supplied estate planning forms. Chapter II traces the early development of these forms. The chapter begins with an overview of legal forms by discussing their sources, functions and purposes, the potential difficulties which arise when they are used, and how forms originated at common law. After examining the potential benefits of statutorily supplied forms, the development of statutory forms in England and the United States is recounted. Attention then turns to the two major methodologies which jurisdictions have selected to provide statutory forms: terms to be incorporated by reference, either automatically or only upon express language, and fill-in-the-blank forms.

Part Two of the dissertation examines each type of estate planning document which has been the subject of a statutory form. Chapter III covers statutory wills including those containing testamentary trusts. The discussion begins with the English statutory will forms which were enacted in 1925 for incorporation into wills by reference. The two paths taken by American jurisdictions is then presented: the incorporation by reference approach reflected in the Uniform Statutory Will Act and the fill-in-the-blank approach adopted by California, Maine, Michigan, and Wisconsin. Each of these statutes is explained in detail with emphasis on their similarities and differences. The effectiveness of the two approaches is analyzed and the recommendation is made that
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these techniques could peaceably coexist in the same jurisdiction because they are directed towards different audiences.

Chapter IV focuses on the estate planning form that is least often supplied by statute - the inter vivos trust. Early legislative efforts to simplify trust instruments by providing fiduciary powers and dispositive provisions which may be incorporated by reference are presented. The chapter then focuses on the Uniform Custodial Trust Act. After a detailed description of the Act, the merits of the Act are weighed against the purposes for which traditional trusts are created. The recommendation is made that despite some flaws, the Act provides a solid estate planning tool and should be enacted in all states. The potential of statutory fill-in forms should also be seriously considered.

Durable powers of attorney are the subject of Chapter V. The type of language that is needed to create a durable power of attorney is analyzed along with the statutory presumption that exists in a few jurisdictions that all powers of attorney are durable. Attention then turns to the states which provide durable power of attorney forms for general use and the Uniform Statutory Form Power of Attorney Act. The effectiveness of these forms is examined against the background of the purposes for which durable powers of attorney are typically created. The chapter concludes with the recommendation that durable power of attorney legislation containing statutory forms be enacted in all states.
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Chapter VI discusses the development of an individual's right to designate a guardian before the need arises. A wide variety of techniques are used to accomplish guardian self-selection and each one is analyzed with special emphasis on the states which have statutory forms. The effectiveness of these forms is reviewed followed by the recommendation that guardian self-designation forms be enacted by all states. Suggestions regarding the contents of the forms are also provided.

Forms relating to critical medical decisions serves as the topic of Chapter VII. This chapter reviews the two basic techniques which have evolved to permit individuals to exercise fundamental self-determination rights: the living will and the durable power of attorney for health care. Statutory forms are the rule rather than the exception in this area of estate planning. A detailed review of statutory forms is followed by an analysis of the effectiveness of these forms to permit individuals or their selected agents to control medical decisions in accordance with the individuals' intent. Although the forms are of great value, suggestions are made which may improve their structure.

Chapter VIII concludes Part Two with a discussion of other types of statutorily enacted estate planning forms. These forms include self-proving affidavits, anatomical gifts, and marital property agreements.

Part Three of the dissertation examines the effect of statutorily enacted estate planning forms on the non-legal
community. Chapter IX begins with a discussion of the potential benefits of these forms to the individual such as the increased use of estate planning techniques to effectuate demonstrated intent, the lowering of estate planning costs, a reduction in the necessary time and effort, and a greater awareness of the importance of planning for death and disability. Benefits to the family such as the reduced conflict between family members that flows from planned estates, and those to the public such as education, expanded access to the legal system, decreased reliance on commercialized self-help estate planning publications, and conservation of resources are also examined. Attention then shifts to the potential disadvantages of statutory forms such as lack of individualization, improper completion, failure to comprehend the form and its effect, encouragement of evil conduct, the lack of a comprehensive estate plan, and the possible decrease in quality of legal services to the low and middle income classes.

In an attempt to acquire data to determine the effectiveness of statutory forms, an empirical study was conducted to ascertain the ability of individuals to satisfactorily complete statutory will forms. Chapter X reports the results of this study. While the study found that there is widespread approval of statutory will forms, the forms were inadequate because they failed to contain sufficient opportunities for individualization. The study also found that a high percentage of the forms were
inaccurately completed; either the participants did not comprehend the actual disposition made of their property in the will or failed to follow instructions when completing the forms. The study also found that detailed options and instructions may tend to increase the opportunity for error. About one-half of the participants indicated they would consult an attorney prior to completing the form. The chapter concludes with recommendations for improving future empirical studies.

Part Four of the dissertation examines the effect of statutorily enacted estate planning forms on the legal community. Chapter XI begins with a presentation of the potential benefits of the forms such as the enhancement of the legal profession's image, improvement of the quality of legal services, a decreased probability of malpractice, abatement of court congestion, and increased estate planning business. Next, the ostensible disadvantages of the forms are reviewed including potential loss of estate planning business, the violation of attorneys' obligations to the public, an increase in unnecessary probate litigation, the encouragement of self-professed "experts," and damage to the legal profession's image.

To assist in ascertaining the reaction of the legal community, surveys of estate planning practitioners and probate judges in states with statutory will forms were conducted. The results of these surveys, as well as a survey of law students, is presented in Chapter XII. Some of the
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findings were that statutory wills are not accepted by most estate planning specialists, statutory wills currently have and are likely to continue to have only a limited impact on the legal profession, the forms are greatly in need of revision, most statutory wills are admitted to probate although a significant number are rejected, and law students favorably receive the forms. The chapter concludes with recommendations for improving future surveys.

Part Five of the dissertation begins with Chapter XIII's predictions for the future. The author believes that there will be an increase in the number of statutory estate planning forms enacted by state legislatures because the public will continue to demand self-help legal techniques, the legal profession will increase its support of the forms, and it will be politically expedient for legislatures to enact them. This will result in an increased use of statutory forms by the non-legal community accompanied by widespread improper use of the forms and unanticipated results. Accordingly, many changes to the current structure of the forms are likely to occur; for example, increased opportunity for individualization, improved instructions and warnings, and streamlined execution procedures.

The dissertation concludes with recommendations in Chapter XIV. These recommendations are based on two premises: first, that the goals of statutory forms are meritorious and second, that there are many valid arguments against statutory forms. The proper resolution of the issue requires a two-step
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process. First, improved forms must be developed which provide greater opportunity for individualization, use plain understandable language, provide more detailed and effectively presented instructions, warnings, and explanations, and use a friendlier layout. Thereafter, these new forms must be evaluated to determine if the benefits of the technique are worth the risk of the inevitable misuse or abuse that can occur. In addition, other methodologies should be examined such as expanding the scope of a statutory form so that one comprehensive form may be used for both death and disability planning, improving delivery methods such as by using computer software and videotape, and by educating the public about the value of estate planning.
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3. See Weil, Will Draftsmanship and the New York Statutes, 28 N.Y. ST. B. BULL. 60, 60 (1956) ("all people die").

4. Nelson & Starck, Formalities and Formalism: A Critical Look at the Execution of Wills, 6 PEPPERDINE L. REV. 331, 348 (1979) ("It is perhaps true that facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life").


6. See, e.g., W. CASEY, NEW ESTATE PLANNING IDEAS 1 (1958) (estate planning "involves the selection, arrangement and disposition of family assets in a way best calculated, not only to save death taxes, but to fit the needs and the aptitudes of family beneficiaries"); E. GERTZ, T. GERTZ & R. GARRO, A GUIDE TO ESTATE PLANNING ix (1983) ("Estate planning is really a lifetime process of arranging assets (property) so that a person may dispose of them during his lifetime and at his death in a manner that best carries out his desires for his family (or other objects of his bounty) consistent with a minimizing of income, gift, and death taxes, and an easing of transfer."); H. TWEED & W. PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 1 (1959) (estate planning is "the process of working out for a client the best ways of using and disposing of all of his properties during his life and after his death, having in mind his wishes and the welfare of his family"); cf. University of Illinois, College of Law Catalog 1 (1987-89) (attorney should develop "an ability to find solutions to human problems"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of possible advantages to family of dying testate).
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8. See 1 PAGE ON THE LAW OF WILLS § 1.6, at 21 (W. Bowe & D. Parker ed. 1960) ("law leaves it primarily to each person . . . to determine for himself to whom his property shall pass").


10. See, e.g., 1 PAGE ON THE LAW OF WILLS § 1.6, at 20 (W. Bowe & D. Parker ed. 1960) (intestate laws "likely to produce hardships and absurd results" in very small or large estates); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 12 (4th ed. 1987) ("Intestate succession . . . [is] calculated to approximate the probable wishes of most decedents."); 1 PAGE ON THE LAW OF WILLS § 1.1, at 1-2 (W. Bowe & D. Parker ed. 1960) (succession schemes based on "assumption as to the natural affections and probable wishes of the ordinary person, or majority of persons").

11. See, e.g., E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 12 (4th ed. 1987) (intestacy plans are "unlikely to satisfy completely the wishes of any individual"); R. SCHWARTZ, WRITE YOUR OWN WILL 13-14 (1961) ("the disposition provided by law would not represent [decedent's] choice"); Comm. on Fiduciary Serv. for Small Estates & Conservatorships, Prob. & Tr. Div., Proposed Uniform Acts for a Statutory Will, Statutory Trust and Statutory Short Form Clauses, 15 REAL PROP. PROB. & TR. J. 837, 839 (1980) ("lawyers recognize that clients generally are not satisfied with the provisions made by intestacy laws for the surviving spouse. Lawyers also recognize that the necessity of legal guardianships for minors . . . are likewise generally not favored."); cf. In re Watson's Will, 262 N.Y. 284, 297, 186 N.E. 787, 790 (1933) ("No two persons are alike; neither are their wills. Every one has his own peculiar family history, temperament, duties, and responsibilities.").

often used with no legal advice leading to adverse results).

13. See Irving Trust v. Day, 314 U.S. 556, 562 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance"). See generally 1 PAGE ON THE LAW OF WILLS § 3.1 (W. Bowe & D. Parker ed. 1960).

14. See Nunnemacher v. State, 129 Wis. 190, 201, 108 N.W. 627, 629 (1906) ("from the very earliest time, men have been acquiring property, protecting it by their own strong arm if necessary, and leaving it for the enjoyment of their descendants"). See generally 1 PAGE ON THE LAW OF WILLS § 3.1 (W. Bowe & D. Parker ed. 1960).


16. See, e.g., Where There's a Will, There's a Way, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985) ("more than two-thirds of all adult Americans die without wills"); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 13 (4th ed. 1987) ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate."); ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING 1 (2d rev. 1983) ("Three out of four Americans die without a will."). Cf. The Law Commission, Distribution on Intestacy 3 (Working Paper No. 108, 1988) ("about half the population [of England and Wales] die intestate"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of studies and surveys demonstrating high percentage of intestate deaths).

17. See Weil, Will Draftsmanship and the New York Statutes, 28 N.Y. ST. B. BULL. 60, 60 (1956) ("The ignorance of laymen about wills is legendary."). See generally Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103 (1985) (noting that most individuals, even wealthy and politically astute persons such as Howard Hughes and Presidents Lincoln, Jackson, Grant and Garfield, died without wills).
18. R. SCHWARTZ, WRITE YOUR OWN WILL 13 (1961) ("it is an unusual person who is aware of what disposition will be made of his property, should he die without leaving a will").

19. For example, many people believe that all of their property will pass to the surviving spouse upon death. In reality, most state intestacy statutes provide that a significant portion of the estate passes to the children. See, e.g., ILL. REV. STAT. ch. 110½, para. 2-1(a) (Smith-Hurd 1987) (if surviving spouse and a descendant of decedent, one-half of the estate passes to the surviving spouse and one-half to the descendant(s) per stirpes); TEX. PROB. CODE ANN. §§ 38(b) & 45 (Vernon 1980) (intestate's share of community property passes to descendants; intestate's separate property divided between surviving spouse and descendants with personal and real property treated differently); UNIF. PROB. CODE § 2-102 (1982) (if surviving issue of decedent are also issue of surviving spouse, surviving spouse takes first $50,000 plus one-half of balance; if one or more of decedent's surviving issue are not also issue of the surviving spouse, the surviving spouse receives one-half of the intestate estate).

20. See W. AYERS, WHAT YOUR HEIRS CAN NEVER TELL YOU 3 (1943).

21. Id. at 2.

22. See, e.g., ILL. ANN. STAT. ch. 110½, para. 4-10 (Smith-Hurd 1978) (under some circumstances, child born after will execution entitled to share as if parent died intestate); TEX. PROB. CODE ANN. § 69 (Vernon 1980) (divorce after making will voids provisions in favor of ex-spouse); I.R.C. §§ 2001-2210 (West 1989) (potential estate tax liability for estates exceeding $600,000).

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25. 1 PAGE ON THE LAW OF WILLS § 1.6, at 24 (W. Bowe & D. Parker ed. 1960).


27. See, e.g., Perkins & Hughes, Short Forms Legislation for Wills and Trusts, 61 MASS. L.Q. 143, 143 (1976) ("The preparation of wills and trusts has become a more and more complicated business."); Comm. on Fiduciary Serv. for Small Estates & Conservatorships, Prob. & Tr. Div., Proposed Uniform Acts for a Statutory Will, Statutory Trust and Statutory Short Form Clauses, 15 REAL PROP. PROB. & TR. J. 837, 837 (1980) ("widespread recognition that the estate planning process has become too complicated . . . for many persons").


29. See generally Shaffer, Nonestate Planning, 106 TR. & EST. 319 (1967) (discussion of reasons for impecunious person to have estate plan).


31. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 38, at 160 (2d ed. 1953) ("A superstitious prejudice against wills is found in many persons past middle age. Apparently they think that testamentary preparation for disposition of their property at their death may somehow hasten their demise. While this attitude is a foolish one, it frequently cannot be altered by any amount of sound advice."). Perhaps a similar fear prevents people from making arrangements for their own funerals.


34. See, e.g., 1982 Ala. Acts No. 82-399, §§ 2-113 & 8-102 (abolishing dower and curtesy; § 2-113 codified at ALA.
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CODE § 43-8-57 (1982) & § 2-102 (providing for surviving spouse to receive significant portion of estate; codified at ALA. CODE § 43-8-41 (1982)); 1986 Ohio Laws S.B. 248 (increasing share of surviving spouse; codified at OHIO REV. CODE ANN. § 2105.06 (Anderson Supp. 1988)); 1984 Pa. Laws 103, No. 21, § 1 ("Any parent who, for one year or upwards previous to the death of the parent's minor or dependent child, has willfully neglected or failed to perform any duty of support owed to the minor or dependent child or who, for one year, has willfully deserted the minor or dependent child shall have no right or interest under [intestate succession] in the real or personal estate of the minor or dependent child;" codified at 20 PA. CONS. STAT. ANN. § 2106(b) (Purdon Supp. 1988)). Cf. The Law Commission, Distribution on Intestacy vii (Working Paper No. 108, 1988) (report of English Law Commission concluded that "reform [of intestacy laws] should probably be in the direction of giving more to the surviving spouse").


36. Id. § 6-201 (1982) (provisions in insurance policy, employment contract, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, or conveyance regarding at death payment deemed nontestamentary).

37. Id.

38. TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1990) ("At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.").

39. A separate partition of separate property into community property was required before the creation of survivorship rights. See, e.g., Hilley v. Hilley, 342 S.W.2d 565 (Tex. 1961) (community interest of deceased spouse in stock held "as joint tenants with right of survivorship" passed to decedent's child by a former marriage, rather than surviving spouse, because the stock was not first partitioned into separate property).

40. See supra note 34.

41. Although asset distribution matters are typically controlled by state law, federal law is also relevant. See, e.g., Employee Retirement Income Security Act, 29 U.S.C.A. § 1055 (West Supp. 1988) (for pension plan to
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qualify under Act, spouse required to be a significant beneficiary).

CHAPTER II
EVOLUTION OF STATUTORILY SUPPLIED
ESTATE PLANNING FORMS

A. LEGAL FORMS - AN OVERVIEW

"Forms . . . are probably God's gift to lawyers." 2

1. Definition of "Legal Form"

The term "legal form" conjures up an image of a "printed
document with blank spaces to be filled in." 3 Such an
impression is, however, too simplistic. A form is much more.
In the abstract, the form of an instrument refers to its legal
exterior apart from its substance. 4 Specifically, a form is

a prototype of an instrument to be employed in a
legal transaction or a judicial proceeding that
includes the primary essential matters, the
appropriate technical phrases or terms, and any
additional material required to render it
officially accurate, arranged in suitable and
systematic order, and conducive to adaptation to
the circumstances of the particular case. 5

2. Sources of Legal Forms

There are many sources of legal forms and the most common
ones are discussed below.

a. Forms Developed by the User

It is common practice for individuals who regularly draft
documents to develop their own set of forms based on prior
experience. When a new form is needed, previously prepared
documents are used as a starting point for drafting the new instrument.

b. Form Books

Many commercial publishers market multi-volume sets of form books.6 A person preparing a document will search these books to locate the forms which match, as nearly as possible, the form that needs to be prepared. These forms are then used as models or samples when drafting the new instrument.

c. Computer Generated Forms

Many individuals prepare and store forms in computer usable formats such as magnetic diskettes and optical CD-ROM.7 Commercial publishers also market computer programs which assist in form preparation. Some programs supply only the text of forms much like traditional form books.8 Other programs prompt the user to enter relevant information and then use that data to select and print a suitable form, inserting individualized information at the appropriate locations.9 Most of these programs are designed for use by attorneys but others are targeted at the lay community.10 The use of computer generated forms "can save time and improve the quality of documents."11

d. Pre-printed Forms

Commonly used forms, especially those of the fill-in-the-blank variety, are printed by commercial publishers, bar associations, and public service organizations in a ready-to-
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use format.\textsuperscript{12} In addition, some forms, especially those relating to procedural matters, are available from the clerk's office at many courthouses.\textsuperscript{13} Persons wishing to use one of these pre-printed forms need only obtain the appropriate form and correctly complete it.

e. Forms Supplied by the Government

Statutes frequently contain the text of forms which may be reproduced as contained in the statute or be incorporated into documents by reference.\textsuperscript{14} In addition, courts\textsuperscript{15} and administrative agencies\textsuperscript{16} issue forms for many purposes. Users may copy these forms for their own use, purchase them from private publishers, or, in some instances, obtain them directly from the appropriate governmental entity.

3. Functions and Purposes of Legal Forms

Proper use of legal forms by both attorneys and non-attorneys plays "an integral part in the smooth operation of the private and public sectors of American society."\textsuperscript{17} In the modern legal community, there is widespread use of legal forms in areas ranging from abandoned property to zoning.\textsuperscript{18} The use of forms has become so routine that the functions and purposes served by forms are easily overlooked or forgotten.\textsuperscript{19}

a. Reduction in Preparation Time

Using previously prepared legal forms is an efficient method of reducing the time and effort needed to draft a document.\textsuperscript{20} A great amount of time may be saved in routine
matters if little or no original material is required, e.g., a standard mortgage or deed of trust. Even if new material needs to be prepared, such as for a non-standard will or contract, drafting time will be significantly reduced by using a form as a starting point. The drafter, typically an attorney, may then use the time saved to handle non-routine matters.

Considerable clerical time is also saved through the use of legal forms. Pre-printed forms with blanks for the insertion of relevant information permit secretaries to complete forms rapidly. With the development of computers capable of storing and swiftly retrieving practically unlimited quantities of text, the speed at which forms may be assembled and printed has dramatically increased.

b. Lower Cost of Legal Services

As a direct result of the professional and clerical time saved through proper use of legal forms, the cost of legal services may be lowered. This reduction in cost produces widespread benefits. Those who could not previously afford assistance may take better advantage of the legal system; those who can afford to pay higher prices are less burdened by legal expenses.

c. Increased Predictability of Results

Because legal forms contain standardized provisions, the user may safely rely on the content of each form being the same every time that form is used. Care must still be taken,
of course, when adapting the form to particular situations. This uniformity improves the user's ability to confidently predict the results which will automatically flow from the use of the form. Past personal experience with the form, legislation, and judicial decisions assist the user in anticipating whether the form will function as intended.

d. Lessened Opportunity for Error

By using a well-designed form, the drafter decreases the chance of undetected clerical and legal errors.26 "If every paper drawn . . . had to be prepared de novo . . . the possibility of error, such as the accidental omission by a stenographer of a line or two, which would easily pass unnoticed in signing and serving a formal paper, would be greatly multiplied."27

Forms also serve as checklists so essential terms are not inadvertently omitted or misstated.28 For example, form sales contracts typically contain spaces for the names and addresses of the buyer and seller, a description of the item sold, the quantity, the price, the payment terms, the delivery terms, and warranties.29

e. Decreased Opportunity for Litigation

Prudent use of legal forms increases the predictability of results and lessens the opportunity for error. As a consequence, there should be less litigation involving the matters for which forms are used. The user has a greater chance of obtaining the intended result because the probable
consequences of using the form may be predicted with reasonable certainty and errors are less likely to occur or go undetected.

In addition, relieving users from concerns about form allows them to "concentrate on any legal questions which may be involved in the matter of substance to be filled into the blank." The chances of problems arising after it is too late to take corrective measures short of litigation are reduced because greater attention may be given to substantive matters.

Forms also reduce litigation, in some instances, by providing a written record of important facts. For example, if a form contract recites all of the important details of the contract, it will become more difficult for breaching parties to make colorable defenses. Thus, recalcitrant parties may decide to fulfill their obligations without the need for judicial intervention.

4. Potential Difficulties in Using Legal Forms

Although the benefits of legal forms are great, their use is subject to inherent difficulties as well as abuse.

a. Lack of Individualization

Forms are generic in nature; they are not designed with any particular user in mind. A form, especially one which is pre-printed with blanks to be filled in, may be difficult to customize to the facts of a specific situation. No two cases are exactly alike and a form may be too rigid to permit the individualized adjustments needed in a particular situation.
b. Improper Selection

The user of a form must exercise great care in selecting the proper form because use of the wrong form could have disastrous effects on the legal transaction involved. For example, if a contract form for an unconditional sale is used rather than one with a thirty day return privilege as intended by the buyer, the legal rights of the parties will be uncertain and litigation may be needed to determine and enforce the true agreement of the parties.

Improper selection (e.g., pulling the wrong form from a file) could result from mere inadvertence or haste. Improper selection may also be due to ignorance on the part of the person selecting the form as to which form should be used. This may occur when a non-lawyer or an attorney unfamiliar with the area of law involved, leafs through a form book and picks a form that to the untrained eye appears proper but which yields unexpected results. Selection problems also arise because of the differences in law between the states. A form meeting the requirements of one state may fail to meet the requirements of another. Likewise, use of a form that has been employed for years with excellent results may suddenly become risky if the user is unaware of recent legislative changes or judicial decisions. These problems are exacerbated when individuals without legal training attempt self-help by selecting and using forms.
c. Improper Completion

A form, no matter how simple, may be improperly completed. Improper completion often stems from a lack of understanding on the part of the person completing the form as to what is required, especially if that person is not legally trained. Reports of inapt completion of forms by non-attorneys date back hundreds of years. For example, a 1677 English case reports Sheriffs "who being [required] to make a return, looked into some book of precedents for a form; and finding the names of John Doe and Richard Roe put down for examples, made their return accordingly, and took no care for [the] true [parties]." This error resulted in the plaintiff's summary judgment being set aside.

Improper completion may also occur subsequent to the document's execution if spaces originally left empty are filled in. This could be done by the user who is unaware of the consequences of altering the original document. Alternatively, the completion could be performed by someone bent on obtaining an advantage by improper means.

Inappropriate completion defeats the user's intent by creating problems that are often difficult and costly to correct. In some situations, discovery of errors will come so late that a remedy will not be available; for example, a will or other document may lack necessary elements which are imposed by law for the document's validity.
d. Encouragement of Laxity

Using prepared forms, for the most part, requires less effort and is faster than drafting a form entirely from scratch. Desire for increased efficiency may cause some form users to become careless and lazy in their use of forms. A form may be used because attorneys do not "care to take the time to think through a transaction and develop [their] own paperwork"\(^4\) rather than because it is best suited to the task at hand. Similarly, a form may be used without sufficient research into the validity and effect of the form under current case and statutory law.\(^4\) Naturally, such laxness will often lead to undesired results.

e. Potential for Abuse by Attorneys

Despite their specialized training, attorneys may improperly select and complete forms or may be too hurried to ascertain whether a particular form is appropriate and to make the required changes.\(^4\) Proper selection of a form requires detailed knowledge of substantive law and facts of the particular transaction. Lawyers may misplace their trust in forms merely because they have "the halo of publication."\(^4\) Such lack of ordinary and reasonable care may subject lawyers to malpractice liability. In addition, the bar may discipline attorneys for failing to act with reasonable diligence.\(^4\)

Prepared forms also give unscrupulous attorneys a technique for taking advantage of naive clients. Clients who need forms as part of the requested legal services may not
realize that their attorneys are merely using forms taken from a book or computerized system that required little or no original effort to prepare.\textsuperscript{45} Attorneys may bill for their time as if the documents had been drafted especially for these clients and the clients may pay their attorneys without suspecting the fraud perpetrated upon them.\textsuperscript{46}

\textbf{f. Promotion of Unauthorized Practice of Law}

The centuries old practice of selling legal forms to the non-lawyer public may promote the unauthorized practice of law by non-attorneys.\textsuperscript{47} The mere act of printing or selling a legal form to a non-attorney does not usually constitute the unauthorized practice of law if no oral or written advice is given.\textsuperscript{48} Significant problems may arise, however, if oral or written advice for completing the form accompanies the sale.

The propriety of non-lawyers selling self-help "kits" to non-legally trained individuals has been frequently litigated.\textsuperscript{49} If the advice accompanying the form is general and not directed to any specific person, such as the sale of a form book containing instructions, most courts hold that the sale is not the unauthorized practice of law.\textsuperscript{50} On the other hand, a few courts hold that these types of sales are improper.\textsuperscript{51} If personalized instructions or advice is given by the non-lawyer, American courts uniformly hold that such conduct constitutes the unauthorized practice of law.\textsuperscript{52}
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5. Origin of Legal Forms at Common Law

Standardized legal forms first appeared in England after the Norman Conquest of 1066. Before examining how the use of forms originated, it is important to be familiar with the general background against which legal forms were first used.

The ruggedness and uncertainties of life in England before the Norman Conquest prevented the growth of a unified and stable government. The law was composed primarily of local customs and traditions which had been followed for centuries. These local rules were occasionally modified by the Dooms (statutes) of the Anglo-Saxon or Danish kings.

The Norman Conquest was probably the most significant event in the development of English law. It has been stated that it was "a catastrophe which determined the whole future history of English law." Perhaps the most important effect of the Conquest was the introduction of a strong centralized government. To help consolidate power, the Norman rulers and their successors in the twelfth and thirteenth centuries strove to concentrate judicial power.

The desire to centralize the justice system resulted in the development of writs. A plaintiff who wished to bring an action in a royal court was required, in most instances, to purchase a writ from the King's Chancery. A writ was a type of letter, document, or order specifying the alleged injury and directing the sheriff to summon the defendant to ascertain why the plaintiff should not obtain the relief sought.
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The writ system rapidly led to the development of standardized forms. "As the same sort of complaint came time and again before the clerk in the Chancery he drew up a common form, something he, or some lesser official, could easily copy with the alteration of a name or a word here and there."63 The writs varied in length but many were short and followed a very rigid format containing blanks in which the clerk would insert the names of the plaintiff and defendant as well as their village or county.64 "Once a writ had been used it became a precedent for the future, and every lawyer would possess a precedent book or register of writs with selections of standard forms, based on the usages of Chancery."65

The importance of legal forms became more critical as the writ system evolved. Writ usage grew most quickly between 1154 and 1272.66 Originally, new writs were drafted as new problems came to the attention of the Chancery; the "original writs were designed to regulate justice, not to limit it."67 As time passed, the land-rich barons became concerned with the expansion of the jurisdiction of the King's justices; they feared these justices would make unfavorable decisions in actions trying title to their land.68 Beginning in approximately 1259, the judges, apprehensive of these wealthy barons, became cautious and reluctant to create new writs or elaborate on old ones.69

Because the ability to modify old writs was greatly restricted, parties were required "to fit their problem into a formula that had been developed [perhaps] centuries earlier
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for very different circumstances." The responsibility for choosing the correct writ was burdensome. Failure to use the proper writ would cause the plaintiff's cause of action to fail and would subject the plaintiff to a fine for bringing a false claim. The same result could occur from slight errors such as omitting just one syllable from a writ. Accordingly, tremendous uniformity was required in using legal forms and attorneys had to take great care in selecting and preparing the forms.

Because deviation from the established forms was often fatal to the cause of action, heavy reliance was placed on form books, especially by those untrained in the law. The forms found in these books and the law surrounding them formed "the basis of the two great medieval treatises of Glanvill and Bracton, and their study was the first occupation of a young law student on entering an inn of Chancery." However, reliance on form books "except in the most routine cases, gave only the illusion of security." Forms begat more forms and the possibility of error increased. The likelihood of mistake was also heightened because most forms were drafted not by skilled English lawyers, but rather by court clerks and scriveners.

In the 1700's, as literacy and the availability of printing facilities increased, forms were published not only for the legal community but also for the lay community. The publication of "self-help" legal books, complete with forms, became widespread. These books claimed to contain everything
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needed to handle a person's legal affairs. Neither the legal community nor polite society, however, held these self-help publications in high regard.

6. Legal Forms Come to America

For a majority of those who came to America, the recollection of English law was not a pleasant one. It was the remembrance of a legal system mired in precedent, antiquity, and corruption. For laymen who had approached the law its most bristling features were expense and delay, costly delay amounting to a denial of justice.

Members of the legal profession were reluctant to come to America and give up secure city practices for ones on the frontier. In addition, American settlers were dissatisfied with conditions in England and lawyers were partially to blame. Lawyers were unwelcome in many parts of the New World and sometimes were outlawed or enjoyed only limited rights and freedoms.

Despite the scarcity of attorneys in early America, legal forms rapidly made the transatlantic voyage. Basic forms for land conveyances and contracts were probably used, even if by memory, from the time the first settlers arrived. Although following many aspects of the common law, "[t]here was a tendency in the earliest days of colonial New England for briefer and less formal statement than was customary in English documents of the same period." As the population of the colonies grew, so did the number of attorneys and their need for forms. Recognizing this, the General Court of the Massachusetts Bay Colony voted in 1647 to obtain two copies of
several English form books. For much of the remainder of the seventeenth century, English form books provided the basis for the majority of forms used in America.

In the eighteenth century, the colonists began to author, edit, and publish their own form books. One of the first domestic form books entitled Scrivener's Guide was edited by a New Jersey attorney. This work was published in 1797 and contained a variety of business forms. A wide variety of form books were subsequently released in the nineteenth century; some directed to attorneys while others sought the lay market.

The American form books were simpler and easier to use than their English counterparts. Some form books began to use a numbering system so that clauses could be selected and assembled in a mechanical fashion. Although more easily used, these form books contained awkward language and were "designed to facilitate agreement rather than understanding, calculated to impress laymen and lay lawyers how easy it would be to talk like a lawyer without actually being one."

The original tendency to eliminate the excess verbiage of the English forms did not last long. In the early 1800's, the length and size of form books grew. The "awful dread of leaving something out" caused the popularity of shorter forms to decrease in favor of longer forms using all-inclusive language.

As the size of the Union expanded, so too did the market for form books. This growth was accelerated by states that
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enacted codes containing similar provisions. Thus, forms prepared for use in one state would have utility in another.\textsuperscript{97} In addition, form books continued to be published for both the legal and lay communities.\textsuperscript{98}

Forms and form books became and are still a staple of the American legal practice. However, form books continue to receive extensive criticism as being "vast, unselective depositories"\textsuperscript{99} which preserve "old formula and old punctuation."\textsuperscript{100} The mere fact that a form had been used before appears to comfort those using it even though the users may be ignorant of the form's actual content and the likely effect of its use.\textsuperscript{101}

The next section examines the feasibility of statutorily enacted forms as a viable method of improving the condition of American forms.

B. GROWTH OF STATUTORILY SUPPLIED LEGAL FORMS

1. Benefits of Statutorily Supplied Forms

Legislative intervention in the area of legal forms has many potential benefits. Statutorily supplied forms are capable of fulfilling the general functions and purposes of legal forms more effectively than individually or commercially prepared forms. Additionally, statutory forms can bring other benefits to both the legal and non-legal community.
a. Better Effectuation of General Functions and Purposes of Forms

Taking advantage of forms provided by statute further carries out the reasons for using forms discussed earlier in this chapter. Initial drafting time is eliminated because the text of the form is supplied by the statute. Thus, there is a greater reduction in preparation time than with a non-statutorily supplied form. This savings of time should translate into even lower costs for legal services.

Statutory forms greatly increase the predictability of results because the requirements of the statute regarding certain formalities are satisfied. A person using the form knows from the outset that the form of the document is correct. In addition, the statute supplying the form may mandate the results which flow from the use of the form. Having the language supplied by the statute further reduces the opportunity for error and, coupled with the increased predictability of results, leads to a decrease in litigation.

b. Improved Currentness of Form

A practitioner may have hundreds or perhaps even thousands of forms on file. After a legislative or court session, numerous changes may be necessary to the forms and, even if the attorney has an established procedure for updating forms, there is no guarantee that all of the appropriate changes will be made. Likewise, if forms are purchased from a commercial publisher, there is no assurance that all the necessary or advisable changes were incorporated into the
forms before they were placed on the market. However, when statutorily supplied forms are available, the user may readily determine if the most current version of the form is being used simply by checking the most recent statute.

c. Increased Understandability of Form

Legal forms have a reputation for being difficult to comprehend. Although legislatively enacted forms are not necessarily more understandable than those that are privately prepared, statutorily mandated forms have the potential of supplying simple and straightforward language. In recent years, many jurisdictions have enacted statutes which either contain easily understood forms or require the language of certain privately prepared forms to be in "plain" language. These statutes result in forms which are more readable for those without, as well as with, legal training.

d. Greater Accessibility to Legal System

Non-attorneys may procure statutorily supplied forms quickly and easily, often without seeking the advice of an attorney. Commercial publishers promptly print the forms and make them available for purchase, public service organizations distribute them for free or for a nominal charge, and some enabling statutes require the forms to be printed and distributed at government expense. This increased accessibility to legal forms permits many individuals to take advantage of various aspects of the legal system that may otherwise be unavailable to them.
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2. Statutorily Supplied Forms at English Common Law

The use of statutorily supplied forms evolved swiftly at English common law. Early statutes provided exacting requirements for the contents of various forms. For example, a 1235 statute mandated some of the requirements of a writ to regain possession of land that had previously been awarded by the court to the plaintiff. As time passed, statutes appeared which gave a fixed meaning to certain language in instruments such as deeds. It was not long until the statutes actually provided the exact text of certain forms. One of the first of these was the Statute of Quo Warranto enacted in 1278. This statute provided the precise text of various writs requiring private court owners to demonstrate their authority and to show that the authority was being exercised in the public interest.

The use of statutory forms became widely accepted under the common law consistent with the common law's great reliance on precedent. In fact, forms, both statutory and non-statutory, were often referred to as "precedents." The subject matter of the statutory forms was very extensive covering, for example, notices from surveyors to remove nuisances, convictions for stealing vegetables, and mortgages.

3. Statutorily Supplied Forms in the United States

Most of the states adapted their law from the English common law so it is not surprising that statutorily supplied
forms are found in the early legal history of the United States. For example, in the early 1600's, the Massachusetts Bay Colony enacted a statutory form of summons for debt on a bond.\textsuperscript{121}

As America grew, statutory forms became commonplace, especially those for acknowledgments,\textsuperscript{122} deeds,\textsuperscript{123} and mortgages.\textsuperscript{124} Following this trend, the American Bar Association in 1882 recommended to the state legislatures that they adopt uniform statutory acknowledgment forms to improve the transfer of real property.\textsuperscript{125}

The twentieth century has seen the continued growth of statutory forms. Commentators frequently praise the potential benefits of statutory forms. For example, one writer stated in 1926 that

\begin{quote}
\textit{it should be feasible, and it would certainly be a boon to the profession to have official blanks for all forms in common use revised by the Attorney General at the end of each legislative session and issued through the clerks of court and recording officers.}\textsuperscript{126}
\end{quote}

The subject matter covered by statutorily enacted forms has expanded and now encompasses areas where private drafting and commercial form books once had a monopoly. One of the most significant of these areas is estate planning.

\section{C. Emergence of Statutorily Supplied Estate Planning Forms}

Legislatures have used two basic methods to provide estate planning forms by statute. This section explains and briefly evaluates these methods. Detailed analysis of
specific types of estate planning documents is reserved for later chapters.

\textbf{1. Terms to be Incorporated by Reference}

Incorporation by reference is a method of considering extraneous written material as if it were set forth in a document although the material is not physically a part of the document. For material to be incorporated by reference, the following conditions must be satisfied:

1. the material to be incorporated must be in writing;
2. the incorporating document must demonstrate the maker's intent to incorporate the extraneous writing;
3. the incorporated material must be in existence at the time the document is executed; and
4. the document must identify the incorporated material with sufficient specificity so that no other material reasonably fits the description.\textsuperscript{127}

This technique has been adopted by many jurisdictions to pull statutory language into estate planning documents as well as for other purposes. A complete form is not provided by the statute; instead, the statute merely supplies the provisions to be incorporated by reference. Two considerably different
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approaches have been taken by legislatures in providing forms to be incorporated by reference.

a. Automatic Incorporation

Under the automatic incorporation approach, the statute provides that certain provisions are part of a particular type of document unless the document expressly provides to the contrary. The main advantage of this technique is that it completes the interstices of instruments by "establishing definite rules to cover matters not settled by the instrument." Because the statutory provisions are automatically incorporated into the document, the drafter does not need to take action to include them. Thus, the provisions provide effective gap-fillers when the drafter has not given thought to the matters covered by the incorporated provisions. This approach is not a true incorporation by reference because there is no demonstrable express intent of the instrument's maker to include the provisions. Instead, the incorporation is based on implied intent, that is, the statute reflects a presumption that the maker would have incorporated these provisions had he thought about them.

Although the certainty, predictability, and reduction of litigation that may result are commendable, the wisdom of this approach is debatable. Implied incorporation by reference potentially defeats the intent of the maker of the document; the maker may not have included these provisions had they actually been considered. In addition, this method makes
it difficult for someone to know the true contents of any document being executed because a thorough knowledge of all statutes would be required to determine whether any of them were being impliedly incorporated. Only after acquiring this knowledge could steps be taken to eliminate undesired provisions.\textsuperscript{131}

\textbf{b. Express Incorporation Required}

Other statutes reflect an opposite and more traditional approach by requiring an express incorporation of the statutory provisions.\textsuperscript{132} For documents to contain the statutory material, they must contain language which evinces the intent to incorporate and identifies the material to be incorporated with reasonable certainty.

If express incorporation is required, it is less likely that material will be deemed a part of an instrument without the person's actual intent. A conscious effort to incorporate is required because specific language must be in the instrument. A potential weakness of this approach, however, is that incorporation language may be included in the boilerplate of a form that was not read or, if read, not understood. Thus, no informed consent may actually be given to the incorporated provisions.

\textbf{c. Suitability of Incorporation by Reference}

Incorporating statutory provisions by reference can "simplify the task of drafting wills and trusts by eliminating the need for spelling out . . . boilerplate provisions that
take so many pages of single-spaced type." The material to be incorporated may be complex and lengthy or it may be relatively short. Because there is no difference in the amount of effort needed to incorporate long or short provisions, incorporation by reference allows precision as well as rapid document preparation.

Incorporation by reference, however, creates interpretation problems. At least two writings, and perhaps many more, need to be examined to give effect to the intention of the person who executed the document. This may lead to ambiguity and eventually to unanticipated results.

In addition, the person incorporating the statutory material is less likely to have actually read, studied, and understood the provisions. It may be advisable to set out all material in the instrument so the person executing the document is aware of its entire contents. In addition, it might be more convenient for anyone who deals with the document to have all of its terms readily available. Although everyone is presumed to know the law, the presumption is likely to be an unrealistic one in this situation.

Other concerns also cast doubt on the advisability of using incorporation by reference. For example, the statutory provisions which are incorporated may be amended and the effect of the amendments may cause uncertainty -- does the incorporation by reference freeze the material as it existed at the date of incorporation or are amendments to be considered? Another possible problem is the effect of the
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instrument under the laws of another state because the effect of the incorporated material may differ considerably between jurisdictions. 139

2. Fill-in-the-Blank Forms

The second technique utilized by legislatures to provide statutory estate planning forms is the enactment of model fill-in-the-blank forms. 140 These statutory forms, sometimes supplemented with instructions, definitions, and other information, are ready to be completed by the user. As with incorporation by reference, there are valid reasons in support of and in opposition to the use of this method.

A fill-in-the-blank form, especially if it is accompanied by extensive straightforward directions and warnings, 141 may be easily understood and completed by the average non-legally trained person. It will also be more easily understood than a form in which provisions are incorporated by reference because the document is self-contained. 142 "There is less danger of wrong clauses finding their way into a [document] if one has before him an instrument that is complete in itself, that can be read from beginning to end without having to refer to other documents." 143

Conversely, it may be unwise to place a fill-in-the-blank form in the hands of a non-legally trained person. Even if adequate warnings are found on the form, there is no assurance that the user will read and comprehend them. 144 The forms would be widely available and could easily be copied or
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purchased. Thus, they could be completed without legal advice and perhaps lead to unintended results.145 If the user left spaces blank, they could be filled in later in an unauthorized manner.146 Fill-in-the-blank forms also limit the user's options to those provided on the form. If too many choices are available, however, the form could get lengthy and burden the user with unwieldy terms.147
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3. WEBSTER'S NEW WORLD DICTIONARY 548 (2d College ed. 1982) (ninth definition of "form").

4. W. AGGS, WHARTON'S LAW-LEXICON 368 (1911).

5. 5 THE GUIDE TO AMERICAN LAW 278 (1985). See also BLACK'S LAW DICTIONARY 586 (5th ed. 1979) (substantially identical definition).


8. These types of programs are referred to as "document modeling software." Moss, There's a PC on My Desk, A.B.A. J., Oct. 1988, at 26; see Software Express Catalog, at 4 (1989) (over 100 legal forms and documents on disk for $7.50).

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schedules); SPECIALITY SOFTWARE (198_) (forms for Chapters 7, 11, 12, & 13 bankruptcies).

10. See NOLO PRESS, WILLWRITER (1985) ("a computer program and accompanying manual which permits the average person to effectively prepare his or her own legal will" Id. at manual 1.); Software Express Catalog, at 4 (1989) (computer "forms might be useful in many simple situations and could help you lower your legal bills when used under an attorney's guidance").


12. See Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973) ("The printing and sale of legal forms . . . has been a practice over the years as a convenience.").

13. See id. (noting that "forms are sometimes available from the courts, as in the probate of estates and in the filing of small claims").

14. See, e.g., CAL. PROB. CODE § 6240 (Deering Supp. 1988) (will forms); TENN. CODE ANN. § 35-50-109(a) (1984) (enumeration of fiduciary powers which may be incorporated by reference into a will or trust); TEX. PROP. CODE ANN. § 5.022 (Vernon 1984) (form for conveyance of a fee simple estate in real property with a covenant of general warranty).

15. See, e.g., 2d CIR. R. § 27 (notice of motion form); 6th CIR. R. 28 (certificate of death penalty case); ILL. SUP. CT. R. 94 (form of oath, award of arbitrators, and notice of award); 59 OHIO ST. B.A. REP. 450 (1986) (detailed set of standard probate forms promulgated by Ohio Supreme Court).


19. See The Legal Blank, 30 LAW NOTES 124 (1926) ("Few lawyers realize how deeply they are indebted to that humble assistant, the legal blank.").

20. See The Ass'n of the Bar of the City of N.Y., Legislative Memorandum in Support of . . . Creation of a Statutory
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Form of Will 1 (Mar. 2, 1979); Tilton & Tilton, Basic Considerations in Designing Forms, PRAC. LAW., July 15, 1980, at 55, 56 ("A lawyer who uses standard forms . . . will inevitably save some time . . ."); The Legal Blank, 30 LAW NOTES 124 (1926) ("If every paper drawn . . . had to be prepared de novo the labor . . . involved would be surprisingly great . . .").

21. See The Legal Blank, 30 LAW NOTES 124 (1926) ("surprisingly great" amount of labor involved if each document prepared de novo).


25. Tilton & Tilton, Basic Considerations in Designing Forms, PRAC. LAW., July 15, 1980, at 55, 56 ("A lawyer who uses standard forms . . . can depend on the . . . text to be always . . . the same."); see also 11 THE GUIDE TO AMERICAN LAW 3 (1985).

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27. The Legal Blank, 30 LAW NOTES 124, 124 (1926).

28. See, e.g., P. BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE ch. 19, § B (1987) (forms used as references to ensure essential element not omitted); Tilton & Tilton, Basic Considerations in Designing Forms, PRAC. LAW., July 15, 1980, at 55, 56 ("Standard forms also increase a lawyer's efficiency because they serve as a checklist so that nothing vital is omitted.").


31. See 11 THE GUIDE TO AMERICAN LAW 3 (1985) ("forms play a prominent role in establishing the existence of facts that might later become subject to legal controversy").


33. See Fejfar, Insight into Lawyering: Bernard Lonergan's Critical Realism Applied to Jurisprudence, 27 B.C.L. REV. 681, 701 (1986) ("In many instances the lawyer has not researched the law relating to the particular form which she intends to use.").

34. See E. LEE, STANDARD LEGAL FORMS v (1919) ("each state may have its own special forms . . . and the reader should always seek for these first").

35. See Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973) (discussing danger of legal forms to public because "law changes from time to time regarding the subject matter of such forms, not only by the change of the statute on the subject but in court opinions").

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38. Id.

39. See Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966) (signatures of witnesses on self-proving affidavit form did not remedy lack of witnesses' signatures on will despite clear intent for document to be will).


41. See 19 A. LEOPOLD, G. BEYER & D. PARK, WEST'S LEGAL FORMS v (2d ed. 1986) ("It is the sincere hope of the authors that the use of the forms will not be attempted until the requirements of the subject matter and needs of the client are clearly understood.").

42. See AMERICAN JURISPRUDENCE LEGAL FORMS v (2d ed. 1971) ("impossible to provide legal forms which an attorney could copy verbatim and which would cover the exact fact situation with which he is confronted").

43. 1 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS ix (1988) (noting that forms are good tools for good lawyers, not substitutes for good lawyers). See also Fejfar, Insight into Lawyering: Bernard Lonergan's Critical Realism Applied to Jurisprudence, 27 B.C.L. REV. 681, 701 (1986) (lawyers use form books on basis of belief which is not due to imminently generated knowledge); cf. P. BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE ch. 19, § B (1987) (forms may appear in form books because they were unclear and thus were the subject of litigation and judicial interpretation).

44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) ("A lawyer shall act with reasonable diligence ... in representing a client").


46. An attorney's fee must be reasonable. Factors to be considered include the time and labor required, the
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48. See, e.g., Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973) ("We perceive no harm to the public . . . in having printed legal forms . . . available, provided they do not carry with them what purports to be instructions on how to fill out such forms or how they are to be used"); Palmer v. Unauthorized Practice Comm. of the State Bar of Tex., 438 S.W.2d 374, 376 (Tex. Civ. App. - Houston [14th Dist.] 1969, no writ) (court implied that sale of lease and deed forms by stationery store is permitted; court held that sale of will form coupled with various attachments was unauthorized practice of law because form was almost will itself).

49. See generally Note, Unauthorized Practice of Law: Sale of Will Forms, 23 OKLA. L. REV. 86 (1970); Annotation, Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law, 71 A.L.R.3d 1000 (1976).

50. See, e.g., New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459 (1967) (sale of book by non-lawyer to general public containing approximately 55 pages of text and 310 pages of forms and instructions held not to constitute the unlawful practice of law); Oregon State Bar v. Gilchrist, 272 Or. 552, ____ , 538 P.2d 913, 919 (Or. 1975) (publishing and selling divorce kits not the practice of law); In re Thompson, 574 S.W.2d 365, 369 (Mo. 1978) (sale of divorce kits not unauthorized practice of law).

51. See, e.g., Florida Bar v. Stupica, 300 So. 2d 683, 687 (Fla. 1974) (sale of divorce kit containing numerous forms coupled with instructions and advice held unauthorized practice of law; limited by Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1193-94 (Fla. 1978) in which the court retreated from its firm position by holding that the sale of sample forms and instructions would be permitted under certain circumstances); Palmer v. Unauthorized Practice Comm. of the State Bar of Tex., 438 S.W.2d 374, 377 (Tex. Civ. App. - Houston [14th Dist.] 1969, no writ) (sale of will forms along with attachments
and advertisements that gave instructions and warnings constituted practice of law).

52. See, e.g., Florida Bar v. Teitelman, 261 So. 2d 140, 142-43 (Fla. 1972) (completion of real estate closing documents as practice of law); Brammer v. Taylor, 338 S.E.2d 207, 212 (W. Va. 1985) (advising another person how to draft a will is practice of law). But see Florida Bar re Amendment to Rules Regulating Fla. Bar, 510 So. 2d 583, 596 (Fla. 1987) (court approved definition of unlicensed practice of law which states that it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communications to assist individuals in the completion of legal forms approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the form(s) and inform the individual how to file such form(s).

The court also held that "nonlawyers can give information regarding routine administrative matters."). See generally Hendricks, Panel of Lawyers Investigating Firm's Mail-Order Bankruptcy Aid, San Antonio Express-News, Jan. 22, 1990, at 6-A, col. 2 (state and local unauthorized practice of law committees investigating Legal Alternatives, Inc., a firm which prepares bankruptcy forms from questionnaires completed by clients).

53. 11 THE GUIDE TO AMERICAN LAW 3 (1985).

54. A detailed history of the development of English law is beyond the scope of this work. For comprehensive treatments of English legal history, see, e.g., W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1923); A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS (4th ed. 1958); F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898).

55. See A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 9-10 (4th ed. 1958) (environment was conservative and harsh; superstitious beliefs were widespread; there were constant Danish invasions).

56. Id. at 10.

57. Id.
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60. 11 THE GUIDE TO AMERICAN LAW 3 (1985).


63. Id. at 294.

64. 11 THE GUIDE TO AMERICAN LAW 3 (1985).

65. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 80 (1971).


67. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 80 (1971); see also A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 296 (4th ed. 1958) ("Bracton certainly maintained in 1256 that if a new wrong was done, a new writ should be invented."). See generally 11 THE GUIDE TO AMERICAN LAW 3 (1985).


69. See, e.g., J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 80 (1971); A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 299 (4th ed. 1958); 11 THE GUIDE TO AMERICAN LAW 3 (1985).

70. 11 THE GUIDE TO AMERICAN LAW 3 (1985).

71. See, e.g., J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 80 (1971); A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 300 (4th ed. 1958).

72. See D. MELLINKOFF, THE LANGUAGE OF THE LAW 174 (1963) (quoting Bracton's maxim, as translated, that "he who fails in a syllable fails in his whole cause").
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73. See id. at 198 ("For the untrained there was a necessary and uncritical dependence upon the form books.").

74. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 81 (1971).


76. Id. at 183, 194.

77. Id. at 195.

78. Id. at 198.

79. Id. quoting JACOB, EVERY MAN HIS OWN LAWYER, tit. p. (6th ed. 1765). Cf. N. DACEY, HOW TO AVOID PROBATE (1966) & N. DACEY, HOW TO AVOID PROBATE II (1983) (form wills and trusts with comments that they are legally correct and will serve reader's purposes well).


81. Id. at 201.

82. Id. at 208.

83. Id. at 208-9 (early constitutions and statutes of some colonies outlawed lawyers or prohibited them from serving in legislatures).

84. Id. at 216.

85. Id. at 213.

86. Id. at 220.

87. Id. at 232.

88. Id.

89. Id. at 233.

90. Id.

91. Id. (referring to PRECEDENTS iii-iv (Reading, Getz ed. 1822)).

92. Id. (reproduction of form from an 1801 Maryland form book, at 236).

93. Id. at 237.

94. Id. at 238.
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95. Id.
96. Id. at 275.
97. Id.
98. Id. at 276-77.
99. Id. at 277.
100. Id.

101. Id. at 277-82 (form books contain forms which do not accomplish intended purpose).

102. See supra § A(3).

103. See, e.g., Note, The Statutory Will: A Simple Alternative to Intestacy, 35 CASE W. RES. L. REV. 307, 307 (1984) (statutory will as "legislative attempt to ease the increasing cost and complexity of testamentary planning"); Perkins & Hughes, Short Forms Legislation for Wills and Trusts, 61 MASS. L.Q. 143, 143 (1976) (one of the aims of Probate Committee of Massachusetts Bar Association in proposing short form will and trust clauses was to reduce the costs of preparing wills and trusts).

104. See The Legal Blank, 30 LAW NOTES 124 (1926).

105. Id. ("no practitioner can with safety rely on the fact that a new form has been issued to meet a statutory change or that he has that form").

106. See, e.g., Ferry & Teitelman, Plain Language Laws: Giving the Consumer an Even Break, 14 CLEARINGHOUSE REV. 522, 522 (1980) ("Few have the stamina to wade through a standard form contract; fewer still have the education to understand one."); 23 A. LEOPOLD, G. BEYER & D. PARK, WEST'S LEGAL FORMS § 104.1, at 727 (2d ed. 1986) ("For many years consumer contracts have been almost impossible for the average consumer to understand."); Printed Forms, 93 JUST. PEACE & LOC. GOV'T REV. 246, 246 (1929) ("We live in an age when printed forms are bewildering in their number and complexity.").


108. See, e.g., CONN. GEN. STAT. §§ 42-151 to -158 (Supp. 1987) (certain consumer leases, loans, and purchases of
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110. The State Bar of California sold 175,000 statutory will forms in the first year after the California statute was enacted. The forms cost $1.00 each plus a self-addressed stamped envelope. See California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7. Hospitals and medical organizations frequently distribute anatomical gift donor cards following the statutory form. Likewise, many groups working for the rights of the elderly or terminally ill distribute statutorily provided directive to physician ("living will") forms.

111. See, e.g., COLO. REV. STAT. § 12-34-105 (1985) (form for anatomical gift to be placed on back of all driver's licenses and state issued identification cards). Cf. ME. REV. STAT. ANN. tit. 18A, § 2-514(b) (Supp. 1987) ("Forms for executing a statutory will shall be provided at all Probate Courts for a cost equivalent to the reasonable cost of printing and storing the forms.").

112. This is of particular importance as the public's image of attorneys is poor and the greater accessibility of the legal system could potentially improve this image. See Jost, What Image Do We Deserve?, A.B.A. J., Nov. 1988, at 47 (discussing poor public image of attorneys). Cf. supra § A(4) (possible dangers of having non-legally trained people complete legal forms).


114. See, e.g., Statute of Bigamy, 1276, 4 Edw. 1, ch. 6 (effect of phrases Dedi et concessi tale tenementum and Dedi et concessi, etc. when contained in deeds).


116. See J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 16 (1971).

117. See, e.g., W. BYTHEWOOD, SELECTION OF PRECEDENTS (1821-34) (11 volume English form book series); J. BAKER, AN
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118. Public Highway Act, 1772, 13 Geo. 3, ch. 78, sched. 11.

119. The Stealing of Vegetables Act, 1772, 13 Geo. 3, ch. 32.

120. Conveyancing and Law of Property Act, 1881, 44 & 45 Vict., ch. 41, sched. 4(f).


123. Id. at 303-37 (reproducing statutory deed forms).

124. Id. at 459-511 (reproducing statutory mortgage forms).

125. Id. at 1 (describing action of ABA and quoting text of acknowledgments).

126. The Legal Blank, 30 LAW NOTES 124 (1926).

127. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 80 (2d ed. 1953) (discussion of incorporation by reference with citations to English and American cases recognizing the doctrine); UNIF. PROB. CODE § 2-510 (1982) ("Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.").

128. See, e.g., UNIF. TRUSTEES' POWERS ACT § 2(a), 7B U.L.A. 745 (1964) ("trustee has all powers conferred upon him by the provisions of this Act unless limited in the trust instrument"); TEX. PROP. CODE ANN. § 112.055 (Vernon 1984) (governing instruments of certain private foundations, nonexempt charitable trusts, and others are considered to contain a list of five provisions geared toward assuring that the instruments comply with Internal Revenue Code provisions to achieve preferred tax status).

129. Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964).

130. See id.

131. There may be circumstances where the automatically incorporated material may not be altered. See, e.g., Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18, § 108(2) ("In case of conflict between the provisions of a
settlement and the provisions of this Act . . . , the provisions of this Act shall prevail . . .").

132. See, e.g., UNIF. STAT. WILL ACT § 3 (1984) (express language incorporating by reference provisions of the act necessary); TENN. CODE ANN. § 35-50-109(a) (1984) (requires "a clearly expressed intention of the testator or settlor" to incorporate fiduciary powers by reference); Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 5, § 179 (statutory will forms must be referred to, otherwise they are not deemed to be incorporated in a will).

133. Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 742 (1964).


135. Id.

136. See Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964).


138. See Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964).

139. Id.


144. Approximately 20% of adult Americans are functionally illiterate. See Ad for Coalition for Literacy, A.B.A. J., Sept. 1976, at 85.
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145. Comm. on Fiduciary Serv. for Small Estates & Conservatorships, Prob. & Tr. Div., Proposed Uniform Acts for a Statutory Will, Statutory Trust and Statutory Short Form Clauses, 15 REAL PROP. PROB. & TR. J. 837, 837 (1980) ("There is widespread apprehension that the adoption of a statutory will form, which would lend itself to use without legal advice by purchase from a stationer, is likely to encourage dangerous misuse.").


PART TWO

TYPES OF STATUTORILY SUPPLIED ESTATE PLANNING FORMS

CHAPTER III

WILLS
(INCLUDING TESTAMENTARY TRUSTS)

A. INTRODUCTION

England’s 1925 Law of Property Act\(^2\) pioneered the use of statutory will forms by Anglo-American jurisprudence. One section of this comprehensive act authorized the Lord Chancellor to prescribe and publish forms that a testator could incorporate by reference into a will.\(^3\) On August 7, 1925, Chancellor Cave prescribed and published these forms along with directions for their use.\(^4\)

England’s innovative approach to will preparation did not quickly cross the Atlantic. Although a few states took significant steps to simplify some aspects of will drafting by enacting statutes containing particular provisions designed to be incorporated by reference into a will,\(^5\) there was little movement in the United States toward providing comprehensive will forms by statute.

In the middle to late 1970’s, legal writers gave new impetus to the concept of statutory wills. These commentators
recognized that the existing system of estate planning, which relied on expensive attorney prepared wills and litigation-producing homemade wills, was failing to provide most people with an effective means for creating individualized estate plans. Several commentators offered suggestions that served to kindle interest in statutory wills. For example, a 1977 essay by Professor Edward C. Halbach, Jr. urged the development of "standardized or partially standardized arrangements which private individuals can . . . by a simple act of selection, utilize for transactions that now must either be individually tailored or go virtually unplanned."6

Another approach was proposed by Harold Marquis, Barbara Croft Hippie, and Judith M. Becker in 1978.7 They suggested the use of a form will presented in a questionnaire format "with questions and answer blanks designed in such a way that it could be satisfactorily completed by the average layman with minimal or no supervision."8

One of the first significant American attempts at enacting comprehensive statutory will forms occurred in May 1979 when a fill-in-the-blank will form was introduced into the New York State Legislature.9 Despite the support of the Association of the Bar of the City of New York,10 the measure failed.11

In 1980, the American Bar Association's Probate and Trust Division's Committee on Fiduciary Services for Small Estates and Conservatorships proposed a statutory will act for adoption by state legislatures.12 This act did not provide a
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form will; rather, the act contained provisions for a complete will that could be incorporated by reference into a will.\textsuperscript{13} The National Conference of Commissioners on Uniform State Laws used the second revised draft of this act as the starting point for drafting a uniform law.\textsuperscript{14} Although the Commissioners made substantial changes to the ABA's draft, the general format remained the same.\textsuperscript{15} The Commissioners evaluated the potential of using fill-in forms, a concept then being debated in California, but concluded that the incorporation by reference approach suggested in the ABA draft was preferable.\textsuperscript{16} The Conference approved the Uniform Statutory Will Act in 1984 and recommended it to the states for enactment.\textsuperscript{17} In 1987, Massachusetts became the first and, to date, only state to pass this uniform act.\textsuperscript{18}

Meanwhile, the fill-in approach was receiving favorable consideration elsewhere, despite the rejection of this approach by both the American Bar Association and the Commissioners on Uniform State Laws. Four states have recently enacted will forms embodied verbatim in the enabling legislation. In 1982, California became the first state to enact a statutory will form.\textsuperscript{19} The California statute, which was developed by the State Bar of California,\textsuperscript{20} was based on the New York proposal which had failed to pass several years earlier.\textsuperscript{21} Redrafting was necessary not only to adapt the forms to California law but to phrase them "in plain English so the general public could understand the forms and the law."\textsuperscript{22} The California provisions took effect on January 1,
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This chapter details the history, operation, and contents of the English, Uniform, and fill-in-the-blank varieties of statutory wills. An analysis comparing and contrasting the various methodologies for providing statutory will forms and their underlying policies is also presented. This chapter concludes with recommendations for statutory will legislation. A discussion of the advantages and disadvantages of statutory estate planning forms in general is reserved for Parts Three and Four of this dissertation.

B. THE ENGLISH STATUTORY WILL FORMS

1. History

The enabling legislation for the English statutory will forms was the 1925 Law of Property Act. Section 179 of the Act provided:

The Lord Chancellor may from time to time prescribe and publish forms to which a testator may refer in his will, and give directions as to the manner in which they may be referred to, but, unless so referred to, such forms shall not be deemed to be incorporated in a will.

In the same year, statutory forms and instructions were prescribed which applied to wills taking effect on or after January 1, 1926. The forms have not since been amended despite other relevant changes in English law such as the reduction of the age of majority.
2. Description

The forms promulgated by the Lord Chancellor do not constitute a comprehensive will; rather, they provide particular provisions that the testator may incorporate by reference into his will as a means of shortening the length and reducing the complexity of the will. The forms are divided into two categories: the "Part I" forms which may be incorporated by reference as a unit or individually and a second group of forms, the "Part II" forms which may only be incorporated one at a time by specific individual reference.

The Chancellor also provided a short definitional section and an important rule of interpretation. In case of conflict, any express language used by the testator in the will is deemed to prevail over the language of the incorporated provision. Thus, a testator may incorporate a form and make any desired modifications to that form. Definitions are provided for the terms "disposition," "dispose of," "the trustees," and "authorised investments." Other terms either have the meanings as provided in the 1925 Law of Property Act or remain undefined.

a. English Part I Forms - General or Specific Reference

Six forms may be incorporated en masse or individually. To incorporate Part I forms, language such as the following is sufficient.

All the forms contained in Part I of the Statutory Will Forms, 1925, are incorporated in my will [subject to the following modifications, namely ... ].
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To incorporate a specific form, the following language was suggested.

The following forms contained in Part I of the Statutory Will Forms, 1925, shall be incorporated in my will:

Form ( )
Form ( )

[Subject to the following modifications, namely . . . ].

A brief description of each of the Part I forms follows.

Form 1 - Confirmation of Settlements

This form confirms the testator's settlements of property as they exist on the date of death. In effect, this provision is an "anti-satisfaction" clause allowing beneficiaries to take under the will without accounting for property previously received from the testator.

Form 2 - Meaning of "Personal Chattels"

Form 2 provides a broad definition of "personal chattels." The term includes most items commonly considered to be personal chattels and expressly excludes any chattels used for business purposes at the time of the testator's death. Regardless of use, money and securities for money are also excluded from the scope of the term. The form also states that a specific disposition of personal chattels will prevail over a general disposition.

Form 3 - Inventories and Provisions Respecting Chattels

This relatively detailed form governs bequests of chattels other than by way of absolute gift. If the beneficiary is entitled only to the use or possession of the
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chattel, duplicate inventories must be prepared; one for the trustee and one for the beneficiary.\textsuperscript{45} The form provides the methods for handling receipts for the property and gives instructions on what to do when property changes occur.\textsuperscript{46} The liabilities of the trustees and the beneficiaries with respect to the chattels are also described; for example, responsibility for loss to the chattels, duty to obtain insurance, and management during the incompetency of the beneficiary.\textsuperscript{47}

\textbf{Form 4 - Legacies to Charities}

This form is the shortest of the statutory will forms. It states that the receipt of the treasurer, or other similar official, of a charitable beneficiary completely discharges the deceased's personal representative.\textsuperscript{48}

\textbf{Form 5 - Directions Respecting Annuities}

The fifth form supplies the trustee with elaborate directions for dealing with annuities which are defined to include "any periodical payment (not being a rentcharge) for life or other terminable interest."\textsuperscript{49} For example, these provisions direct how the funds are to be established, govern the relationship between the annuity fund and the estate, and define the responsibility of the trustee with respect to investments.\textsuperscript{50}

\textbf{Form 6 - Power of Appropriation}

This form provides that the power of appropriation conferred by the 1925 Administration of Estate Act may be
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exercised by the personal representatives or trustees without any of the consents required by the Act. The objective of Form 6 is "to avoid an appropriation attracting ad valorem stamp duty." If practicable, however, the trustee is still required to give notice to those normally required to give consent.

b. English Part II Forms - Specific Reference Required

The four remaining statutory forms may only be incorporated individually by specific reference; they may not be incorporated as a group. To incorporate these forms, language such as the following is needed.

Form__ of the Statutory Will Forms, 1925, is incorporated in my will, and shall apply to . . . [subject to the following modifications . . . ].

A brief description of each of the Part II forms follows.

Form 7 - Trusts of a Settled Legacy

Form 7 is one of the longer statutory forms and contains provisions used to establish a trust of liquid assets. If the testator indicates that this form is to apply to a legacy of money or investments, the property will be held in trust for the lifetime benefit of the named legatee. After the legatee dies, the remainder is held in trust for the descendants of the legatee, appointed by deed or by will, until such descendants reach age twenty-one or marry. The form also provides for disposition of the property should the legatee fail to exercise the power of appointment. Additionally, the form contains sections governing when descendants must go into
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hotchpot to take additional shares,⁵⁸ what happens if the legatee has no descendants,⁵⁹ and the ability of the legatee to appoint the income of the trust to his spouse.⁶⁰

Form 8 - Administration

Incorporation of this form results in the application of standardized administrative provisions for property disposed of by the will, other than by exercise of a special power.⁶¹ The form is primarily a listing of fiduciary powers such as the ability to sell real and personal property,⁶² to postpone a sale under proper circumstances,⁶³ to retain reversionary interests until they become possessory,⁶⁴ to pay funeral costs, debts, duties, other liabilities, and legacies,⁶⁵ and to make proper investments.⁶⁶ The form also contains important provisions regarding the allocation of expenses between principal and income⁶⁷ and the treatment of most receipts as income.⁶⁸

Form 9 - Trusts for Spouse for Life

This form establishes a trust for the duration of the surviving spouse's life with the remainder to the descendants appointed by the surviving spouse by deed or by will.⁶⁹ If the surviving spouse fails to exercise the power of appointment, the remainder passes to the testator's descendants.⁷⁰ Detailed trust provisions, very similar to those in Form 7, are also set forth.⁷¹
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Form 10 - Trusts for Spouse and Issue

The last statutory form establishes a trust for the surviving spouse with a remainder to the testator's descendants. This form is similar to Form 9 but does not grant the testator's surviving spouse a power of appointment.

3. Experience

When the English statutory forms were promulgated, there was anticipation for their widespread use. From the beginning, however, it appears that the forms failed to achieve significant popularity. By 1929, only four years after the forms were published, English legal writers were already commenting that "the public [did] not seem very eager to avail themselves of such forms." In 1949, Joseph Trachtman investigated the "apparent desuetude" of the statutory forms. Trachtman was puzzled by the lack of discussion of the statutory will forms in the English texts or current periodicals, of any reported litigation which might have arisen from inept use of the statutory forms, and of any amendments or amplification of the statutory will forms since their publication. He noted that English form books were brimming with will forms but contained little, if any, mention of the statutory forms. Trachtman traveled to England and spoke with many practitioners. His discussions confirmed that the forms were rarely used. As Trachtman explained:

As I went on my rounds, what impressed me most was that so little attention was paid by anyone to the forms; that so many practitioners were either unaware of their existence (sometimes confusing...
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them with printed forms sold by legal stationers) or if they knew about them, were quite content to let others use them if they wanted to.\textsuperscript{79}

The disuse of the statutory will forms apparently continues.\textsuperscript{80} A review of current English literature reveals little discussion of the statutory will forms, although some treatises and form books reprint them along with minimal annotations.\textsuperscript{81} These forms have not been modified or amended despite changes in social climate and other statutes. This lack of revision may be further evidence of their unpopularity. For example, Form 3 details life estates in personal property although testators rarely create such life estates.\textsuperscript{82} Additionally, several forms keep property in trust for the legatee's or testator's descendants until they reach age twenty-one even though the age of majority was lowered to eighteen by the Family Law Reform Act of 1969.\textsuperscript{83}

C. THE UNITED STATES EXPERIENCE: THE UNIFORM STATUTORY WILL ACT

1. History

a. The American Bar Association

The Uniform Statutory Will Act originated in the American Bar Association's Probate and Trust Division's Committee on Fiduciary Services for Small Estates and Conservatorships.\textsuperscript{84} The Committee recognized "that the estate planning process [had] become too complicated and too costly for many persons."\textsuperscript{85} Moreover, the Committee was concerned that
attorneys who are not estate planning experts take risks when they attempt to draft wills and trusts. Errors could easily be made that might frustrate the client's intent and expose the attorney to malpractice liability. Accordingly, the Committee undertook to draft statutes which would provide "a broadly usable, quality, flexible, tax-competent and prudent dispositive and administrative scheme that may be easily adopted by a simple, cost-effective will."

To accomplish this laudable goal, the Committee drafted three statutes. The first was a proposal for a statutory will act. This act did not include a fill-in-the-blank will form; instead, it contained provisions that could be incorporated by reference. Unlike the English Statutory Will Forms, however, the Committee's form provided a comprehensive dispositive and administrative framework. The form mandated the shares of the estate to be received by the surviving spouse and descendants. The form also provided rules governing powers of appointment, survival, disclaimers, the allocation of death taxes, and various administrative matters.

The second proposal was for a statutory custodianship trusts act which is discussed in detail in Chapter IV of this dissertation.

The third proposal was a short form clauses for wills and trusts act. This act was similar to the English Statutory Will Forms in that it provided statutory form clauses that could be incorporated by specific reference into a will or
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trust. These clauses concerned fiduciary powers, disability discretion, and discretion in the invasion and allocation of principal.

The ABA Committee's report issued in 1980 concluded by inviting all interested persons to submit comments and suggestions on the proposed acts. As a result of this input, the Committee issued a second revised draft of the proposed statutory will dated October 17, 1981.

b. Commissioners on Uniform State Laws

In the early 1980's, the National Conference of Commissioners on Uniform State Laws undertook consideration of possible uniform legislation for statutory wills. After deciding to follow the general approach of the ABA draft, rather than the fill-in approach, the Special Drafting Committee for the Uniform Statutory Will Act used the ABA's second revised draft as the starting point of its initial discussions. The Commissioners made substantial changes to the ABA's draft but the goal and basic philosophy remained the same -- "to provide a scheme of testamentary disposition of broad utility" by giving testators the ability to incorporate by reference comprehensive statutory will provisions into a simple will.

The Commissioners approved the final version of the Act in 1984. Detailed notes and commentary followed shortly thereafter. To date, Massachusetts is the only state to adopt the Uniform Statutory Will Act.
CHAPTEB III

2. Description

a. Definitions

The Uniform Statutory Will Act begins with a section defining the meanings and usages of ten important terms. Many of these definitions reflect the usage of these words in other uniform acts, particularly the Uniform Probate Code.

i. Child

The Act provides an elaborate definition of "child." In general, the term means a child of a natural parent whose relationship is involved. An adopted person is treated as the child of the adopting parents and not as a child of the natural parents. If a person is adopted by the spouse of a natural parent, however, the person is also deemed the child of both natural parents. A person born out of wedlock is a child of the mother but is a child of the father only if that person is openly and notoriously treated by the father as his child. Stepchildren, foster children, grandchildren, and other more remote descendants are not treated as children.

ii. Issue

"Issue" is defined to include all lineal descendants of all generations. The status of a child in each generation is determined in accordance with the Act's definition of child.
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iii. Personal Representative

The term "personal representative" is broadly defined to include an "executor, administrator, successor personal representative, special administrator, and a person who performs substantially the same functions relating to the estate of a decedent under the law governing their status."  

iv. Property

"Property" is broadly defined to encompass any interest in real or personal property, whether the interest be present or future, legal or equitable, vested or contingent.

v. Representation

The Commissioners elected to provide a separate definition of the term "representation," thereby avoiding the difficulties that arise in interpreting the terms per capita and per stirpes. Representation means

the estate is divided into as many equal shares as there are surviving issue in the nearest degree of kinship and deceased individuals in the same degree who left issue surviving the decedent, each surviving issue in the nearest degree receiving one share and the share of each deceased individual in the same degree being divided among issue of that individual in the same manner.

vi. Statutory-Will Estate

The "statutory-will estate" is the testator's entire testamentary estate unless the will provides otherwise. Thus, the statutory will may be used by a testator to dispose of his entire estate or only a portion if other property is expressly disposed of in a different manner.
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vii. Surviving Spouse

In defining the term "surviving spouse," the Act refers to the individual to whom the testator was married at the time of death, not the testator's spouse at the time of will execution. In an attempt to effectuate the testator's probable intent, the Act places further requirements on a spouse for the spouse to qualify for treatment as a surviving spouse. For example, a spouse is not considered a surviving spouse if at the time of the testator's death separation existed pursuant to a court decree of separation or a written separation agreement signed by both spouses. The definition also contains language dealing with conflicts of law problems regarding recognition of divorces, annulments, and marriages obtained in other jurisdictions.

viii. Testamentary Estate

The definition of "testamentary estate" is broad and all inclusive; it "includes every interest in property subject to disposition or appointed by a will of the decedent."

ix. Testator's Residence

The "testator's residence" is carefully defined to protect the testator's home(s) and to deal with different types of residential arrangements. The testator's residence includes "one or more properties normally used at the time of the testator's death by the testator or the surviving spouse as a residence for any part of the year." Thus, the definition encompasses both permanent homes and vacation or
temporary homes.\textsuperscript{130} This definition "attempts to reflect the probable intent of a lay person when referring to the person's 'residence' without further specific description of the property."\textsuperscript{131} The comment to the section also notes that the term is not synonymous with the testator's "legal residence."\textsuperscript{132} The Act provides special rules for cooperatives\textsuperscript{133} and for property that is used partially for commercial, agricultural, or other business purposes.\textsuperscript{134}

x. Trustee

The term "trustee" includes "an original, additional, or successor trustee, whether or not appointed or confirmed by the court."\textsuperscript{135}

b. Requirements to Execute a Statutory Will

The Uniform Act neither adds to nor subtracts from a state's usual requirements for executing a valid will. Only individuals with capacity under state law may execute a statutory will and the execution must comply with all other state law requirements.\textsuperscript{136}

c. Incorporation by Reference

i. Basic Idea

As noted previously, the Uniform Act adopts an incorporation by reference approach rather than providing a fill-in-the-blank form.\textsuperscript{137} This permits the testator to adopt the Act's dispositive scheme in a "simple will."\textsuperscript{138} The will may incorporate by reference some or all of the provisions of
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the Act.\textsuperscript{139} The testator may make modifications and additions to the incorporated material through appropriate will provisions. In cases of conflict between an express provision of the testator's will and the statutory will, the testator's will provision prevails.\textsuperscript{140}

\textit{ii. Date of Incorporation and Effect of Amendments}

The version of the Act in effect on the date the testator executes the will is the version that controls the estate's disposition and administration.\textsuperscript{141} Subsequent changes to the Act have no effect unless the testator executes a codicil or otherwise republishes the will.\textsuperscript{142}

\textit{iii. Method of Incorporation by Reference}

The Act contains sample language that is deemed sufficient to incorporate by reference the provisions of the Act. The following language is suggested:

Except as otherwise provided in this will, I direct that my testamentary estate be disposed of in accordance with the [Enacting State's] Uniform Statutory Will Act.\textsuperscript{143}

d. Disposition of Estate - Surviving Spouse and No Surviving Issue

If the testator is survived by a spouse but no issue, the surviving spouse takes the entire statutory-will estate.\textsuperscript{144}

e. Disposition of Estate - Surviving Spouse and Surviving Issue

If the testator is survived by both a spouse and issue, the testator's estate is distributed as detailed below.
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i. Testator's Residence and Tangible Personal Property

The testator's residence and tangible personal property pass to the surviving spouse regardless of the property's value.\textsuperscript{145} There is, however, no exoneration of mortgages; the surviving spouse must take the property subject to all liens and encumbrances.\textsuperscript{146} In addition, under this clause the surviving spouse does not take personal property held by the testator primarily for investment or for commercial, agricultural, or other business purposes.\textsuperscript{147}

ii. Larger of $300,000 or One-half Balance

The surviving spouse also receives an outright interest in the greater of $300,000 or one-half of the balance of the statutory-will estate.\textsuperscript{148} Significantly, the drafters did not mandate the $300,000 figure but merely suggested it. They contemplated that states, especially those with community property systems, might wish to use a different amount.\textsuperscript{149}

iii. Balance of Estate

The remainder of the estate passes into a trust for the benefit of the testator's surviving spouse and issue\textsuperscript{150} unless the personal representative, who is not the surviving spouse, determines that a trust would be uneconomical.\textsuperscript{151} If such a determination is made, the entire statutory-will estate passes outright to the surviving spouse.\textsuperscript{152}

The trust created with the balance of the estate is designed to provide ample opportunity for reducing federal estate taxes. At the discretion of the personal
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representative, up to one-half of the trust may qualify for the unlimited marital deduction as qualified terminable interest property (QTIP).\textsuperscript{153} Accordingly, post-mortem estate planning with both QTIP elections and disclaimers is possible.\textsuperscript{154} This is especially important if the testator's estate grows substantially after the will is executed.\textsuperscript{155}

The terms of the trust regarding the payment of income during the surviving spouse's life are:

- The net income of the trust is paid to or applied for the surviving spouse's benefit at least quarterly.\textsuperscript{156}
- On the surviving spouse's death, all accrued or undistributed net income is paid to the surviving spouse's estate.\textsuperscript{157}
- The surviving spouse may compel the trustee to convert unproductive property to productive property.\textsuperscript{158}

The terms of the trust regarding the payment of principal during the surviving spouse's lifetime are:

- The trustee may make discretionary payments to the testator's surviving spouse and issue for their health, education, support, or maintenance.\textsuperscript{159}
- In determining the amount of support payments, the trustee must give reasonable consideration to the distributee's other resources.\textsuperscript{160}
- If support payments are to be made, the principal must be administered as two separate shares which were equal when the trust was created.\textsuperscript{161}
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- One share is deemed the surviving spouse's share and payments may not be made from that share to anyone other than the surviving spouse.\textsuperscript{162}

- The trustee must give primary consideration to the needs of the surviving spouse and those children of the testator who are under age twenty-three or disabled.\textsuperscript{163}

Distributions may also be made to children over twenty-three.

- The trustee may pay expenses incurred before a beneficiary's death and may also pay the beneficiary's funeral and burial expenses.\textsuperscript{164}

- If the trustee is not the surviving spouse and determines that it is uneconomical to continue the trust, the trustee may terminate the trust and distribute the principal to the surviving spouse.\textsuperscript{165}

- If the trustee determines it is equitable to do so, the trustee may reduce later distributions to the testator's issue by the amounts of principal paid.\textsuperscript{166}

- If a beneficiary serves as the trustee, the trustee may only make distributions to himself for his own health, education, support, or maintenance and may not appoint property to his estate, his creditors, or the creditors of his estate.\textsuperscript{167}

The terms of the trust regarding payments after the death of the surviving spouse are:

- If no beneficiary is under the stated age or is disabled,\textsuperscript{168} the remainder of the principal is paid to the testator's children in equal shares.\textsuperscript{169} If any of the
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testator's children are deceased, the property passes to the testator's then living issue by representation. If none of the testator's issue survive, then the property passes via the applicable laws of intestate succession.

f. Disposition of Estate - No Surviving Spouse

i. If Surviving Issue

If the testator's spouse fails to survive but the testator is survived by all of his children, the statutory-will estate passes in equal shares to the children. If all of his children did not survive, then the estate passes to the testator's surviving issue by representation.

ii. If No Surviving Issue

If there is no surviving spouse and no surviving issue, the testator's entire statutory-will estate passes under the state's intestacy laws.

iii. If Underage or Disabled Issue

If a child of the testator is under a stated age or if the distributee is mentally or physically disabled, special distribution rules will normally apply. These rules will not apply, however, if the personal representative, who is not one of the testator's issue, determines that it would be uneconomical to create a trust. If such a determination is made, the property passes to the issue free of trust.
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g. Trust for Underage Children

i. Creation

If property is distributable to a child of the testator who is under the age specified by the testator in the will, or age twenty-three in default of a specification, all property distributable to the testator's issue must be held in trust. In exercising distribution powers, the trustee must give primary consideration to the needs of the testator's children who are underage or under a disability.

ii. Distribution When Beneficiary Underage

If at least one of the testator's children is underage, the trustee is authorized to "pay the income and principal of the trust to or for the benefit or account of one or more of the issue of the testator in amounts the trustee deems advisable for their needs for health, education, support, or maintenance." Undistributed income may be added to the principal of the trust.

The trustee also has discretion to make advance distributions of principal as if the trust were terminating. The trustee may distribute part or all of the beneficiary's future share. If the entire share is distributed, the trustee is prohibited from making future distributions of either principal or income to that distributee or his issue. No standard governs the trustee's ability to make such an anticipatory distribution. The drafters contemplated that this type of distribution would be made "when the property in
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the trust exceeds an amount that will be necessary by any reasonable expectation to fulfill the primary responsibility for children under the specified age."\textsuperscript{187}

\textit{iii. Distribution When Trust Terminates}

The trust terminates when none of the testator's children are underage or when the trustee determines that continuation of the trust would be uneconomical.\textsuperscript{188} Upon termination, the remainder of the trust property is distributed to the testator's issue in proportion to the shares which were determined when the property became subject to the trust.\textsuperscript{189} In computing each distributee's share, the trustee must charge the share with any advance distributions of principal made to that distributee.\textsuperscript{190} In addition, the trustee has the discretion to charge the share of a distributee with any payments of income or principal previously made to or for the benefit of the distributee or his lineal relatives.\textsuperscript{191} If any issue dies before receiving complete distribution of his share, the share will be distributed to his assignees, or if none, to his estate.\textsuperscript{192}

\textit{iv. Issue as Trustee}

If one of the testator's issue serves as trustee, the trustee may not terminate the trust on the ground that it is uneconomical.\textsuperscript{193} In addition, the trustee's discretion may be exercised only to provide for that person's health, education, support, or maintenance; it may not be exercised for the trustee, his creditors, or creditors of his estate.\textsuperscript{194}
h. Disability of Non-Spouse Distributee

i. Determination of Disability

Disability is broadly defined to include the following:

- Distributee is under the age specified in the testator's will, or in the absence of a specification, age twenty-three.\(^{196}\)

- The personal representative or trustee determines that the distributee "cannot effectively manage or apply the property by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause."\(^{197}\)

ii. Distribution Options

If a distributee is under a disability, the personal representative or trustee has the following distribution options:

- Distribute principal or income directly to the distributee.\(^{198}\)

- Deposit or invest the property in the distributee's name or for his account.\(^{199}\)

- Distribute to the distributee's guardian or conservator.\(^{200}\)

- Transfer or keep the property in trust.\(^{201}\) The trustee may then at any time distribute or apply the income and principal to or for the benefit of the distributee.\(^{202}\) This trust terminates when the trustee distributes all the
property, the distributee reaches the required age, the
disability is removed, or the distributee dies. Upon
termination, the remaining trust property is given to the
distributee or the personal representative of the
distributee's estate.

i. Powers of Appointment

A statutory will must meet several requirements before it
will be deemed to exercise a power of appointment held by the
testator. These requirements are imposed to "preclude an
inadvertent exercise of a power of appointment by a donee." If the requirements are met, "the appointed property passes as
part of the statutory-will estate unless the will provides
otherwise." These requirements are summarized below:

• the testator's will must comply with any conditions
imposed on the exercise of the power;
• the appointment must be within the scope of the
power,
• the will must expressly refer to the power of
appointment or express an intent to exercise any power held by
the testator.

j. Survival

The survival period presumed by the statutory will is
thirty days. Thus, an individual who does not outlive the
testator by at least thirty days is deemed to have predeceased
the testator.
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k. Appointment of Fiduciaries

i. Testator Designation

The testator's designation of personal representatives and trustees gives the designated persons the right to serve as long as they are qualified. The testator may also designate individuals to serve if the primary designatee is unable or unwilling to serve.

ii. Failure of Testator's Designation of Personal Representative

If the testator failed to designate a personal representative or the named person is unable or unwilling to serve, the priority for appointment is determined by the law of the state of the testator's domicile at time of death.

iii. Failure of Testator's Designation of Trustee

If the testator failed to designate a trustee or if the named person is unable or unwilling to serve, the personal representative may appoint a qualified person to serve as the trustee. This appointment does not require court approval and the personal representative may even appoint himself to the position.

iv. When Acting Fiduciary Unable to Continue

Different rules apply when a currently serving fiduciary is unable to continue because of resignation, removal, lack of capacity, or death. If there is a surviving spouse who is able and willing to act, the surviving spouse may appoint a qualified successor. If there is no surviving
spouse or the surviving spouse is unable or unwilling to act, a majority of the testator's adult children may appoint the successor.\textsuperscript{218}

\textbf{v. Other Cases}

In all other cases, fiduciaries must be appointed by the court.\textsuperscript{219}

1. \textbf{Fiduciary Powers}

The Act provides two distinct alternatives with respect to fiduciary powers.

\textit{i. Alternative A}

This alternative grants fiduciaries all of the powers available under local law, unless the testator had expressly indicated otherwise, and provides for a reference to local acts that grant powers to personal representatives and trustees.\textsuperscript{220} Alternative A works well in jurisdictions that already have statutes providing fiduciary powers.\textsuperscript{221}

\textit{ii. Alternative B}

The second alternative provides a detailed list of fiduciary powers. Unless expressly limited by the testator's will, the trustee has all of the powers otherwise conferred by law as well as twenty-two enumerated powers.\textsuperscript{222} These powers are extensive\textsuperscript{223} and include an open-ended provision granting the trustee the power to "perform any other act necessary or appropriate to administer the trust."\textsuperscript{224} The personal representative has the same powers plus the ability, under
certain circumstances, to satisfy written charitable pledges of the decedent.\textsuperscript{225}

\textbf{m. Fiduciary Duties}

Personal representatives and trustees must "observe the standards in dealing with the estate which would be observed by a prudent person dealing with the property of another."\textsuperscript{226} If a fiduciary possesses special skills or is named as a fiduciary because of a representation of special skills or expertise, the fiduciary must exercise this higher standard of care.\textsuperscript{227} The fiduciary also has a duty to preserve marital deduction elections when exercising powers of allocation.\textsuperscript{228}

\textbf{n. Bond or Surety}

It is presumed that fiduciaries serve without bond or surety.\textsuperscript{229} The testator may provide otherwise in the will and the court may require bond or surety upon the application of an interested person.\textsuperscript{230}

\textbf{o. Sample Form}

Despite the Commissioners' distaste for fill-in-the-blank forms,\textsuperscript{231} the drafters included an appendix to the Act containing a sample form for a complete will which utilizes the Act.\textsuperscript{232} This form is short and contains a limited number of blanks. The only spaces provided are those for the testator's name and residence, the name of the state whose statutory will provisions are being incorporated, designation of primary and successor personal representatives and
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trustees, appointment of guardian for minor children, date of will execution, testator's signature, witnesses' names and signatures, and notarial jurat. In addition, optional language is provided for self- and proxy-executions and testator's gender.

3. Experience

Although the Uniform Statutory Will Act was approved by the Commissioners in 1984, the only state to enact it has been Massachusetts. The Act was approved on July 23, 1987 and took effect ninety days thereafter. Except for very minor and non-substantive differences, the Massachusetts version is identical to the Uniform version. Each time the Uniform Act invited an enacting state to change particular terms, Massachusetts followed the Uniform Act's suggestions.

In the fiduciary powers section, Massachusetts selected alternative B which provides an extensive list of fiduciary powers. The only amendments to the Massachusetts Act have been technical corrections made before the Act took effect. No appellate case was located which interpreted any of the Act's provisions.

D. THE UNITED STATES EXPERIENCE: OTHER STATUTORY WILL FORMS

1. History

Responding "to pressure to widen the distribution of essential legal services," New York became one of the first
states during the recent period of interest in statutory wills to attempt the enactment of a fill-in will form. A bill containing a will form was introduced into the New York State Legislature in May 1979. Despite the support of the Association of the Bar of the City of New York, the bill failed to obtain the necessary support to pass.

The State Bar of California reworked the New York fill-in proposal in an attempt to become the first state to enact a statutory will form. The California State Bar's Estate Planning, Trust and Probate Law Section's subcommittee on Pre-Death Estate Planning Techniques adapted the proposal to California law and phrased its provisions in plain English so the average person would be more likely to understand the form. The bill passed the California Legislature and was signed into law by Governor Edmund G. Brown, Jr. in September 1982 to take effect on January 1, 1983.

Also in 1983, Maine and Wisconsin enacted fill-in will forms embodied verbatim in the enabling legislation. The Maine statute took effect on April 24, 1984 and the Wisconsin provisions took effect on May 2, 1984.

The chairman of the Michigan House Judiciary Committee introduced a bill providing for statutory wills in 1984. The bill was prepared by the Probate and Trust Law Section of the Michigan Bar but was introduced too late to be enacted in 1984. Similar legislation was introduced in a later session and enacted with an effective date of July 1, 1986.
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2. Description

a. Basic Formats

Three basic formats have been followed by the states which have enacted statutory fill-in form wills.

i. Fill-in Form That Incorporates Statutory Provisions

The California\textsuperscript{256} and Wisconsin\textsuperscript{257} statutory wills contain many provisions that are not found on the face of the form but are incorporated by reference into the will.\textsuperscript{258} The incorporating language is located in a notice preceding the body of the will.\textsuperscript{259} Several types of material are incorporated into these statutory wills.

The first category of material incorporated by reference consists of definitions and rules of construction. In this respect, the California provision is somewhat more comprehensive than that of Wisconsin.\textsuperscript{260}

The second type of incorporated material consists of statutory provisions that contain the "full text" of will provisions that are set forth in the actual will form in an abbreviated fashion.\textsuperscript{261} This incorporated material provides the details of the statutory dispositive provisions which may be needed to prevent interpretative confusion or other problems. For example, a California form provision provides that the testator's personal and household items pass to the surviving spouse, if living; otherwise, these items pass equally to the testator's surviving children.\textsuperscript{262} The full text
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contained in the statute provides a more detailed explanation of the property encompassed by the term "household items" and includes additional rules. The full text states, inter alia, that when distributing these items to the testator's children, the executor is to use his discretion to distribute the shares to them in portions as nearly equal as is feasible, and that if both the surviving spouse and all children predecease the testator, the items become part of the residual estate.\(^\text{263}\)

The third category of material automatically incorporated by reference consists of certain statutory clauses.\(^\text{264}\) These provisions deal mainly with various aspects of administration such as powers of the executor\(^\text{265}\) and powers of a guardian.\(^\text{266}\) In addition, the clauses provide that if the testator does not effectively dispose of the residuary estate, it passes under the state's intestacy statutes.\(^\text{267}\) Additional provisions are incorporated if the form will includes a testamentary trust.\(^\text{268}\)

Generally, these statutory wills include only the full text of the property disposition clauses and the mandatory clauses as they existed when the testator executed the will.\(^\text{269}\) Later amendments to the incorporated statutes do not affect previously executed wills.

\textit{ii. Fill-in Form With Self-Contained Definitions and Additional Clauses}

The second format includes definitions and additional clauses as part of the form but segregated from the body of the will. This approach was taken by Michigan. At the end of the Michigan statutory will, after the witnesses'
signatures, two types of additional material are set forth. The first type of material consists of definitions of words commonly used in the will and basic rules of construction. The second type consists of provisions dealing with the fiduciary powers of personal representatives, guardians, and conservators. The last article of the body of the will reminds the testator that the "[definitions and additional clauses found at the end . . . are part of [the] will." In effect, this language incorporates part of the statutory document into itself. Otherwise, an argument could be made that the additional material is not part of the "will" because it follows the testator's signature and attestation.

iii. Fill-in Form Only

The third and simplest format provides merely a fill-in-the-blank form. This is the approach adopted by Maine. The Maine statutory form stands totally on its own without reference to material outside of the statutory will document or outside of the body of the will.

b. Contents - Statutory Wills Without Trusts

This section compares and contrasts important provisions of the statutory fill-in forms adopted in California, Maine, Michigan, and Wisconsin.

i. Notices and Warnings

Each of the statutory will forms begins with a list of notices and warnings to the prospective testator. The
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following types of notices or warnings are found in all of the forms:

- Possibility that the testator may need legal advice; Stats. \(^{224}\)
- Statutory will does not control non-probate assets; Stats. \(^{225}\)
- Statutory will is not designed to reduce taxes; Stats. \(^{226}\)
- Testator should avoid making alterations or additions to the statutory form; Stats. \(^{227}\)
- Explanation that statutory will may be revoked or amended; Stats. \(^{228}\)
- Rules regarding attestation of witnesses; Stats. \(^{229}\)
- Recommendation to store will in a safe deposit box or other secure location; Stats. \(^{230}\)
- Rules regarding adopted children; Stats. \(^{231}\) and
- Recommendation to make a new will upon change in marital status. Stats. \(^{232}\)

The following types of notices and warnings are found in some, but not all, of the statutory will forms:

- Possibility that testator may need tax advice (California, Maine, and Wisconsin); Stats. \(^{233}\)
- Effect of improper alterations or additions (California and Michigan); Stats. \(^{234}\)
- Reference to definitions, rules of construction, full text of dispositive provisions and mandatory provisions which are incorporated into the will (California and Wisconsin); Stats. \(^{235}\)
- Recommendation that if testator has children under age twenty-one a different type of will should be considered,
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e.g., a statutory will form containing a testamentary trust (California and Wisconsin);\textsuperscript{286}

- Recommendation to make a new will if testator has a child after the statutory will is executed (Maine);\textsuperscript{287}

- Recommendation to tell family members where statutory will is stored (Michigan);\textsuperscript{288}

- Warning that the will may be inappropriate in complex family or business situations (Wisconsin);\textsuperscript{289}

- Rules regarding execution ceremony (Michigan);\textsuperscript{290} and

- Admonition to read entire statutory will carefully before completing it (Michigan).\textsuperscript{291}

\textit{ii. Revocation of Prior Wills and Codicils}

Each of the statutory fill-in wills contains language expressly revoking all of the testator's prior wills and codicils.\textsuperscript{292} Wisconsin's form also provides a plain English definition of the term "codicil."\textsuperscript{293}

\textit{iii. Testator's Residence}

Only the Michigan statutory fill-in will provides a space for the testator to state his residence.\textsuperscript{294}

\textit{iv. Designation of Spouse}

Michigan is the only state to provide for an express statement of the name of the testator's spouse.\textsuperscript{295} This ties the distribution made by the statutory will to the person who is the testator's spouse at the time of the will's execution.\textsuperscript{296} The other statutory forms allow interpretation
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of the term spouse to mean the testator's spouse at time of death.297

v. Listing of Children

Again, Michigan is the only state to request that the testator list his living children by name.298

vi. Gifts of Personal Property to Named Beneficiaries

The California statutory will places significant restrictions on the testator's ability to make specific gifts of personal property. The testator is permitted to make only one cash gift to either a person or a charity.299 The form requires the testator to name the beneficiary, indicate the amount of the gift in numerals and words, and separately sign that portion of the will.300 If the named individual predeceases the testator or the charity does not accept the gift, then no gift is made; the gift is not saved via an anti-lapse statute for the issue of the individual beneficiary and the court may not apply cy pres to locate an equitably equivalent charitable beneficiary.301 The form also provides that death taxes are not to be apportioned against this gift.302

The Maine statutory will provides a testator with eight opportunities to make specific gifts of personal property; five gifts of personal and household items to named individuals303 and three cash gifts to named charitable organizations or institutions.304 Each gift is made by the testator listing the name of the recipient, describing the
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item or stating the amount of the gift, and separately signing each bequest.\textsuperscript{305} If a testator wishes to make cash gifts to specific individuals, various options are available under the residuary clause.\textsuperscript{306} Specific instructions are not provided with respect to a named beneficiary of a gift of a specific item who predeceases the testator, suggesting that Maine's normal anti-lapse statute would apply.\textsuperscript{307} If a charitable organization or institution no longer exists or does not accept the legacy, lapse occurs and the court may not exercise cy pres to save the gift.\textsuperscript{308}

The Michigan statutory will provides some opportunity for making specific bequests. The will affords the testator with the option of making one or two cash gifts to named persons or charities.\textsuperscript{309} To effectuate such gifts, the testator must state the beneficiary's name, address, and the amount of the gift in figures and words as well as separately sign each legacy.\textsuperscript{310} The form states that these cash gifts are not subject to tax apportionment.\textsuperscript{311} The statutory will makes no provision for specific bequests of items of personal property. However, the form does explain the testator's right to leave a separate list or statement, either in his own handwriting or signed by him at the end, which makes gifts of specific books, jewelry, clothing, automobiles, furniture, and other personal and household items.\textsuperscript{312}

The Wisconsin statutory will provides a unified approach to specific gifts. The testator may make up to five specific gifts of cash, personal property, or real property.\textsuperscript{313} The
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testator must describe cash gifts in both numerals and words and each gift must be separately signed in a box provided on the form.\textsuperscript{314} The testator is directed to write the phrase "not used" in the boxes which are left empty.\textsuperscript{315} The form also provides that lapse occurs if a named beneficiary predeceases the testator or if a charity does not accept the gift.\textsuperscript{316} Thus, neither an anti-lapse statute nor cy pres is available to save any of the gifts.

vii. Gifts of Real Property to Named Beneficiaries

The forms of only two states provide the testator with the opportunity to make specific gifts of real property via a statutory will. Maine's statutory will provides a separate section for up to five specific gifts of real property to named beneficiaries.\textsuperscript{317} As discussed in the subsection immediately above, the Wisconsin statutory will accommodates up to five specific gifts, any or all of which may be of real property.\textsuperscript{318}

viii. Disposition of Personal and Household Items Not Specifically Bequeathed

The statutory fill-in wills are uniform in the disposition of personal and household items that have not been specifically bequeathed; the surviving spouse takes all of this property and if there is no surviving spouse, it passes equally to the testator's surviving children.\textsuperscript{319}
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ix. Residuary Estate

The California statutory will provides the testator with three options for the distribution of the residuary estate. The first alternative allows the testator to give the residue to the surviving spouse or if none, to the testator's children and the descendants of any deceased child. The testator's second alternative is to leave the entire residue to his children and the descendants of any deceased child. This option totally excludes the surviving spouse. The third possibility is for the testator to have the residue distributed as if he had died intestate. To adopt any one of these options, the testator must sign in a box located next to the desired distribution plan and write "not used" in the remaining boxes.

The Maine statutory will also contains three options for distributing the residuary estate. The first option allows the testator to leave all remaining property to the surviving spouse, or if there is no surviving spouse, in equal shares to the children and the descendants of any deceased child. The second option is to leave a stated dollar amount to the surviving spouse and the remaining property in equal shares to the children and the descendants of any deceased child. The third alternative gives the testator the opportunity to make up to five gifts of designated sums of money to named persons. To select one of these options, the testator must initial a box located in front of the desired clause and sign at the end of the clause. If the testator fails to follow
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these requirements, the residue passes via intestacy. The testator also has the opportunity to direct the distribution of property which does not pass under the other sections of the statutory will.

The Michigan statutory will provides far less flexibility because the testator has no discretion concerning the distribution of the residuary estate in most situations. The surviving spouse takes the entire residuary estate and if there is no surviving spouse, the residue passes to the testator's children and the descendants of any deceased child. The only choice provided to a testator concerns the distribution of the residue if there is no surviving spouse, children, or descendants of children. The first option is to have one-half pass to his heirs under intestacy and the other half pass to his spouse's heirs as if the spouse had died intestate immediately after the testator. The second option, which is also the default choice, is to have the entire residuary estate pass via intestacy. The testator selects one of these options by signing below the text of the appropriate provision.

The provisions of the Wisconsin statutory will are also more restrictive than those of California and Maine. The testator has only two choices for disposing of the residuary estate. The first choice is to have the entire residue pass to the surviving spouse or, if there is no surviving spouse, to the testator's children and the descendants of any deceased child by right of representation. The second choice, which
is also the default option, is for the residue to pass via intestacy. To make a selection, the testator must sign opposite the desired provision and write the words "not used" across from the other clause.

x. Nomination of Personal Representative

Each statutory will form allows the testator to nominate a personal representative. California, Maine, and Wisconsin permit designation of one primary and two alternate personal representatives. The Michigan form provides for only one primary and one alternate personal representative. None of the forms accommodates the appointment of co-personal representatives. The Michigan form also has a place for the address of the personal representative and provides a brief explanation of the personal representative's duties. Maine is the only state to require a separate signature for each nomination of a personal representative.

The forms of two states also provide a brief listing of the personal representative's powers. Michigan provides them at the end of the will following the attestation clause and list of definitions and Wisconsin lists them in the body of the will. California and Wisconsin also expand upon the personal representative's powers in the clauses that are mandatorily incorporated into all statutory wills.
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xi. Nomination of Guardian or Conservator

All of the statutory will forms permit the testator to designate a guardian or conservator for minor children. California, Maine, and Michigan allow the testator to designate a different person as guardian of the person and guardian/conservator of the estate. The Wisconsin form, however, requires that the same person serve in both capacities. The California and Maine forms allow designation of one primary and two alternate nominations. The Michigan and Wisconsin forms permit only one primary and one alternate to be named. The Michigan form also requests the nominee's address and the Maine form requires the separate signing of each nomination. Each of the statutory forms provides a brief explanation of the purpose and function of these fiduciaries or other information regarding their nomination and selection. California and Wisconsin also provide information about the powers of guardians in the clauses automatically incorporated by reference.

xii. Bond

Of the four fill-in statutory will forms, only the Maine form fails to address the issue of bond. The other three forms address the issue of bond in various ways but none permit the testator to deal separately with each fiduciary designation; bond must either be required of all fiduciaries or waived for all of them. The California statutory will explains the purpose of bond and permits the testator to waive
bond by signing in a box; bond is required if not specifically waived.\textsuperscript{362} The Michigan form also explains the purpose of bond and requires the testator's signature directly below either a statement requiring bond or a statement waiving bond; the statute does not indicate the result if neither statement is signed.\textsuperscript{363} The Wisconsin form does not explain the purpose of bond but does give the testator the opportunity to require it by signing in a box; if the testator does not sign, bond is deemed waived.\textsuperscript{364}

xiii. Execution

Each statutory will provides a signature line for the testator and a place to indicate the date of execution.\textsuperscript{365} Except for Michigan, each state's form also provides blank spaces for the testator to indicate the city and state in which the will execution takes place.\textsuperscript{366}

xiv. Attestation

Each statutory will contains attestation clauses that comply with applicable state law.\textsuperscript{367} California\textsuperscript{368} and Michigan\textsuperscript{369} recommend use of a supernumerary witness and provide appropriate blank spaces for the extra witness' signature, printed name, and address.

c. Contents - Statutory Wills With Trusts

California\textsuperscript{370} and Wisconsin\textsuperscript{371} provide additional statutory forms that may be used to create wills containing testamentary trusts. An earlier proposal for the Michigan statutory will contained provisions for a testamentary trust but those
provisions were not enacted. The forms for statutory wills with trusts are similar to the forms for wills without trusts. The forms containing trust provisions also include special warnings, provide for residuary estate distribution and trustee nomination, and explain trustee powers and certain implied terms.

i. Notices and Warnings

The first notice in the California and Wisconsin statutory will with trust forms is that the form is specially designed to create a trust and should not be used unless a trust is intended. The Wisconsin form also contains a conspicuous warning in the body of the will that the available trust options may not achieve the best possible tax results, particularly for testators possessing substantial estates, and a recommendation to consult a competent tax advisor.

ii. Distribution of Residuary Estate

The California statutory will with trust form gives the testator two options concerning disposition of the residuary estate. The first alternative gives the residue outright to the surviving spouse, but if there is no surviving spouse, the residue passes into a single trust that provides for the support and education of the testator's children and the descendants of any deceased child until each of the testator's living children are at least twenty-one years old. The form does not detail the provisions of the trust; instead, the full text of the provisions are set forth in the
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California Probate Code.\(^{376}\) The most significant dispositive provision reads as follows:

As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.\(^{377}\)

Alternatively, the testator may elect to create a trust for his descendants with the entire residuary estate on the same terms as discussed above. This option may be chosen regardless of whether or not the testator is survived by a spouse.\(^{378}\)

The testator must adopt one of the alternatives by signing in a box next to the appropriate provision\(^{379}\) and writing "not used" in the box by the provision not selected.\(^{380}\) If the testator fails to sign either box, or signs both, the residue will be distributed via intestacy.\(^{381}\)

The Wisconsin statutory will with trust form also provides the testator with two choices. Unlike the California
scheme, however, the choices have significant differences and provide for a greater degree of individualization. The first Wisconsin option is the same as the first California option, i.e., the residuary estate passes outright to the surviving spouse or if there is no surviving spouse, into a trust for the testator's children and descendants of deceased children.\textsuperscript{382} This trust usually ends when the testator's youngest living child reaches age twenty-one.\textsuperscript{383} Unlike the California form, the Wisconsin form permits the testator to specify termination of the trust at any age over eighteen.\textsuperscript{384} As with California, the full text of the trust is found in the enabling statute.\textsuperscript{385} The trust's dispositive framework is basically the same as the California provision quoted above except that the trustee is given greater latitude with respect to final distribution; if a distributee is under a disability, the trustee has discretion to keep the property in trust and make appropriate distributions for the benefit of the disabled person.\textsuperscript{386}

Alternatively, the testator may place the entire residuary estate in trust for the surviving spouse and children.\textsuperscript{387} The terms of the trust supplied by the full text of this provision are basically the same as for the trust created under the first option. The second option, however, mandates that the trustee give primary consideration to the welfare of the surviving spouse.\textsuperscript{388} The trust does not terminate until the surviving spouse dies and all of the testator's living children attain the age of twenty-one.\textsuperscript{389} As
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with the first option, the testator may specify a different termination age as long as it is at least eighteen.\textsuperscript{390}

The method for selecting one of the trust options is substantially the same as the method adopted by the California form.\textsuperscript{391}

\textit{iii. Nomination of Trustee}

The California and Wisconsin provisions regarding nomination of trustees for the statutory will trusts are virtually identical. Each state allows the testator to name one primary trustee and two successor trustees.\textsuperscript{392}

\textit{iv. Trustee Powers}

Neither statutory form lists the powers of the trustee. Rather, trustee powers stem from provisions that are automatically incorporated by reference into the forms. The California and Wisconsin provisions are very similar and provide, for example, that the trustee may exercise any powers conferred by law, may hire and pay agents, and may exercise various options with respect to the distribution of assets from the trust including to distribute assets to a minor beneficiary's custodian under the Uniform Gifts/Transfers to Minors Acts upon termination of the trust.\textsuperscript{393}

\textit{v. Other Trust Provisions}

The forms for both states have nearly identical automatically incorporated provisions which contain several additional trust provisions.\textsuperscript{394} These implied trust terms include a spendthrift clause,\textsuperscript{395} a provision guaranteeing the
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right of the trustee to reasonable compensation, and an exculpatory provision binding all interested persons to discretionary determinations made by the trustee in good faith.

d. Other Provisions of Enabling Legislation

This section examines other important provisions of statutory will form legislation.

i. Printing and Distribution Instructions

Each state that has adopted statutory wills has enacted provisions governing the form's printing and distribution. California, Michigan, and Wisconsin require that notices preceding the body of the will be printed in ten-point boldface type. Maine mandates that statutory will forms must "be provided at all Probate Courts for a cost equivalent to the reasonable cost of printing and storing the forms." Michigan requires anyone printing and distributing the form to reproduce it exactly as it appears in the statute. The Wisconsin enabling legislation requires a signature line to be printed on each page of the printed document.

ii. Other Rules Regarding the Statutory Will

The enabling legislation of each state's statutory will contains various rules regarding the statutory will. The Michigan statute provides the least amount of additional material because Michigan's form places definitions and additional clauses within the form itself, although after the
actual will.\textsuperscript{404} The Maine statute also contains scant additional material but does authorize the testator to fill in blanks in his own handwriting or with a typewriter.\textsuperscript{405}

The California and Wisconsin statutes contain a substantial amount of additional material. As previously noted, the statutory wills of both states incorporate by reference definitions, rules of construction, full texts of dispositive provisions, and other clauses.\textsuperscript{406} Extensive additional provisions also apply. The California statute governs testamentary capacity,\textsuperscript{407} execution procedure,\textsuperscript{408} attestation,\textsuperscript{409} improperly completed forms,\textsuperscript{410} interpretation of will section titles,\textsuperscript{411} revocation,\textsuperscript{412} additions or deletions,\textsuperscript{413} and the affect of dissolution or annulment of the testator's marriage.\textsuperscript{414} The Wisconsin statute is less extensive but does govern statutory will execution,\textsuperscript{415} improperly completed forms,\textsuperscript{416} revocation,\textsuperscript{417} and additions or deletions.\textsuperscript{418}

3. Experience

a. California

The original California statutory will provisions were enacted in 1982 and took effect on January 1, 1983.\textsuperscript{419} Several groups took immediate action to make the forms widely available to the general public. On December 18, 1982, the Board of Governors of the State Bar of California approved publication and distribution of the statutory forms.\textsuperscript{420} The forms became available in March 1983 to both the legal community and the public for $1.00 each, provided a self-
addressed, stamped, legal-sized envelope accompanied the request.\textsuperscript{421} Discounts were available for bulk purchases.\textsuperscript{422} In the first year, the California Bar sold 175,000 copies of the forms.\textsuperscript{423}

Private publishers also responded rapidly by making the forms available. One month after the statutory will legislation took effect, a California publisher reported selling 15,000 will without trust forms and 10,000 will with trust forms.\textsuperscript{424} This publisher also noted that although many attorneys had requested bulk lots of the forms, the majority of the sales had been to non-lawyers.\textsuperscript{425}

The large volume of sales within a relatively short period of time is good evidence of the public's acceptance of and interest in the forms. This acceptance was also demonstrated by the increased awareness of the will form and the importance of the estate planning process that was aroused by the publicity surrounding the forms.\textsuperscript{426} At least initially, however, it appeared that the public did not consult with attorneys about the form wills\textsuperscript{427} despite the recommendations of commentators to check with an attorney to be certain of the statutory form's suitability.\textsuperscript{428}

California substantially overhauled its Probate Code and a new revision and recodification of the statutory will provisions took effect on January 1, 1985.\textsuperscript{429} For the most part, the changes did not affect the substance of the statutory will provisions. Most of the changes were aimed at integrating these provisions into the overall scheme of
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California probate law. The only significant change to the forms was the addition of language to the bond articles which explained the term and how bond operated.\(^{430}\) Although technical amendments were made to the statutory will probate code provisions in 1984, 1985, and 1987, there were no changes to the statutory forms.\(^{431}\)

Recent reports from California indicate that the statutory will forms are often improperly completed or are not properly executed.\(^{432}\) This has led some probate specialists to conclude that the statutory form should be abolished.\(^{433}\) They believe that "mistakes will continue as long as consumers are encouraged to execute their own wills without a lawyer's help."\(^{434}\) However, it appears that most probate attorneys think that the statutory forms are a good tool for consumers and thus should be retained.\(^{435}\)

In an attempt to simplify the forms as well as to give consumers a greater opportunity to individualize the statutory will form, the Estate Planning, Trust and Probate Law Section of the California Bar is revising the statutory forms.\(^{436}\) The most current draft reflects the following significant changes:

- Important information is provided in question and answer format at the beginning of the form;\(^{437}\)
- Increased number of alternatives for disposition of property;\(^{438}\)
- Elimination of the statutory will with trust;\(^{439}\)
- Improved wording of attestation clause;\(^{440}\)
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• Recommendations to typeset the form, use color for signature boxes, and preparation of a Spanish language version. 441

No California appellate case was located which involved the statutory will statutes or forms.

b. Maine

Maine's statutory will provisions took effect on April 24, 1984. 442 The only changes to the original statute consist of a few minor technical corrections made even before the statute's effective date. 443 Little has been written about Maine's experience with its statutory will.

One written Probate Court decision was found interpreting a statutory will in which the testator added a restriction to a gift of real property that the land "must be occupied for ten years by any of the three [named beneficiaries] before being sold." 444 The probate judge found that the restriction was an illegal restraint on alienation and, in effect, would be ignored. 445 Thus, the statutory will gave fee simple interests to the beneficiaries. 446 No appellate case was located which involved any aspect of Maine's statutory wills.

c. Wisconsin

The Wisconsin statutory will provisions became effective on May 2, 1984. 447 The forms remain as originally enacted, and the mandatory clauses incorporated by reference were amended only once to make a minor technical addition. 448 The Center for Public Representation has published a non-technical guide
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to the statutory wills. In addition, the Wisconsin Bar Bulletin published an article in which the authors criticized the second trust option which provides a trust for the surviving spouse and children. The authors of this article concluded that use of this trust option may lead to unintended results and unfavorable tax consequences. No reported appellate case was located which concerned a Wisconsin statutory will.

d. Michigan

Michigan is the most recent jurisdiction to enact a fill-in statutory will form. The Michigan provisions took effect on July 1, 1986. Neither the form nor the statutory provisions have been amended despite proposals for a statutory will with trust form. A 1985 article urged the passage of statutory will legislation, but little has been written concerning the current status of statutory wills. There is some evidence that the forms are popular, although a perception exists among some Michigan practitioners that the forms create more problems than they solve.

e. Other Jurisdictions

The Ohio Legislature considered statutory will legislation in 1983 but failed to pass the bill. There is currently some interest in statutory wills in New Jersey, New York and Texas.
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E. ANALYSIS

This section compares and contrasts the various methodologies for providing statutory will forms and their underlying policies. There are several interrelated dimensions to this analysis. The first involves the advisability of the incorporation by reference approach used by the Uniform Statutory Will Act vis-à-vis the fill-in-the-blank approach presently used by four of the five jurisdictions with statutory will legislation. The second aspect requires an examination of the variations that exist within the fill-in-the-blank approaches. The third dimension concerns the substantive contents of the form will, especially the dispositive provisions that are either mandatory or subject to modification. A discussion of the advisability of statutory forms in general is reserved for Parts Three and Four of this dissertation.

The starting point of the analysis requires a realization that although the incorporation by reference approach and the fill-in-the-blank approach are significantly different, both techniques are directed towards the same end — decreasing the number of people who die intestate, or stated another way, increasing the number of people who die with valid wills that effectuate demonstrated intent. These approaches differ only in the way in which they strive to effectuate this goal.
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1. Attorney vs. Individual Administration

Perhaps the most fundamental philosophical difference between the incorporation by reference and fill-in approaches is the focus on the immediate user of the statutory provisions. The Uniform Act is designed primarily for use by attorneys while the fill-in forms anticipate non-attorney use.

The drafters prepared the Uniform Act with the legal practitioner in mind; there was no intent "to provide a form for use by non-lawyers without the benefit of legal advice." This intent is further evidenced by the following language from the Act's prefatory note:

The approach of this Act is to provide attorneys a simple will embodying an estate plan workable for many clients, a will that can be prepared quickly, that can be adapted easily to special situations, and that guards against common drafting errors, all at minimum cost to the client and productive use of the lawyer's time. Although the Act is thus helpful to the legal profession, its intended and true beneficiaries are the public in terms of economical and expeditious legal services.

The drafters expressly rejected the fill-in approach due to their lack of confidence in the public's ability to use the forms correctly. The drafters were deeply concerned that fill-in forms would "be used without consulting an attorney and if used that way, the forms [would be] fraught with opportunities for misunderstanding and mistake by the unwitting." The drafters of the Uniform Act further believed that the incorporation approach would reduce the risk of error by both non-attorney and attorney users.
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Jurisdictions adopting fill-in forms demonstrate greater confidence that the average individual (as well as the average attorney) will complete the forms properly. Supposedly, a person only needs to be "able to read and possess . . . the intelligence to understand the printed word"463 to correctly complete the form. Although each statutory form begins with a conspicuous warning that the user should seriously consider obtaining legal advice,464 each form continues with instructions and plain language provisions allowing the user to be self-sufficient in preparing the will without assistance. Each form warns users not to exercise creativity by making additions or alterations. Users are also notified of the possible untoward results of such conduct.465

The ultimate analysis must focus on which one of the two approaches will actually lead to a greater number of people executing valid wills which carry out their intent. Because the Uniform Act has been enacted in only one state and for a relatively short period of time,466 empirical evidence is not yet available to indicate the success or failure of this approach. However, there has been a large public response in favor of statutory wills.467

Because conclusive evidence is lacking, the success of the Uniform Act remains the subject of considerable speculation. It is unclear whether the Uniform Act will cause Massachusetts' attorneys to attract more estate planning clients or to serve existing clients more effectively. If more clients are attracted by the lure of a cheaper will, the
provisions of the Act may be deemed appropriate and actually be used. It is also speculative whether the initial interest will continue in jurisdictions using fill-in forms. Finally, it is possible that the completed forms will lead to more litigation than they save.

2. Intestacy Alternative vs. Individualization

The amount of individualization encouraged is the second fundamental difference between the two approaches. The Uniform Act is billed as creating a statutory will which is "an optional alternative to intestacy" that "will fit the needs and desires of a broad segment of persons . . . particularly many of that large number of persons who may otherwise die without a will." The Act takes a paternalistic approach by providing an intestacy-like distribution scheme which the drafters believed would be preferable to the government's intestacy plan.

In theory, the testator has great latitude to adjust the distribution plan to his individual situation. The Uniform Act provides that a specific provision of the will overrides a contrary provision in the Act. The Act's prefatory note states that the will "can be adapted easily to special situations" and that it can "apply to a portion of the testator's estate as part of a will which includes other devises."

The Uniform Act's comment that the testator has the ability to individualize is, however, mostly window-dressing.
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The Act is designed to operate as a single unit; substantial changes could prevent the will from adequately functioning to protect the family or achieve tax benefits. Evidence of the drafter's intent to discourage modification is found in the form contained in the Act's appendix. The only discretion given to the testator is in the selection of fiduciaries -- the form does not even permit the testator to leave a family heirloom to his favorite child or to make a gift to charity.474

By contrast, the fill-in forms permit considerable individualization. Opportunities are provided to make specific gifts and to choose the method of distributing the residuary estate. Jurisdictions vary greatly on the amount of discretion given to the testator to alter the default disposition plan. Nonetheless, all of the fill-in forms provide, on their face, greater latitude than the Uniform Act's form.475 On the other hand, the fill-in forms can be individualized only within the confines specified in the form and the enabling legislation476 while the Uniform Act permits the individualization of all provisions of the statutory will.477

3. Degree of Family Protection

a. Family vs. Non-Family

Closely connected to the amount of individualization allowed by the forms is the degree to which each form encourages the testator to protect the natural objects of his bounty. The Uniform Act's default distribution scheme makes
the entire estate available to the surviving spouse unless the estate is sufficiently large to trigger the inclusion of the testator's issue. If no spouse or issue survive, the enacting state's intestacy statute is followed which also attempts to keep the testator's property within the family, e.g., parents and siblings. The Act's sample form accords no opportunity for the testator to alter this plan, though of course, the testator is allowed to make gifts to other beneficiaries by express provision.

The fill-in forms make it easier for a testator to prefer non-family members or charities over family members. The Maine form affords the testator the greatest ability to leave property outside of the family. This form allows the testator to leave five specific gifts of real property, five specific gifts of personal and household items, multiple cash gifts, and the residuary estate to non-family beneficiaries. The Wisconsin form provides considerably less latitude to the testator by authorizing only five specific gifts, which may be of real property, personal property, or cash, to non-family beneficiaries. The California and Michigan forms are the strongest in protecting the family permitting only a limited number of cash gifts to leave the family -- two in Michigan and one in California. Of course, these cash gifts could be large enough to deplete all or a significant portion of the estate.

Although it may appear that the forms' protection of the family is motivated by a public policy favoring family members
to outsiders, the actual reasons for limitations on dispositive provisions may have other origins. The drafters of the California form stated that dispositive provisions to non-family members should be limited for three reasons: (1) "significant risk that non-family members would be misnamed or could not be located";\(^{485}\) (2) "difficult to provide for logical substitutional gifts if the named beneficiary predeceases the testator";\(^{486}\) and (3) "[s]tatutory will forms may be easier to forge or may be more susceptible to abuse by 'artful and designing persons.'"\(^{487}\) This limitation to family members does, however, reduce the number of people who may find the statutory will a useful estate planning tool. For example, the California form would be of limited value to an unmarried individual who has no children or to an elderly person whose spouse is deceased and whose children have abandoned him.

b. Surviving Spouse vs. Children

The forms also vary in the degree of protection given the surviving spouse vis-à-vis the testator's children and other descendants. The Uniform Act demonstrates a considerable bias in favor of the surviving spouse; the spouse receives the testator's residence, tangible non-business personal property, the greater of $300,000 or one-half of the statutory-will estate with the rest of the estate, if any, being held in trust for the spouse's benefit.\(^{488}\) This preference reflects the drafters' belief that "clients often are not satisfied with the provisions made by intestacy statutes for the
surviving spouse\textsuperscript{489} and attempts to counter the common misconception that intestacy statutes give priority treatment to the surviving spouse.

Each fill-in form is biased in some way towards giving greater protection to the surviving spouse. The Michigan form is the strongest in favoring the surviving spouse over the testator's children. The surviving spouse is entitled to the entire estate with the possible exception of two cash gifts and personal non-business property left via a separate writing.\textsuperscript{490} The California form favors the surviving spouse with respect to personal and household items but allows the testator to exclude the spouse from sharing in the residual estate.\textsuperscript{491} The Wisconsin and Maine forms, although favoring the surviving spouse, allow the testator to effectively disinherit the spouse in favor of the children. In Wisconsin, the testator may make significant specific gifts or select an intestate distribution for the residuary.\textsuperscript{492} In Maine, the testator may simply choose options or name recipients which do not include the spouse.\textsuperscript{493}

c. Availability of Trust Protection

The Uniform Act provides trust protection for underage and disabled beneficiaries and, under some circumstances, for the surviving spouse and non-disabled/non-underage children.\textsuperscript{494} The California and Wisconsin forms also permit the testator to elect trust protection. California testators may decide to have the residuary estate pass into trust for the testator's
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children\textsuperscript{495} while Wisconsin testators may also include the surviving spouse as a beneficiary of the trust.\textsuperscript{496}

4. Understandability

Another fundamental difference between the incorporation and fill-in approaches is the level of sophistication a person must possess to comprehend relevant material.

a. Reference vs. Full Text

The Uniform Act's reliance on incorporation by reference discourages testators from actually reading the incorporated material. Greater effort is required to obtain and study this material than where all relevant provisions are set forth in a unified document. Thus, a testator is less likely to be aware of, understand, and consent to the contents of the Uniform Act's will than one which is self-contained.

The fill-in jurisdictions differ in their approaches.\textsuperscript{497} The various approaches reflect each jurisdiction's resolution of the problem of making the forms easily understood and usable by the general public yet assuring that the will contains the necessary material to function properly.

Each of the fill-in jurisdictions has endeavored to make its form as simple as possible. No state has placed lengthy clauses, definitions, or rules of construction within the text of the will. The forms only provide brief explanations and basic options. The Maine statute reflects a belief that further explanations are not needed while the remaining three states provide extensive additional material either by
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incorporating statutory provisions by reference (California and Wisconsin) or by including such material after the will's attestation clause (Michigan). 498

b. Legalese vs. Plain Language

Although the Uniform Act is relatively straightforward, a non-lawyer would probably find it difficult to understand. The Act contains complicated references and explanations that could frustrate many readers. For example, one of the distribution provisions reads as follows:

The share of the surviving spouse is . . . if there is a surviving issue . . . subject to subsection (b), an interest in the remaining portion of the statutory-will estate, including any property that would pass under subsection (a)(2)(i) or (a)(2)(ii) but disclaimed by the surviving spouse, in a trust upon the terms set forth in Section 6. 499

It is obvious that the Act was not designed to be read or understood by the general public.

In contrast, the fill-in forms were designed to be read and understood by the average individual. 500 These forms contain simple language, explanations, and directions enabling a person of average intelligence and reading skills to properly complete the form. Some of the forms, however, contain language that is likely to cause problems for non-attorneys such as Wisconsin's use of the phrase "by right of representation" without any explanation. 501
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5. Tax Planning vs. No Tax Planning

The two approaches also differ on the amount of emphasis placed on tax planning. The drafters of the Uniform Act were tax conscious as reflected in the following excerpt from the prefatory note:

While it is recognized that this Act may be used most often by persons with small to medium-sized estates, the statutory-will scheme is not limited to estates with any particular cap in size. If the testator's estate at death should be substantially larger than the testator perhaps anticipated when the will was executed, some estate planning concepts are provided in this statutory-will scheme that will reduce the detrimental tax effects that might result in intestacy.\textsuperscript{502}

The Act is carefully drafted to permit post-mortem tax planning.\textsuperscript{503}

On the other hand, the fill-in wills are designed with few or no tax planning features. The potential benefits of complicated tax provisions were deemed to be outweighed by the goal of keeping the form simple and understandable to non-attorneys.\textsuperscript{504} Each form warns its user that the form will is not designed to reduce taxes.\textsuperscript{505} In fact, use of some forms may lead to unfavorable tax consequences.\textsuperscript{506} This may not be a significant problem, however, because most estates are not large enough to require tax planning.\textsuperscript{507}
F. RECOMMENDATIONS

1. Co-Existence of Uniform Act and Fill-in Forms

Because of significant differences in the operation of the Uniform Act and the fill-in forms, it is conceivable that they will be used by different segments of the population. The Uniform Act may assist attorneys who already have estate planning clients with average needs by permitting the will preparation service to be handled less expensively, more efficiently, and more effectively. Alternatively, the fill-in forms may serve people with simple estates and traditional dispositive desires who would not hire an attorney to prepare their wills. These people may not wish to pay an attorney because the nominal fee of a form is considerably less than an attorney-advised will. It is also possible that these persons simply may not wish to take the time or effort needed to consult an attorney.

The most advantageous solution may be for each jurisdiction to have both types of provisions: the Uniform Act to indirectly help individuals by using the attorney as a conduit and the fill-in forms for directly helping do-it-yourself individuals. The drafters of the Uniform Act recognized this possibility. In a comment to the repealer section the drafters stated: "A statutory-form type statutory-will statute and this Act can both be enacted by a state without presenting a conflict."
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A state wishing to enact a fill-in statutory form will must next determine how that statute should be designed. Decisions must be made concerning the approach (self-contained or some material incorporated by reference) and the contents of the will form.

2. Synthesis of Self-Contained and Incorporated Material

In determining which approach is most advisable, state legislatures must not lose sight of the statute's primary goal of increasing the number of people who die testate. A long, multi-optioned, and complex self-contained fill-in form may make the document too cumbersome and thus intimidate potential users. Conversely, a form that is too short provides for less individualization and contingency planning and thus may be less likely to effectuate the testator's actual intent. On the other hand, when provisions are incorporated by reference, it is difficult to ascertain whether the extrinsic material was actually read and understood by the testator and intended to be part of the will. There is, of course, no guarantee that a testator will read and understand the provisions of a fill-in will. Further, "[t]here is less danger of wrong clauses finding their way into a will if one has before him an instrument that is complete in itself, that can be read from beginning to end without having to refer to other documents." The form should provide all material reasonably needed by the testator to make fully informed dispositive and
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administrative choices. Additional material necessary to resolve technical or legal matters but which is of little interest to the average testator may be incorporated by reference. Relevant material, however, should be strategically placed in the form so the form is as self-contained as possible. The potential testator, as well as anyone who may later need to read and interpret the will, should have all relevant material available. In this way, the potential testator can see what his will actually contains and can make more knowledgeable decisions. It also will be more convenient for others coming in contact with the will to have all of its terms readily available.

After concluding that the form should be as self-contained as possible, it is necessary to determine which material is relevant and where it should be located. Traditional attorney caution leans toward supplying any additional material that could be needed and the policy of full disclosure to the testator would indicate inclusion on the form. On the other hand, the desire to encourage the general public to use the forms by keeping them uncluttered leans toward incorporation by reference.

To make a proper decision, each additional provision needs to be examined critically. Any material reasonably necessary for the testator should be provided on the form so its user has full disclosure of the applicable rules. Provisions regarding dispositions of property and the nominating of fiduciaries fall into this category. Only in
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this manner can the will truly reflect the testator's wishes. However, this included material should not be isolated at the end of the document as on the Michigan form. The better approach is to situate the additional material in the will itself where such information is needed. The document will necessarily be longer but careful organization and use of plain English can make it straightforward and easy to follow.

Clauses that are deemed of lessor importance to a testator, such as boilerplate lists of fiduciary powers, may be incorporated by reference. The provisions, however, must be incorporated in a manner that clearly draws the testator's attention to the fact that there is more to the will than meets the eye. The significance of each incorporation should be carefully explained on the form. Vague or general references, such as those in the California and Wisconsin forms, should be avoided.511

3. Provide Adequate Opportunity for Individualization

The ultimate goal of estate planning is to ascertain and effectuate the intent of each individual to the fullest extent possible within legal bounds.512 Statutory forms are designed to facilitate individuals dying with a will that carries out their distribution wishes rather than having distribution determined by a state's intestacy laws.513 Accordingly, a statutory form should not directly or indirectly encourage a particular mode of disposition. Although most testators will favor their spouse and children, and despite public policy
favoring the protection of family members, a statutory form should leave such decisions in the hands of the testator. A person should not be coerced into leaving a portion of his estate to his spouse or children to use a statutory form. Instead, sufficient options should be provided on the form so the testator is in full command of the dispositive scheme and does not "alter an intended distribution pattern simply to fit it into the form's set pattern."
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1. Portions of this chapter will be printed in Beyer, Statutory Will Methodologies -- Incorporated Forms vs. Fill-in Forms: Rivalry or Peaceful Co-Existence?, 94 DICK. L. REV. ___ (1990). The author acknowledges the kind assistance of Mr. Harold I. Boucher in supplying materials on the legislative history of the California statutory will and for his support of this research.


3. Id.


5. See, e.g., UNIF. TRUSTEES' POWERS ACT, 7B U.L.A. 741 (1964) (detailing fiduciary powers that are automatically incorporated into trusts and incorporated by express reference into other documents); MASS. ANN. LAWS ch. 184B (Law. Co-op. 1987) (providing three categories of fiduciary powers that may be incorporated by reference into a will or trust); TENN. CODE ANN. § 35-50-109(a) (1984) (listing fiduciary powers that may be incorporated by reference).


8. Id. at 677 (recognizing that the development of the forms could be via free enterprise system or legislative enactment).

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13. Id.


15. Id.

16. Id.

17. Id. at historical note.


22. Id.


28. Id. § 179.


32. Id. § 3(1)(i).

33. Id. § 3(1)(ii).

34. Id.

35. Id. § 3(1)(iii).

36. Id. § 3(1)(iv).

37. Id. § 3(1)(v).

38. Id. at sched.

39. Id.

40. Id. at Form 1.

41. Id. at Form 2.

42. Id. at (1).

43. Id. at (2).

44. Id. at Form 3.

45. Id. The beneficiary in this situation is called the "usufructuary."

46. Id. at (2) - (6).

47. Id. at (7) & (8).

48. Id. at Form 4.

49. Id. at Form 5.

50. Id.
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51. Id. at Form 6.


54. Id. at sched. (the schedule contains model forms for incorporating each of the Part II forms).

55. Id. at Form 7.

56. Id. at (3).

57. Id.

58. Id. at (4).

59. Id. at (5).

60. Id. at (6).

61. Id. at Form 8.

62. Id. at (1).

63. Id. at (2).

64. Id. at (3).

65. Id. at (4).

66. Id. at (5).

67. Id. at (6).

68. Id. at (7).

69. Id. at Form 9.

70. Id. at (2)(ii).

71. Id. at (2) & (3).

72. Id. at Form 10.

73. See Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964).
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75. Trachtman, Statutory Will Forms -- Survey of English Experience, 88 TR. & EST. 640 (1949) (Trachtman was then the newly elected chairman of the American Bar Association's Committee on Standards of Draftsmanship).

76. Id. at 640.

77. Id.

78. Id. at 641.

79. Id. (Form 8 setting forth administrative powers appeared the most commonly used form; some other forms were occasionally used while others were rarely, if ever, used.).

80. See Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964) (1964 assertion that the drafting habits of English practitioners were "not likely to have materially changed" since Trachtman's 1949 investigation).


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for a Statutory Will, Statutory Trust and Statutory Short Form Clauses, 15 REAL PROP. PROB. & TR. J. 837, 837 (1980).

86. Id.

87. Id.


91. Id. at 842 (§ 2-102).

92. Id. at 842-44 (§§ 3-101 to -104).

93. Id. at 844 (§ 3-105).

94. Id. at 844 (§ 3-106).

95. Id. at 844 (§ 3-107).

96. Id. at 845 (§ 3-108).

97. Id. at 845-46 (application of other law, § 4-101; fiduciary powers, § 4-102; disability discretion, § 4-103; bond or surety, § 4-104).


99. Id. at 839-41, 850-53.

100. Id.

101. Id. at 850-52 (§ 3-101).
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102. Id. at 852 (§ 3-102).


106. Id.

107. Id.

108. Id.

109. Id. at historical note. The author of the ABA Committee report was of the opinion that the approval of the Act carried "the original ABA program to a sound conclusion, providing an estate planning tool that will meet important needs of the public and the legal profession." Perkins, The Uniform Statutory Will Act, PROB. & PROP., Winter 1985, at 11, 11.


112. Id.

113. Id.

114. Id.

115. Id.

116. Id.

117. Id. § 1(2).

118. Id.

119: Id. § 1(3).

120. Id. § 1(4).

121. Id. § 1(5).
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122. Id. § 1(6).

123. Id. (comment).

124. Id. § 1(7).

125. Id.

126. Id.

(An individual separated from the testator whose marriage to the testator continues in effect under the law of this State solely because a judgment of divorce or annulment of the marriage is not recognized as valid in this State is not the testator's surviving spouse under this [Act]. An individual whose marriage to the testator at the time of death is not recognized in this State solely because a judgment of divorce or annulment of a previous marriage of either or both of them is not recognized as valid in this State is the testator's surviving spouse under this [Act].).

127. Id. § 1(8).

128. Id. § 1(9) & comment (1984).

129. Id.

130. Id.

131. Id. (comment).

132. Id.

133. Id. § (1)(9) ("If the property used as a residence is a unit in a cooperative or other entity, it includes all rights and interests relating to that unit.").

134. Id.

(If the property is used in part for a commercial, agricultural, or other business purpose, the testator's residence is an area not exceeding [3] acres, which includes the structure used in whole or in part as a residence and structures normally used by the testator in connection with the dwelling and excludes structures and areas outside the dwelling used primarily for a commercial, agricultural, or other business purpose.").
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135. Id. § 1(10).

136. Id. § 2.

137. See supra notes 84-110 and accompanying text.

138. UNIF. STAT. WILL ACT § 3(a) & comment (1984) (indicating that will could be only one page in length).

139. Id.

140. Id.

141. Id. § 3(b).

142. Id. at comment ("The policy assumption . . . is that the Statutory Will Act on the date the testator executes the will represents the testator's intent and the state does not alter the testator's will through subsequent amendments to the statute.").

143. Id. § 3(c).

144. Id. § 5(a).

145. Id. § 5(a)(2)(i).

146. Id.

147. Id.

148. Id. § 5(a)(2)(ii).

149. Id. at comment (suggesting a smaller figure for community property states since the surviving spouse's interest in community property would not be a part of the testamentary estate and hence not governed by the statutory will).

150. Id. § 5(a)(2)(iii) (this remainder includes property that the surviving spouse would have received under § 5(a)(2)(i) & (ii) but which was disclaimed by the surviving spouse).

151. Id. § 5(b) & comment (the term "uneconomical" should be broadly construed to allow consideration of all relevant factors).

152. Id.

153. Id. See also I.R.C. § 2056(b)(7) (Supp. 1988).
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155. Id. at 12.


157. Id.

158. Id. (the demand by the surviving spouse must be in writing).

159. Id. § 6(2).

160. Id.

161. Id.

162. Id.

163. Id. (The drafters placed the age in brackets to allow jurisdictions to choose higher or lower ages. The drafters believed that the deceased spouse would want children to complete college). In determining the needs of beneficiaries, the trustee may rely in good faith on written statements supplied by the beneficiary. Id.

164. Id.

165. Id.

166. Id. This accounting may also be done in determining shares of ancestors and descendants of the testator's issue that received the distribution. Id.

167. Id. This provision was included to make certain the trustee's power is not deemed a general power of appointment under I.R.C. §§ 2041 & 2514.

168. Id. §§ 8 & 9 (property to remain in trust if beneficiaries under stated age; special distribution rules apply if beneficiary under disability).

169. Id. § 6(3).

170. Id.

171. Id. To determine the intestate share, the law of testator's state of domicile is applied as it exists upon the surviving spouse's death, not as the law existed at the time of testator's death. The location of the property is also irrelevant. Id. at comment.
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172. Id. § 7(a)(1) (this distribution is subject to provisions creating a trust if a child is under a specific age, § 8, or if the distributee is a disabled person, § 9).

173. Id.

174. Id. § 7(a)(2) (this distribution is subject to provisions creating a trust if a child is under a specific age, § 8, or if the distributee is a disabled person, § 9). In determining the intestate distribution, the property is treated as being in the state and the testator is treated as having died domiciled in the state. Id.

175. Id. §§ 8 & 9.

176. Id. § 7(b).

177. Id.

178. This may arise when a trust for a surviving spouse terminates or when there is no surviving spouse. Id. §§ 6(3) & 7(a).

179. The drafters suggested age twenty-three "because it is an age when most children will have received their first degree from college." Id. at comment.

180. Id. § 8(a). Only one of testator's children need be underage for all property passing to testator's issue to be held in trust. Id. § 7(b). The trust will not be created if a non-spouse personal representative determines that the trust would be uneconomical. Id. § 8(f).

181. Id. § 8(a).

182. Id. § 8(b).

183. Id.

184. Id. § 8(c).

185. Id.

186. Id.

187. Id. at comment.

188. Id. § 8(d).

189. Id. § 8(e) (if testator's spouse survived the testator, these shares are determined under § 6(3), if not, these shares are determined under § 7).
190. Id.
191. Id.
192. Id.
193. Id. § 8(f).
194. Id. This provision prevents the discretionary powers from being deemed a general power of appointment under I.R.C. §§ 2041 & 2514. Id. at comment.
195. The distribution options discussed in this section do not apply to distributions to the testator's surviving spouse. Id. § 9(c). This preserves the possibility that the surviving spouse's share will qualify for the marital deduction. Id. at comment.
196. Id. § 9(a).
197. Id.
198. Id.
199. Id. This authorizes distributions to be made under the Uniform Gifts/Transfers to Minors Acts. Id. at comment.
200. Id.
201. Id.
202. Id.
203. Id. § 9(b).
204. Id.
205. Id. § 10(a).
206. Id. at comment.
207. Id. § 10(b).
208. Id. § 10.
209. Id.
210. Id.
211. Id. § 11. The drafters bracketed the number of days so jurisdictions may raise or lower the required survival period.
212. Id. § 12(a).

213. Id. § 12(b).

214. Id.

215. Id. § 12(c).

216. Id.

217. Id. § 12(d).

218. Id.

219. Id. § 12(e).

220. Id. § 13(a) & (b), Alternative A.

221. See id. at comment.

222. Id. § 13(a), Alternative B.

223. The powers expressly granted are as follows:

(1) retain property in the form in which it is received, including assets in which the trustee is personally interested;

(2) make ordinary or extraordinary repairs, store, insure, or otherwise care for any tangible personal property, and pay shipping or other expense relating to the property as the trustee considers advisable;

(3) abandon property the trustee determines to be worthless;

(4) invest principal and income in any property the trustee determines and, without limiting the generality of the foregoing, invest in shares of an investment company or in shares or undivided portions of any common trust fund established by the trustee;

(5) sell, exchange, or otherwise dispose of property at public or private sale on terms the trustee determines, no purchaser being bound to see to the application of any proceeds;

(6) lease property on terms the trustee determines even if the term extends beyond the time the property becomes distributable;

(7) allocate items of income or expense to income or principal, as provided by law;

(8) keep registered securities in the name of a nominee;

(9) pay, compromise, or contest claims
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or controversies, including claims for estate or inheritance taxes, in any manner the trustee determines;

(10) participate in any manner the trustee determines in any reorganization, merger, or consolidation of any entity whose securities constitute part of the property held;

(11) deposit securities with a voting trustee or committee of security holders even if under the terms of deposit the securities may remain deposited beyond the time they become distributable;

(12) vote any security in person or by special, limited, or general proxy, with or without power of substitution, and otherwise exercise all the rights that may be exercised by any security holder in an individual capacity;

(13) borrow any amount the trustee considers advisable to obtain cash for any purpose of the trust, and in connection therewith, mortgage or otherwise encumber any property on any conditions the trustee determines even if the term of the loan may extend beyond the term of the trust;

(14) allot in or toward satisfaction of any payment, distribution, or division, in any manner the trustee determines, any property held at the then current fair market value;

(15) hold trusts and shares undivided or at any time hold them or any of them set apart one from another;

(16) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(17) sell or exercise stock subscription or conversion rights;

(18) employ persons, including attorneys, auditors, investment advisers, or agents, even if associated with the trustee, to advise or assist the trustee in the performance of duties, act without independent investigation upon their recommendations, and instead of acting personally, employ agents to perform any act of administration, whether or not discretionary;

(19) continue any unincorporated business or venture in which the decedent was engaged at the time of death;

(20) incorporate any business or venture
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in which the decedent was engaged at the time of death;

(21) distribute property distributable to the estate of an individual directly to the devisees or heirs of the individual

Id.

224. Id. § 13(a)(22).

225. Id. § 13(b) (claims may be satisfied, even if not legally binding or properly presented, if the personal representative believes the testator would have wanted the pledges to be paid).

226. Id. § 13(c) (this subsection is identical in both alternatives).

227. Id.

228. Id. ("Except to the extent qualified property is not available, only property that qualifies for the estate tax marital deduction under the Internal Revenue Code, as amended, may be allocated to the surviving spouse under Section 5 or to the surviving spouse's share of principal in a trust established under Section 6.").

229. Id. § 14.

230. Id.

231. See id. at prefatory note.

232. Id. at app. I.

233. Id.

234. Id.

235. Id. at historical note.


237. Id.

238. For example, Massachusetts moved § 15 of the Uniform Act dealing with the Act's short title into the definitional section. MASS. ANN. LAWS ch. 191B, § 1 (Law. Co-op. Supp. 1988). The Uniform Act's modern use of "is" to indicate mandatory actions or results was changed to the traditional "shall be." Compare UNIF. STAT. WILL ACT § 5 (1984) ("share of the surviving spouse is") with MASS.
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239. See, e.g., MASS. ANN. LAWS ch. 191B, § 5(a)(2)(ii) (Law. Co-op. Supp. 1988) (if there is surviving issue, surviving spouse receives, inter alia, greater of $300,000 or one-half remainder of estate); id. § 8(a) (age twenty-three used as underage cut-off); id. § 11 (thirty day survival period required).

240. Id. § 13.

241. See, e.g., 1987 Mass. Acts 465, §§ 51 & 52 (correcting § 6); id. § 53 (correcting § 8); id. § 54 (correcting § 12); id. § 55 (correcting § 13).


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253. Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 677 (1985) (the bill was introduced by State Representative Perry Bullard).

254. Id.


258. The forms published by the State Bar of California contain all of the incorporated material on the back of the last page of the form. See Appendices B & G. The forms published by the Wisconsin Legal Blank Co., Inc. have the incorporated material on a separate sheet of paper stapled to the will form.

259. CAL. PROB. CODE § 6240 (West Supp. 1988) (notice 6); id. § 6241 (notice 7); WIS. STAT. ANN. § 853.55 (West Supp. 1988) (notice 5); id. § 853.56 (notice 6).

260. CAL. PROB. CODE §§ 6200-10 (West Supp. 1988) (e.g., definitions of "testator," "spouse," "executor," "trustee," "descendants," and "person"; gender and number interpretation rules; construction of "shall" and "may"; manner of distribution to descendants); WIS. STAT. ANN. § 853.50 (West Supp. 1988) (e.g., definitions of "by right of representation," "children," "issue," "testator," and "trustee").


262. Id. PROB. CODE § 6240 (West Supp. 1988) (art. 2.1).

263. Id. § 6242.


265. CAL. PROB. CODE § 6245(b) (West Supp. 1988); WIS. STAT. ANN. § 853.60(2) (West Supp. 1988).

266. CAL. PROB. CODE § 6245(c) (West Supp. 1988); WIS. STAT. ANN. § 853.60(3) (West Supp. 1988).
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271. Id.

272. Id. (art. 3.4).


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(notice 8 speaking only to ability to make a new will); WIS. STAT. ANN. § 853.55 (West Supp. 1988) (notice 4).


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291. Id. (instruction 2).


295. Id.

296. See id. (definition (c)).

297. But see CAL. PROB. CODE § 6202 (West Supp. 1988) (defining "spouse" to mean spouse at time of will execution).


299. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.2).

300. Id.

301. Id.

302. Id.

303. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 2.2).

304. Id. (art. 2.3).

305. Id. (arts. 2.2 & 2.3).

306. Id. (art. 2.4). Distribution of the residuary estate is discussed in greater detail in § D(2)(b)(9) of this Chapter.

307. Id. § 2-605.

308. Id. (art. 2.3).

309. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (art. 2.1).
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310. Id.

311. Id.

312. Id.

313. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 2.2).

314. Id.

315. Id.

316. Id.

317. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 2.1, each gift must be separately signed).

318. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 2.2).

319. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.1). The full text of this provision is found in CAL. PROB. CODE § 6242 (West Supp. 1988); ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 2.1); MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (art. 2.1, also stating that any inheritance tax due is not to be paid from this property); WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 2.1). The full text of this provision is found in WIS. STAT. ANN. § 853.55 (West Supp. 1988). The statutes provide varying definitions or descriptions of personal and household items. Compare, e.g., CAL. PROB. CODE § 6242 (West Supp. 1988) ("books, jewelry, clothing, personal automobiles, household furnishings and effects, and other tangible articles of a household or personal use") with WIS. STAT. ANN. § 853.57 (West Supp. 1988) ("books, jewelry, clothing, personal automobiles, recreational equipment, household furnishings and effects, and other tangible articles of a household, recreational or personal use, together with all policies of insurance insuring any such items").

320. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.3(a)). The full text of this provision is found in CAL. PROB. CODE § 6243(a) (West Supp. 1988).

321. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.3(b)). The full text of this provision is found in CAL. PROB. CODE § 6243(b) (West Supp. 1988).

322. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.3(c)). The full text of this provision is found in CAL. PROB. CODE § 6243(c) (West Supp. 1988).

323. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.3). If the testator signs in more than one box or fails to sign...
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in any box, the residue is distributed as intestate property. *Id.*

324. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 2.4A).

325. *Id.* (art. 2.4B). If there is no surviving spouse, that amount designated for the surviving spouse is distributed in equal shares to the testator's children and the descendants of any deceased child. *Id.*

326. *Id.* (art. 2.4C).

327. *Id.*

328. *Id.* (i.e., by failing to sign AND initial only one choice).

329. *Id.* (art. 2.5). A separate signature is required for this designation to be effective. *Id.*

330. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (art. 2.3).

331. *Id.*

332. *Id.*

333. *Id.*

334. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 2.3(a)). The full text of this provision is found in WIS. STAT. ANN. § 853.58(a) (West Supp. 1988).

335. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 2.3(b)). The full text of this provision is found in WIS. STAT. ANN. § 853.58(b) (West Supp. 1988).


337. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 3.1).

338. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 3.3).


340. MICH. COMP. LAWS ANN. § 700.123a (West Supp. 1988) (art. 3.1).

341. See generally Letter from Francis J. Collin, Jr. to John L. McDonnell, Jr., at 3 (Dec. 9, 1980) ("possible permutations that are introduced once co-fiduciaries are possible would lead to an excessively long list of
alternatives, would add unnecessary length and complexity to the Statutory Will, and would be misunderstood by many testators.

342. Id.

343. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 3.3).

344. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (additional clauses (a)).

345. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 3.1).

346. CAL. PROB. CODE § 6245(b) (West Supp. 1988) (e.g., powers conferred by law, enumerated powers such as the ability to sell assets at public or private sale, powers regarding distributions to minors, powers regarding partition when assets are distributed).

347. WIS. STAT. ANN. § 853.60(2) (West Supp. 1988) (substantially the same as California provision, supra note 346).

348. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 3.2).

349. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (arts. 3.1 & 3.2).

350. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (art. 3.2).

351. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 3.2).

352. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 3.2).

353. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 3.1).

354. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (art. 3.2).

355. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 3.2).

356. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (art. 3.2).

357. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (arts. 3.2 & 3.3).

358. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 3.2; e.g., same person may serve as both guardian of person and property; institution may serve only as guardian of property); ME. REV. STAT. ANN. tit. 18A, § 2-514(a)
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(Supp. 1987) (arts. 3.2 & 3.3; e.g., if no conservator
named, guardian acts as conservator); MICH. COMP. LAWS
ANN. § 700.123c (West Supp. 1988) (art. 3.2 & additional
clause (b); e.g., because spouse may predecease, testator
should nominate guardian and conservator); WIS. STAT.
ANN. § 853.55 (West Supp. 1988) (art. 3.2; e.g., testator
should name guardian for children under age eighteen).

359. CAL. PROB. CODE § 6245(c) (West Supp. 1988) (same
authority as custodial parent plus powers conferred by
law).

360. WIS. STAT. ANN. § 853.60(3) (West Supp. 1988) (all powers
conferred by law).

361. See ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp.
1987). Bond will not be required in most circumstances
because the will does not expressly require it. Id.
§ 3-603.

362. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 3.3).

3.3).

364. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 3.3).

365. CAL. PROB. CODE § 6240 (West Supp. 1988); ME. REV. STAT.
ANN. tit. 18A, § 2-514(a) (Supp. 1987); MICH. COMP. LAWS
ANN. § 700.123c (West Supp. 1988); WIS. STAT. ANN.

366. CAL. PROB. CODE § 6240 (West Supp. 1988); ME. REV. STAT.
ANN. tit. 18A, § 2-514(a) (Supp. 1987); MICH. COMP. LAWS
ANN. § 700.123c (West Supp. 1988); WIS. STAT. ANN.

367. CAL. PROB. CODE § 6240 (West Supp. 1988); ME. REV. STAT.
ANN. tit. 18A, § 2-514(a) (Supp. 1987); MICH. COMP. LAWS
ANN. § 700.123c (West Supp. 1988); WIS. STAT. ANN.


372. See Lawrence, III & Sytsma, Michigan Statutory Wills, 64

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374. WIS. STAT. ANN. § 853.56 (West Supp. 1988) (art. 2.3). See generally Erlanger & Crowley, Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan, WIS. B. BULL., Jan. 1986, at 17, 17-18 (concluding that the second trust option should not be contained in a do-it-yourself will because "(1) the instructions do not explain the significance of the choice and thus create the possibility that the testator will make a choice with unintended consequences; and (2) under certain circumstances, [the trust] has uncertain and potentially costly income tax consequences").

375. CAL. PROB. CODE § 6241 (West Supp. 1988) (art. 2.3(a)).

376. Id. § 6244(a).

377. Id. § 6244(a)(2)(A).

378. Id. § 6241 (art. 2.3(b)).

379. Id. § 6241 (art. 2.3).

380. Id.

381. Id.

382. WIS. STAT. ANN. § 853.56 (West Supp. 1988) (art. 2.3(a)).

383. Id.

384. Id.

385. Id. § 853.59(a).

386. Id. § 853.59(a)(2)(B).

387. Id. § 853.56 (art. 2.3(b)).

388. Id. § 853.59(b)(1)(A).

389. Id.

390. Id. § 853.56 (art. 2.3(b)).

391. Id. § 853.56 (art. 2.3).

392. CAL. PROB. CODE § 6241 (West Supp. 1988) (art. 3.2); WIS. STAT. ANN. § 853.56 (West Supp. 1988) (art. 3.2).

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393. CAL. PROB. CODE § 6246(b) (West Supp. 1988); WIS. STAT. ANN. § 853.61(2) (West Supp. 1988).


403. WIS. STAT. ANN. § 853.52(4) (West Supp. 1988) (failure of the printer to include such a line and/or failure of the testator to sign the line does not affect the validity of the will).


405. ME. REV. STAT. ANN. tit. 18A, § 2-514(b) (Supp. 1987) (other rules deal with markouts and failure to sign individual provisions).

406. See supra § D(2)(a) of this Chapter.


408. Id. § 6221.

409. Id. § 6221.5.

410. Id. § 6223.

411. Id. § 6224.

412. Id. § 6225.

413. Id.

414. Id. § 6226 (dissolution or annulment revokes gifts to spouse and nominations of spouse as a fiduciary; property
then passes as if spouse had predeceased; legal separation is insufficient to remove spouse as a beneficiary or fiduciary).


416. Id. §§ 853.53 & 853.54(3).

417. Id. § 853.54(1).

418. Id. § 853.54(3).


422. Id. (10 for $5.00; 25 for $8.75; 50 for $12.50; or 100 for $25.00). Current prices are $1.00 each, 25 for $15.00, and 100 for $50.00. St. B. of Cal., Order Form (Aug. 1986).

423. California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7.


425. Id. at 16.

426. Id. (head of probate section of San Diego County Bar Association stated that there was a high level of public interest during public talks; vice-president of form publisher believed sales due to publicity as well as public perception that the new form wills replaced old handwritten wills).

427. Id. (in first month after statutory will provisions took effect, author's interviews with probate attorneys throughout California revealed no case in which a client had asked for advice regarding statutory form; head of probate section of San Diego Bar Association had not received inquires from individuals).

428. See, e.g., Kellogg, Adapting Your Practice to the New Statutory Wills, CAL. LAW., Feb. 1983, at 14 (recommending that attorney send explanatory/warning letter to clients); California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 17 ("[i]deally, the statutory will should be used with a lawyer's help"); Est. Plan., Tr. & Prob. L. Sec. St. B. Cal., Possible
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Legislation -- Statutory Will 5 (Dec. 16, 1980) (form should be "sufficiently complex to discourage its use unless a California lawyer supervises it").


432. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (Alameda County Court Commissioner Barbara J. Miller stated that most statutory wills are not completed correctly; one-half of statutory wills offered for probate in Los Angeles County are rejected because they are improperly filled out or not signed).

433. Id. (Alameda County Court Commissioner Barbara J. Miller indicated that the public may be better off without statutory will option).

434. Id.

435. Id.

436. Id.; see also Vollmer, California Statutory Will Revisions Being Considered: Your Comments Requested, Fall 1989, EST. PLAN., TR. & PROB. NEWS, at 1, 5-9.


438. Id.

439. Id. ("[Statutory will with trust] is too complex for consumers and has income tax and other problems associated with it. The advantages and disadvantages of family pot trusts should be carefully explained to consumers by an attorney.").

440. Id. (changes made so will is considered self-executing even if witnesses cannot be found).

441. Id.

442. 1983 Me. Laws ch. 376.

443. 1983 Me. Laws ch. 816, § A,7 (in art. 2.4(B) of the form, "spouse" substituted for "wife" and "that" for "her").

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445. Id. at 1-2.

446. Id. at 3.


452. See Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677 (1985) (original proposal contained will with trust form); Letter from Fredric A. Sytsma to Gerry W. Beyer (Oct. 24, 1988) (current proposal to enact will with trust form).

453. Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677 (1985) (the statutory will legislation that eventually passed is significantly different from the proposal discussed in this article, e.g., the proposal contained provisions for a statutory will with trust while the enacted version does not).


to Robert M. Brucken (Dec. 28, 1983). In Texas, statutory probate judges appear to be opposed to statutory wills. See Letter from Kent H. McMahan to Gerry W. Beyer (Nov. 17, 1988). There is also some evidence that New Jersey considered statutory will legislation. The Limits to a Do-It-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84.

458. See, e.g., UNIF. STAT. WILL ACT prefatory note (1984) ("goal of presenting a widely usable "simple will"; dispositive scheme "will fit the needs and desires of a broad segment of persons as an alternative to intestate succession and perhaps particularly many of that large number of persons who may otherwise die without a will"); California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7, 7 ("impetus for [statutory will] came from lawyers who felt that the testamentary needs of the middle class and people with simple estates were not being met"). See generally supra Chapter II(B).


461. Id. But see UNIF. STAT. FORM POWER OF ATTORNEY ACT § 1 (1988) (fill-in form for power of attorney approved and recommended).


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467. See, e.g., California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7 (within a year after the effective date of statutory will legislation, State Bar of California sold 175,000 statutory will forms); Girdner, State's Consumers Snapping Up Wills Under New Statute, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (within a month after the statutory will provisions took effect, one private forms publisher sold 25,000 statutory forms); Letter from Fredric A. Sytsma to Gerry W. Beyer (Oct. 24, 1988) (reflecting belief that the Michigan statutory will form is "very popular"); Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8, 8 (belief that statutory will is a great service to Bar and public). Contra Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 (belief that "statutory will would do great disservice to the families of persons availing themselves of it").


469. Id.

470. Id. See generally supra Chapter I(B)(1).

471. UNIF. STAT. WILL ACT § 3(a) (1984).

472. Id. at prefatory note.

473. Id.

474. Id. at app. I. This form does not permit the testator to designate an alternative guardian for his children should the original nominee be unable or unwilling to serve. Id.

475. See generally supra § D(2)(b) & (c).

476. See, e.g., MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (notice 3; "Warning! It is strongly recommended that you do not add or cross out any words on this form except for filling in the blanks because all or part of this will may not be valid if you do so."); WIS. STAT. ANN. § 853.54(2) (West Supp. 1988) ("Any additions to or deletions from the face of the form of the Wisconsin basic will or basic will with trust, other than in accordance with the instructions, shall be ineffective and shall be disregarded.").

477. UNIF. STAT. WILL ACT § 3(a) (1984) ("To the extent an express provision of a will conflicts with this [Act], the will governs").

478. Id. §§ 5-7.
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479. Id. § 7(a)(2).

480. Id. § 3(a) & app.

481. ME. REV. STAT. ANN. tit. 18A, § 3-514(a) (Supp. 1987) (arts. 2.2-2.5).

482. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (art. 2.2).

483. MICH. COMP. LAWS ANN. § 700.123a (West Supp. 1988) (art. 2.1).

484. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.2).


486. Id.

487. Id.


489. Id. at prefatory note.

490. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (arts. 2.1, 2.2 & 2.3).

491. CAL. PROB. CODE § 6240 (West Supp. 1988) (arts. 2.1 & 2.3).

492. WIS. STAT. ANN. § 853.55 (West Supp. 1988) (arts. 2.2 & 2.3).


495. CAL. PROB. CODE § 6241 (West Supp. 1988) (art. 2.3). See generally supra § D(2)(c).

496. WIS. STAT. ANN. § 853.56 (West Supp. 1988) (art. 2.3). See generally supra § D(2)(c).

497. See supra § D(2)(a).

498. Id.


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("An attempt has been made to write the Statutory Will in layman's language in order to encourage its use and to respond to public pressure for 'plain English' legal documents.").

501. WIS. STAT. ANN. § 853.56 (West Supp. 1988) (art. 2.3; this phrase is defined by provisions which are incorporated by reference; id. § 853.50(1)).


506. Erlanger & Crowley, Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan, WIS. B. BULL., Jan. 1986, at 18 (second option in statutory will with trust form has, under certain circumstances, "uncertain and potentially costly income tax consequences").

507. See, e.g., Est. Plan., Tr. & Prob. L. Sec. St. B. Cal., Possible Legislation -- Statutory Will 1 (Dec. 16, 1980) ("Probably 90% of all estates do not have sufficient assets to require the filing of a federal estate tax return.").


512. See, e.g., W. CASEY, NEW ESTATE PLANNING IDEAS 1 (1958) (estate planning "involves the selection, arrangement and disposition of family assets in a way best calculated, not only to save death taxes, but to fit the needs and the aptitudes of family beneficiaries"); E. GERTZ, T.
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GERTZ & R. GARRO, A GUIDE TO ESTATE PLANNING ix (1983) ("Estate planning is really a lifetime process of arranging assets (property) so that a person may dispose of them during his lifetime and at his death in a manner that best carries out his desires for his family (or other objects of his bounty) consistent with a minimizing of income, gift, and death taxes, and an easing of transfer."); H. TWEED & W. PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 1 (1959) (estate planning is "the process of working out for a client the best ways of using and disposing of all of his properties during his life and after his death, having in mind his wishes and the welfare of his family"); cf. University of Illinois, College of Law Catalog 1 (1987-89) (attorney should develop "an ability to find solutions to human problems"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of possible advantages to family of dying testate).

513. See, e.g., UNIF. STAT. WILL ACT prefatory note (1984) ("goal of presenting a widely usable 'simple will'"); dispositive scheme "will fit the needs and desires of a broad segment of persons as an alternative to intestate succession and perhaps particularly many of that large number of persons who may otherwise die without a will"); California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7, 7 ("impetus for [statutory will] from lawyers who felt that the testamentary needs of the middle class and people with simple estates were not being met"). See generally supra Chapter II(B).

CHAPTER IV
INTER VIVOS TRUSTS

A. INTRODUCTION

Of the major types of estate planning documents analyzed in this dissertation, the inter vivos trust is the one least often supplied by statute. Many legislatures have taken significant steps toward the simplification of trust instruments by providing statutory trustee powers or dispositive provisions which may be incorporated into trusts by reference.\(^1\) The Uniform Custodial Trust Act also provides a practical and economical trust technique. This Act enables individuals to secure the benefits of inter vivos trusts by executing simple statements which evidence their desire for the Act's provisions to govern specified property.\(^2\) No state has to date enacted a statutory fill-in-the-blank inter vivos trust form.\(^3\) There is some evidence, however, that reflects the beginning of a movement to enact inter vivos trust fill-in forms.\(^4\)

This chapter begins by reviewing the early legislative steps taken to simplify trust instruments. The Uniform Custodial Trust Act is examined in detail with an analysis of the extent to which the Uniform Act effectuates the purposes for which inter vivos trusts are typically created. A discussion of the potential use of statutory fill-in forms for inter vivos trusts is also presented. The chapter concludes
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with recommendations for statutory inter vivos trust legislation. A discussion of the advantages and disadvantages of statutory estate planning forms in general is reserved for Parts Three and Four of this dissertation.

B. EARLY LEGISLATIVE ATTEMPTS TO SIMPLIFY TRUST INSTRUMENTS

1. Incorporation by Reference of Statutory Fiduciary Powers

One of the earliest legislative attempts to simplify trust instruments was the enactment of lists of fiduciary powers which were automatically deemed part of trust documents or which settlors could incorporate by reference. Absent specific statutory provisions, the general rule was that a trustee had only the fiduciary powers which were expressly granted by the settlor in the trust instrument and those powers reasonably implied therefrom.\(^5\) Courts, relying on out-dated legal precedents and social conditions, tended to construe powers narrowly and were reluctant to find implied powers.\(^6\) Accordingly, a person who drafted a trust needed "extensive knowledge of archaic rules which no longer [made] sense and an ability to forecast the future which surpasse[d] that of most lawyers"\(^7\) to prepare a trust document that would empower the trustee with authority "to take the most desirable action on any possible future state of events."\(^8\) As a result of this narrow reading of trust instruments, attorneys drafted lengthy and complex documents in their attempt to provide

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trustees with comprehensive powers and to protect themselves from claims of negligent drafting. To remedy this significant shortcoming of trust law, legislatures began to enact statutes that supplied trustees with the powers needed to effectively administer trusts.

Great Britain was the leader in responding to the need for simplifying trustee powers provisions of trust instruments. In the early 1920's, several statutes were enacted in Great Britain to consolidate prior law and provide trustees with extensive powers. The movement to supply trustee powers by statute grew rapidly thereafter, both in the British Commonwealth and in the United States.

Two methods developed for supplying trustee powers by statute. The first method utilizes an automatic incorporation by reference approach, that is, the trust instrument is deemed to contain the trustee powers provided by statute without any mention of or reference to those powers in the trust instrument. Automatic incorporation has two variations; the statute can either (a) mandate powers that cannot be altered by the settlor; or (b) permit the settlor to alter the statutory powers by express language in the instrument. The second method reflects a more traditional approach. This technique requires an express incorporation of the statutory provisions, that is, the trust document must contain language evincing the settlor's intent to incorporate the trustee powers contained in the relevant statute.
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The automatic incorporation by reference approach which preserves the settlor's ability to alter the statutory powers by express language in the trust instrument has gained widespread support. This technique is used in England, advocated by the National Conference of Commissioners on Uniform State Laws in its First Tentative Draft of a Uniform Trust Administration Act, reflected in the Uniform Trustees' Powers Act, and followed by other jurisdictions as part of their statutory efforts to improve trust law. On the other hand, the express incorporation of trustee powers approach has received significantly less acceptance. This technique was initially advocated by the Uniform Law Commissioners in their Second Tentative Draft of a Uniform Trust Administration Act and has been followed by only a few jurisdictions. In addition, this method was suggested by the American Bar Association's Probate and Trust Division Committee on Fiduciary Services for Small Estates and Conservatorships when it proposed a short form clauses for wills and trusts act in 1980. The ABA proposal was adopted in substance by Massachusetts in 1981.

The main advantage of the automatic incorporation by reference approach is that it serves as an effective gap-filler when the settlor fails to include trust provisions supplying trustee powers. More effective trust administration may result because the trustee has the power to handle unanticipated circumstances promptly and cost-effectively without assuming the risk of personal liability.
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for taking actions without proper authority or incurring the
delay and expense of securing court approval. However,
automatic incorporation may potentially defeat the settlor's
intent because no evidence is present in the trust instrument
that the settlor would have granted the trustee the statutory
powers had he actually considered them. The ABA's 1980
proposal for short form clauses attempted to address this
problem by requiring that the drafting attorney supply the
settlor with a copy of the incorporated material. The
attorney's failure to do so, however, would not affect the
validity of the trust instrument or the provisions
incorporated by reference.

2. Incorporation by Reference of Statutory
Dispositive Provisions

A recent innovation for simplifying trust instruments is
for legislatures to enact statutes that supply the text of
dispositive provisions which may be incorporated by express
reference into trusts. The impetus for this technique came
from a 1980 ABA Committee report. The Committee proposed two
dispositive provisions which could be incorporated into
trusts. One clause grants the trustee various discretionary
powers that relate to the distribution of trust property when
the beneficiary is under a stated age or is unable to manage
property because of mental illness, mental deficiency,
physical illness or disability, or advanced age. The other
clause authorizes the trustee to exercise his discretion when
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distributions of trust principal are made to the beneficiaries under appropriate circumstances.27

The Committee believed that these clauses would improve trusts drafted by many attorneys, including those experienced in trust preparation.28 Incorporation of these provisions would simplify the instruments as well as reduce "the costly process of preparing, checking and revising" trusts.29 The Committee recognized the inherent risk in supplying form clauses but believed that these clauses would often operate better than those derived from other sources because the provisions were "drafted to avoid foreseeable tax traps and to cover issues frequently neglected, sometimes foreclosed unintentionally, often left to future interpretation or litigation on the basis of inference from ambiguous language."30 Massachusetts appears to be the only state that has enacted statutes based on the ABA's suggested dispositive clauses.31

3. American Bar Association's Proposal for Custodianship Trusts

The 1980 ABA Committee report that proposed the trustee powers and dispositive provisions that could be incorporated by reference also recommended a statutory custodianship trusts act.32 The ABA proposal, based on the approach taken by the Uniform Gifts to Minors Act, permits a person to transfer property into a statutory trust by a simple notation on the instrument of transfer or ownership that names a trustee and indicates that the terms of the act are to apply.33 During the
life of the settlor, the income and principal would be used for the "support, education, care or benefit of the transferor and his dependents" following state rules which govern conservators. The settlor could revoke the trust by simply delivering a signed revocation to the trustee. Upon the death of the settlor, the remaining property would be paid to the settlor's estate and then pass to the settlor's heirs via intestacy or to the beneficiaries named in the settlor's will. Special rules were provided for trusts funded with community property. The proposal also contained provisions dealing with other matters such as accountings, trustee compensation, successor trustees, trustee powers, bond, and the effect of the transferor's subsequent legal incapacity.

The ABA proposal was narrow in scope; a custodial trust could be created only for the benefit of the settlor. The technique was aimed toward the management of property, rather than the transfer of property, with the expectation that the technique would be especially helpful to older persons who wanted to plan for their own incompetency. Establishing a custodial trust while competent would reduce the need for and expense of court appointed guardians and conservators. In addition, this type of trust would create less controversy and litigation than other techniques such as joint bank accounts which grant someone the right to make withdrawals for the depositor but leave the depositor's intent as to survivorship rights unclear. The act was not intended to give the
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transferor a method of making a gift of his property which would be subject to trust restriction nor to be a method of avoiding probate. 48

In 1981, Massachusetts enacted custodianship trusts legislation modeled after the ABA proposal. 49 The Massachusetts statute condensed the twelve sections of the ABA proposal into three by combining many of the sections and by eliminating the provisions governing community property. Although much of the Massachusetts Act is either verbatim or substantively identical to the ABA proposal, the standard by which the trustee is to make distributions is, however, somewhat different. The trustee is required to make payments for the "comfortable and suitable maintenance and support of the transferor and his family in accordance with the principles applicable to a conservator. " 50 Viewed one way, this is a more restrictive standard than the ABA proposal which allows distributions for the settlor's "benefit" rather than being limited to the settlor's "maintenance and support. " 51 In another respect, however, the Massachusetts statute is broader because distributions may be made for the settlor's "family" rather than to the more restricted class of "dependents." 52
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C. THE UNIFORM CUSTODIAL TRUST ACT

1. History and Purposes

The National Conference of Commissioners on Uniform State Laws began drafting the Uniform Custodial Trust Act in 1984. After three years of work, the Act was approved by the Commissioners at their 1987 conference and then by the American Bar Association in February 1988.

The Act authorizes the creation of a statutory custodial trust by delivering property to another person with a clear indication that the property is to be governed by the provisions of the Act. Using trust analogies, the drafters modeled the Act after the Uniform Transfers to Minors Act because "of its widespread use and the familiarity of third party financial institutions with the registration concept." The Act bears a faint resemblance to the 1980 ABA proposal and the Massachusetts version but is considerably broader in scope and attempts to provide a comprehensive set of rules to govern the majority of contingencies that could arise during the administration of the trust.

The Act was "designed to provide a statutory standby inter vivos trust for individuals who are typically not very affluent or sophisticated, and possibly represented by attorneys engaged in general rather than specialized estate practice." The drafters anticipated that the primary users of the Act would be elderly individuals seeking to make arrangements for the future management of their property in
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the event they become incapacitated.\textsuperscript{60} Other users would include individuals who need to distribute funds to incapacitated persons who did not have guardians or conservators, parents who wish to make gifts to adult children, military personnel and others who may temporarily reside outside of the United States, and those persons who have received property under the Uniform Gifts/Transfers to Minors Acts and who desire to continue the custodial trust arrangement into their adult years.\textsuperscript{61}

2. Description

a. Definitions

The Act begins with a comprehensive section that defines fifteen of the most important and frequently used terms in the Act.

i. Adult

Under the Act, an individual who is at least eighteen years old qualifies as an "adult."\textsuperscript{62}

ii. Beneficiary

A "beneficiary" is "an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit."\textsuperscript{63} Charitable organizations, corporations, partnerships, and other non-human entities may not be beneficiaries of custodial trusts.

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iii. Conservator

A broad definition is given to the term "conservator" to include not only a person appointed or qualified by a court to manage an individual's estate, but also "a person legally authorized to perform substantially the same functions." 64

iv. Court

The term "court" is left undefined so that each enacting state may insert the court it wishes to have jurisdiction over custodial trust arrangements. 65 The drafters anticipated that most states would designate the same court that typically handles conservators and decedent's estates. 66

v. Custodial Trust Property

Any kind of property may be placed into a custodial trust: real or personal, tangible or intangible. 67 The drafters envisioned that the most frequently used property would be intangible property such as stocks, bonds, and bank accounts. 68 The term "custodial trust property" refers to the property interests held by a custodial trustee under the Act as well as the income and proceeds derived from those interests. 69

vi. Custodial Trustee

A "custodial trustee" is the person designated as trustee of a custodial trust or as a substitute or successor to the designated person. 70
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vii. Guardian

An individual's "guardian" is the person appointed or qualified by a court as the individual's guardian. The term includes a limited guardian but not a guardian ad litem. A guardian of a person's estate does not fall within the purview of this term; such guardians are covered by the term conservator.

viii. Incapacitated

The definition of "incapacitated" is perhaps the most important definition in the Act because a determination of incapacity converts the trust from one that is revocable by the beneficiary to a discretionary trust. A person is incapacitated if he lacks "the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabling cause."  

ix. Legal Representative

A "legal representative" is a personal representative or a conservator but not a guardian of the person.

x. Member of the Beneficiary's Family

The term "member of the beneficiary's family" is defined to encompass an extensive group of individuals who may be interested in the custodial trust. Family members include
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the "beneficiary's spouse, descendant, stepchild, parent, stepparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption." 76

xi. Person

A "person" is defined to include "an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity." 77

xii. Personal Representative

Consistent with the Act's tendency towards broad definitions, a "personal representative" includes "an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions, or a successor to any of them." 78

xiii. State

The term "state" includes any state, territory, or possession of the United States including the District of Columbia and Puerto Rico. 79

xiv. Transferor

A "transferor" is the settlor of the custodial trust, that is, the "person who creates a custodial trust by transfer or declaration." 80
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xv. Trust Company

Any financial institution, corporation, or other legal entity authorized to exercise general trust powers is included within the definition of a "trust company."81

b. Methods of Creating Custodial Trusts

The Act provides a person with several methods to create a custodial trust. The methods are relatively simple to effectuate one of the Act's goals of making the creation of custodial trusts an easy process that may be done without legal advice.

i. Transfer in Trust

The drafters expect the transfer in trust to be the most commonly used method for creating a custodial trust.82 The property owner simply makes a written transfer directing the transferee to hold the property as a custodial trustee under the Act.83 A beneficiary must be designated in the transfer and the transferor is authorized to name himself as the beneficiary.84 The Act supplies a concise fill-in form that may be used to evidence the transfer.85 In addition, the Act lists ten customary methods to transfer property that can be used to create a custodial trust, such as by the registration of securities, life insurance policies, and certificates of title in custodial trust form.86

ii. Self-Declaration of Trust

A property owner may also create a custodial trust by executing a written declaration which describes the
property, names a beneficiary, and indicates that the declarant is holding the property as a custodial trustee under the Act. The property owner, however, cannot be the sole beneficiary of a self-declaration of trust. As with a transfer in trust, the Act supplies a short fill-in form that may be used to evidence the declaration of trust and permits the use of customary methods of evidencing ownership of property to create the custodial trust.

iii. Designation to Take Effect Upon Future Event

A person with the right to designate the recipient of property contingent upon a future event may create a custodial trust which will take effect when the future event occurs. The designation must be in writing and it must clearly indicate that the property is to be held in a custodial trust for the named beneficiary. The designation "may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights." The instrument containing the designation may be irrevocable or revocable by the person making the designation thus permitting flexibility in making custodial trust designations. This type of designation, especially when used in a will, may avoid the necessity of obtaining a conservator for an incapacitated beneficiary and reduce the need for a traditional support trust and its associated drafting and administrative costs.
The drafters recognized that an enacting state's rule against perpetuities could potentially impact on custodial trusts created upon a future event. While problems posed by this rule will exist, the drafters downplayed their impact and concluded that "because the use of a custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise." 95

iv. Delivery of Property or Payment of a Debt to an Incapacitated Person Who Does Not Have a Conservator

The Act provides a convenient method for persons to discharge their obligations if they hold the property of or owe money to an incapacitated person who does not have a conservator. The obligor may "make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual." 96 If the value of the property or the amount of the debt exceeds a specific amount, court authorization is required. 97 The drafters suggested the figure of $20,000 as the threshold amount. 98 The obligor will be discharged from liability to the incapacitated person if a written acknowledgment of delivery signed by the custodial trustee is obtained. 99 The custodial trustee has authority only to receive property, not to settle claims for disputed amounts. 100

v. Other Methods

The four methods discussed above are not exclusive; if other methods are used to create a custodial trust that
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satisfies the requirements of the Act, they will be equally effective. For example, "[a] custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property." The Act was not designed to displace or restrict other methods of trust creation. Thus, if a trust fails to meet the requirements of the Act, such as where a non-beneficiary transferor reserves the power to revoke the transfer, the trust may still be enforceable under the state's normal trust law.

c. Acceptance by Custodial Trustee

The trustee's duties under the Act are triggered by his acceptance of the custodial trust property. Although the acceptance may be express or implied, the drafters highly recommend using a written acceptance. The Act provides a simple form that may be used by a trustee to acknowledge the acceptance.

The trustee's acceptance is also significant because it subjects the trustee to the court's personal jurisdiction for any matter relating to the trust. The court's jurisdiction over the trustee continues even if the parties relocate or the property is removed from the state.

If the designated trustee does not wish to serve, he "may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative." The transferor or the transferor's legal representative may then designate a substitute trustee.
the method of trust creation was a designation to take effect upon a future event and that event has not yet occurred, the person designated as a substitute trustee is eligible to serve or if none were named, the person who made the original designation may name a substitute trustee.\textsuperscript{112}

If the named trustee is deceased, incompetent, or otherwise ineligible to serve, the successor trustee named in the trust instrument is authorized to serve.\textsuperscript{113} If the successor fails to serve, the beneficiary, if competent, may designate the successor.\textsuperscript{114} The beneficiary's conservator will become the successor trustee if the beneficiary is incapacitated or fails to act within ninety days.\textsuperscript{115} If the beneficiary does not have a conservator or if the conservator fails to act, "the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to designate a successor custodial trustee."\textsuperscript{116}

If the named custodial trustee declines to serve or is unable to serve, the trustee or his legal representative is required to give any property or records of the trust that he has to the new trustee as soon as practicable.\textsuperscript{117}
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d. Subsequent Additions to the Corpus of a Custodial Trust

The Act permits anyone to add property to an existing custodial trust by using any of the custodial trust creation methods. 118

e. Beneficiaries of a Custodial Trust

i. Title

The beneficiary of a custodial trust has only the beneficial interest in the property; legal title to the property is in the trustee. 119

ii. Multiple Beneficiaries

Custodial trusts may be established for multiple beneficiaries. However, the beneficiaries' interests are "deemed to be separate custodial trusts of equal undivided interests for each beneficiary." 120 Thus, the trustee must account separately to each beneficiary. 121

Generally, survivorship is not presumed between multiple beneficiaries; a right of survivorship will exist only if the trust instrument specifically provides for survivorship. 122 If the transfer or declaration is for the use and benefit of a husband and wife, however, survivorship is presumed. 123

iii. Successive Beneficiaries

The Act does not authorize successive interests in trust. 124 The only situation where the trust may continue beyond the lifetime of the original beneficiary is when the at-death distributee is incapacitated. 125 In such a case, the
trust continues for the use and benefit of the distributee but only until the distributee's incapacity is removed or the trust terminates.\textsuperscript{126}

\textit{iv. Beneficiary's Right to Control}

A beneficiary has practically unlimited control over the property placed in a custodial trust. Provided the beneficiary is not incapacitated, the trustee is required to "follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property."\textsuperscript{127}

\textit{v. Liability of a Beneficiary}

Under most circumstances, a beneficiary is isolated from personal liability for an obligation which arises from the beneficial ownership of trust property or for a tort committed during the administration of the trust.\textsuperscript{128} However, the beneficiary will be personally liable if the beneficiary is in possession of the trust property that gave rise to the liability or is personally at fault.\textsuperscript{129} In addition, the beneficiary may also be liable to the extent that he is protected as the insured under a liability insurance policy.\textsuperscript{130}

\textit{f. Duties of the Custodial Trustee}

\textit{i. Register Trust}

If required by state law, the trustee must record or register the instrument that vests title to the custodial trust property.\textsuperscript{131}
ii. Follow Beneficiary's Instructions

As long as the beneficiary is not incapacitated, the trustee must follow the beneficiary's directions concerning the management, control, investment, and retention of trust property.\textsuperscript{132}

iii. Observe Standard of Care

Unless a competent beneficiary has indicated otherwise, the trustee must "observe the standard of care that would be observed by a prudent person dealing with property of another."\textsuperscript{133} The trustee is not limited by other state laws that restrict investments by fiduciaries.\textsuperscript{134} Rather, the trustee has full discretion to retain in the trust any property received from the transferor;\textsuperscript{135} thus, the trustee may keep the family farm or family heirlooms in the trust even if their appropriateness as a trust investment is debatable.

In two circumstances, the trustee will be held to a higher standard of care; first, when the trustee possesses a special skill or expertise and second, when the trustee is selected on the basis of a representation of having a special skill or expertise.\textsuperscript{136} In these situations, the trustee must exercise the actual or represented higher standard of care.\textsuperscript{137}

iv. Perform Basic Management Duties

Unless otherwise directed by a competent beneficiary, the custodial trustee has the typical duties of a trustee, i.e., to "take control of and collect, hold, manage, invest, and reinvest" the property.\textsuperscript{138}

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v. Segregate and Earmark Trust Property

The trustee has the duty to segregate all trust property over which he has control and to make certain the property is clearly marked to show it is custodial trust property of the beneficiary. This duty may be easily satisfied by the trustee recording, registering, or otherwise indicating that the property is held for a named beneficiary under the Act.

vi. Keep Records

The trustee must keep detailed records of all transactions regarding trust property including the information necessary to prepare tax returns. This material must be available to the beneficiary or his legal representative at reasonable times.

vii. Act Without Regard to Durable Power of Attorney

The trustee need not follow the directions of someone exercising a durable power of attorney given by the beneficiary. Accordingly, the holder of a durable power of attorney may not terminate the trust nor direct the administration or distribution of property held in a custodial trust.


g. Powers of Custodial Trustee

i. Generally

A trustee is provided with very broad powers under the Act. The trustee has "all the rights and powers over
custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.\textsuperscript{145} Alternatively, a state could choose to substitute language which refers to its statutes supplying fiduciary powers.\textsuperscript{146}

\textit{ii. Consolidation of Multiple Custodial Trusts for Same Beneficiary}

The trustee may administer trust property held for the same beneficiary as one trust even though the property came from different transferors or was received at different times.\textsuperscript{147} This power makes administration easier and more efficient because it is unnecessary to keep separate records. In addition, consolidation may increase the trustee's ability to make profitable investments because greater capital would be available, and to diversify the assets to spread the risk of loss should a particular trust investment fail.

\textit{h. Liability of a Custodial Trustee to Third Parties}

Tort, contract, and other plaintiffs affected by trust property may recover directly from trust property by "proceeding against the custodial trustee in a fiduciary capacity."\textsuperscript{148} The plaintiff has this direct cause of action regardless of whether or not the trustee is personally liable,\textsuperscript{149} and may also have an action against the trustee in his individual capacity.

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There are two ways a trustee may avoid personal liability on contracts properly entered into for the trust. First, the trustee may reveal his representative capacity to the other parties to the contract or second, he may identify the trust in the contract.\textsuperscript{150} The most prudent course of action for the trustee is to make certain that his representative capacity is disclosed and that a written contract unequivocally states that the trustee is entering into the contract on behalf of the custodial trust.

The trustee will not be liable for obligations arising from the control of trust property nor for torts committed while administering the trust unless the trustee is personally at fault.\textsuperscript{151} The trustee may purchase insurance to protect against liability for negligent conduct. If the trustee is protected as the insured by liability insurance, the trustee may be liable to the extent of such protection even if he was not at fault.\textsuperscript{152}

i. Protection of Persons Dealing With Custodial Trustee

The Act extends considerable protection to persons who deal in good faith with a custodial trustee and thus trustees should be able to execute transactions with third parties quickly and readily.\textsuperscript{153} Without the necessity of first obtaining a court order, a person may follow the instructions of or otherwise deal with a person who acts or purports to act as a custodial trustee.\textsuperscript{154} Provided the third person does not
have knowledge to the contrary, the person is not responsible for determining:

(1) the validity of the purported custodial trustee's designation;

(2) the propriety of, or the authority under this [Act] for, any action of the purported custodial trustee;

(3) the validity or propriety of an instrument executed or instruction given pursuant to this [Act] either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or

(4) the propriety of the application of property vested in the purported custodial trustee.\textsuperscript{155}

\textbf{j. Expenses and Compensation of Custodial Trustee}

Unless the trust instrument, an agreement with a beneficiary, or a court order provides otherwise, the trustee is entitled to reasonable compensation and to reimbursement from trust property for his reasonable expenses.\textsuperscript{156} The trustee must elect to take compensation within six months after the end of each calendar year.\textsuperscript{157} Failure to make a timely election results in a waiver of this right. Thus, claims of imputed compensation are avoided as are claims for accumulated compensation when the trust is terminated.\textsuperscript{158}

\textbf{k. Bond of Custodial Trustee}

Under normal circumstances, the Act presumes that a trustee does not have to give bond or other security for the faithful performance of his duties.\textsuperscript{159} The trust instrument
may provide otherwise as may an agreement with the beneficiary or a court order.\textsuperscript{160}

1. Accountings by Custodial Trustee

   i. When Accountings are Required

      The Act provides a variety of situations in which the trustee is required to prepare and deliver a written statement describing the trust property and its administration. These situations are as follows:
      - At the time the trustee accepts the property;\textsuperscript{161}
      - Once each year after acceptance;\textsuperscript{162}
      - Upon a request by the beneficiary or the beneficiary's legal representative;\textsuperscript{163}
      - When the trustee resigns;\textsuperscript{164}
      - When the trustee is removed;\textsuperscript{165}
      - When the trust is terminated;\textsuperscript{166}
      - Court order following petition of "a beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary";\textsuperscript{167} and

         • Court order following petition by successor trustee.\textsuperscript{168}

   ii. To Whom Accountings are Delivered

      Accountings are typically delivered to the beneficiary or to the beneficiary's legal representative.\textsuperscript{169}

      Upon termination of the beneficiary's interest, the accounting
must be given to the person who will receive the balance of the trust property.\textsuperscript{170}

\textit{iii. Contents of an Accounting}

The Act does not detail the contents of the accountings. The drafters suggest that each account should, at a minimum, contain a listing of the "assets and values at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or available for distribution at the close of the accounting period."\textsuperscript{171}

\textit{m. Barring of Beneficiary's Claims Against the Custodial Trustee}

The Act provides a comprehensive set of statutes of limitations in its effort "to inform the parties of substantially all of their obligations and rights."\textsuperscript{172} Unless tolled, or previously barred by, for example, a court order or the consent of the beneficiary, the basic statutes of limitations on actions against a trustee by a beneficiary, a person to whom trust property is to be paid or delivered, and the legal representative of a incapacitated or deceased beneficiary are as follows:

- Two years from the date the claimant receives a final accounting or a statement which fully discloses the matter;\textsuperscript{173}

- Three years from the termination of the trust if the claimant did not receive a final accounting or a statement fully disclosing the matter;\textsuperscript{174} and
• Five years from the termination of the trust if the claimant's claim is based on "fraud, misrepresentation, or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust."\textsuperscript{175}

Tolling provisions are provided in the Act so the normal statutes of limitations will not run under specific circumstances. A longer than normal statute of limitations may apply in the following situations:

• If the claimant is a minor, the limitations period will not run until the earlier of two years after he becomes an adult or dies.\textsuperscript{176}

• If the claimant is an incapacitated adult, the statute will not run until the earliest of two years after the appointment of a conservator, the removal of the incapacity, or the claimant's death.\textsuperscript{177}

• If the claimant is a deceased adult who was not incapacitated, the statute will not run until two years after the claimant's death.\textsuperscript{178}

n. Successor Custodial Trustees

i. Ability of Transferor to Designate Successor

A transferor may designate a successor trustee or provide a method for the designation of a successor.\textsuperscript{179} Likewise, when an individual selects a person to be a trustee upon the occurrence of a future event, the designation may indicate substitute or successor trustees.\textsuperscript{180}
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ii. Resignation of Trustee

There are two basic steps that a trustee must follow to resign. First, a written notice must be delivered to the successor trustee, if any, the beneficiary, and to an incapacitated beneficiary's conservator. Second, the trustee must take appropriate steps to transfer, record, or register the property in the name of the successor trustee and to deliver the trust records to the successor.

iii. Removal of Trustee

A wide variety of interested persons may petition the court to have the trustee removed for cause: the beneficiary (whether or not incapacitated), the beneficiary's conservator, an adult member of the beneficiary's family, the guardian of the beneficiary's person, a person interested in the trust property, and a person interested in the welfare of the beneficiary.

iv. Selection of Successor Trustee

If a successor trustee was not designated by the transferor or the original designator, a beneficiary who is not incapacitated may designate a successor trustee. Special limitations are not imposed on the person the beneficiary selects. If the beneficiary is incapacitated or fails to act within ninety days of the event giving rise to the need for a successor, the beneficiary's conservator becomes the trustee. If the beneficiary does not have a conservator or if the conservator does not act, the resigning...
trustee may designate a successor. If a successor has not yet been designated, interested persons may petition the court to designate a successor.

**o. Distribution of Custodial Trust Property - Beneficiary Not Incapacitated**

If the beneficiary is not incapacitated, the trustee must follow the beneficiary's distribution instructions. In this situation, the trustee functions more like an agent than a traditional trustee. The beneficiary may require the trustee to pay trust property directly to him or to expend it for his use and benefit. The beneficiary's power is sufficiently broad to permit the beneficiary to demand that the entire balance of the trust property be turned over to the beneficiary without showing that the property is needed for any particular purpose. Thus, a competent beneficiary may wisely or capriciously use the property without question by the trustee.

If the transferor does not wish to grant the beneficiary such expansive and unrestricted rights, the transferor may designate in the trust instrument that the trustee is to administer the property as if the beneficiary were incapacitated. However, this designation is not necessarily permanent because the trustee may reasonably conclude that "circumstances concerning the beneficiary's ability to manage property and business affairs have changed" over time and thus administer the trust as if the transferor had not directed the
trust to be administered as if the beneficiary were incapacitated.\textsuperscript{193}

To facilitate distribution of trust property, the trustee may establish bank accounts with reasonable amounts of trust property and allow the beneficiary to make withdrawals or write checks on the account.\textsuperscript{194}

\subsection*{p. Distribution of Custodial Trust Property - Beneficiary Incapacitated}

The trustee's duties with respect to the distribution of trust property are considerably different if the beneficiary is or becomes incapacitated or if the transferor directed that the trust be administered as if the beneficiary were incapacitated.\textsuperscript{195} In this situation, the trustee is authorized to use trust property as he considers reasonably prudent for the use and benefit of the beneficiary as well as for individuals who were supported by the beneficiary when he became incapacitated or who are legally entitled to the beneficiary's support, even if such individuals have not been receiving any support (e.g., beneficiary failed to make child support payments).\textsuperscript{196} It is significant that the Act permits distributions for the benefit of the beneficiary without regard to whether the distributions are needed for the beneficiary's support, maintenance, education, or health care. Thus, the trustee may make extravagant expenditures for superfluous and non-essential requests made by the beneficiary. In addition, "[e]xpenditures may be made in the manner, when, and to the extent that the custodial trustee
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determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary."¹⁹⁷

The trustee may maintain a bank account and permit the beneficiary to make withdrawals from or write checks on the account.¹⁹⁸ The drafters believed that this would be a useful technique because an incapacitated person may lack the ability to manage business affairs but still be sufficiently competent to pay utility bills and go grocery shopping.¹⁹⁹

The burden of determining whether a beneficiary is incapacitated frequently falls on the trustee. The trustee may determine that the beneficiary is incapacitated by relying on a direction or authority, such as a durable power of attorney, given while the beneficiary was not incapacitated.²⁰⁰ The trustee may also rely on a certificate from the beneficiary's doctor or on other persuasive evidence.²⁰¹ Conversely, the trustee may reasonably conclude that the beneficiary is no longer incapacitated and thereafter administer the trust accordingly.²⁰²

Upon petition of the beneficiary, trustee, or other interested person, the court will make a determination of the beneficiary's capacity.²⁰³

Even if neither the trustee nor the court has made a determination of incapacity, the trustee is under an obligation to administrator the trust as if the beneficiary were incapacitated if the trustee has reason to believe that the beneficiary is incapacitated.²⁰⁴
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The incapacity of a beneficiary does not affect any other aspect of the trust other than the distribution method. That is, the beneficiary's incapacity does not terminate the trust, revoke the designation of a successor trustee, alter the rights or powers of the trustee, nor remove any of the immunities which third persons may have who act on the trustee's instructions.\textsuperscript{205}

\textbf{g. Termination of Custodial Trusts}

\textit{i. Beneficiary's Right to Terminate}

A competent adult beneficiary, or the conservator of an incapacitated beneficiary, has the right to terminate the trust at any time and need not give a justification for the termination.\textsuperscript{206} This right exists even if the beneficiary was not the transferor. The procedure is simple; the beneficiary or conservator merely delivers a signed writing to the trustee that declares the termination.\textsuperscript{207} However, the exercise of a durable power of attorney granted by a presently incapacitated beneficiary will not terminate the trust.\textsuperscript{208}

\textit{ii. Transferor's Right to Revoke or Terminate}

Transfers under the Act are irrevocable and do not permit the transferor/settlor to terminate the trust or retrieve the transferred property.\textsuperscript{209} If the transferor is also the beneficiary, however, the transferor may terminate the trust in his capacity as beneficiary.\textsuperscript{210}
ii. Death of Beneficiary

The trust will terminate when the beneficiary dies.\textsuperscript{211}

iv. Distribution on Trust Termination

The beneficiary is entitled to all remaining trust property when the trust terminates.\textsuperscript{212} If the beneficiary is incapacitated, the beneficiary's conservator or other recipient designated by the court will receive the property.\textsuperscript{213}

Should the trust terminate because of the beneficiary's death, several distribution plans are possible. The beneficiary's directions are given primary consideration.\textsuperscript{214} To be effective, the beneficiary's instructions must be in writing, signed by the beneficiary while not incapacitated, and received by the trustee during the beneficiary's lifetime.\textsuperscript{215} The drafters supplied a sample form for making this designation in the comments.\textsuperscript{216}

If the beneficiary did not leave valid instructions, the remaining trust property will go first to the survivor of multiple beneficiaries, if survivorship was expressly provided for in the trust instrument.\textsuperscript{217} If survivorship is inapplicable, the balance is distributed as designated in the trust instrument,\textsuperscript{218} and in the absence of a designation, to the deceased beneficiary's estate.\textsuperscript{219}

If the distributee is incapacitated, the trust will not terminate but will continue for the use and benefit of the distributee until the incapacity is removed or the trust is
otherwise terminated. Thus, a termination of a custodial trust will not trigger a need for a conservator should the recipient be under eighteen years of age, insane, or otherwise incapacitated.

After a custodial trust ends due to the beneficiary's death, the trustee retains the power to conclude trust business. The trustee may "discharge obligations of the custodial trustee or beneficiary [which were] incurred before the termination of the custodial trust."221

r. Power of Court

The Act is designed to function without the supervision or interference of a court. Only when important matters require the attention of an outside adjudicative or decision-making force may the jurisdiction of the court be invoked. Examples of these situations include actions to remove a trustee, issue instructions to a trustee, review the propriety of a trustee's acts, review compensation determinations, require and approve trustee accounts, determine the beneficiary's capacity, designate a successor trustee, and authorize large payments to a custodial trust of property belonging to or owed to an incapacitated beneficiary.229

s. Law Applicable to Custodial Trusts

The Act is constructed to resolve conflicts of law problems in a simple manner. If at the time the trust is created, the transferor, beneficiary or trustee is a resident
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of the forum state or has its principal place of business in the state or if the situs of the trust property is in the state, then the forum state's version of the Act will control. Subsequent changes in the residence or principal places of business of the parties or in the location of the trust property are irrelevant; the trust is still subject to the Act.

If a transfer is made pursuant to a version of the Act in force in another state, the trust is governed by the law of that state and may be enforced in the forum state.

3. Experience

a. Quasi-Adoption by Missouri

Missouri enacted the Missouri Personal Custodian Law in 1986. Although this law is similar to the Uniform Custodial Trust Act, it is debatable whether it constitutes an adoption of the Uniform Act because it was passed prior to the Commissioners' approval of the Act. Uniform Laws Annotated and Vernon's Annotated Missouri Statutes refer to the Missouri law as an adoption of the Uniform Act while a commentator refers to the Missouri law as one of the models considered by the Commissioners when drafting the Uniform Act. A handout from the National Conference of Commissioners on Uniform State Laws does not list Missouri as an adopting state.

The Missouri law is structured and organized somewhat differently than the Uniform Act and contains several
significant variations. Examples of these differences include the following:\textsuperscript{237}

- A narrow definition of "incapacitated person" which restricts incapacity to physical or mental conditions as compared to the more expansive definition of the Uniform Act which includes confinement and disappearance;\textsuperscript{238}

- Restriction on who may serve as a custodian to adult individuals and financial institutions rather than permitting any legal entity which can qualify as a person to serve;\textsuperscript{239}

- Prohibition on naming multiple beneficiaries in a transfer;\textsuperscript{240}

- Differences in when court approval is needed when a person holding property of or owing money to an incapacitated person delivers it to a custodian;\textsuperscript{241}

- Authorization for a court to designate a custodian to control an incapacitated person's estate when it determines that a full administration of the person's estate is not needed;\textsuperscript{242}

- Provisions expanding and limiting the types of expenditures the custodian may make;\textsuperscript{243}

- Differences in the distribution of custodial property on the beneficiary's death;\textsuperscript{244}

- No grace period for a custodian to decide whether or not to receive compensation;\textsuperscript{245} and

- Imposition of more rigid requirements on a custodian who wishes to avoid personal liability on contracts entered into for the beneficiary with custodial property.\textsuperscript{246}
Despite these and other variations, the Missouri law operates in substantially the same manner as the Uniform Act and thus Missouri's experience with the statute should be a fair indication of how the statute will operate in practice. Unfortunately, no reported case was located which dealt with the law.

b. Adoption - Rhode Island

In 1988, Rhode Island became the first, and so far only, state to officially adopt the Act after its approval by the Commissioners. Except for minor differences in wording, punctuation changes, and typographical errors, the Rhode Island version is a verbatim enactment of the Act.

Due to the recent adoption of the Act, no reported Rhode Island case concerning custodial trusts was located.

c. Other Jurisdictions

The Act has been recently introduced into the legislatures of Hawaii, Idaho, Massachusetts, Minnesota, and Washington.

D. STATUTORY INTER VIVOS TRUST FILL-IN FORMS

Although California and Wisconsin have enacted statutory fill-in forms for testamentary trusts, no jurisdiction has yet to adopt statutory fill-in forms for inter vivos trusts. This situation may be changing because advocates of statutory forms are beginning to urge the preparation and enactment of statutory fill-in forms for revocable inter vivos trusts.
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E. ANALYSIS

The Uniform Custodial Trust Act and similar legislation reflect a considerably different approach to property transfer than do traditional inter vivos trusts. Although differences abound in both substance and procedure, the underlying goal of the techniques is analogous; that is, to provide individuals with the ability to transfer property in a manner that has the potential of effectuating the transferors' intentions. This section analyzes the degree to which custodial trust acts carry out the purposes for which inter vivos trusts are typically created. In addition, the last subsection examines the prospect of statutorily supplied fill-in forms for inter vivos trusts.

1. Providing For and Protecting Beneficiary

Perhaps the foremost reason a person creates an inter vivos trust is to provide for and protect beneficiaries which the person believes to be worthy of his assistance.251 Custodial trusts also serve this function but the extent to which they can effectively do so is limited.

a. Identity of Beneficiary

Inter vivos trusts may be created for any entity which has the capacity to take and hold title to property.252 Corporations, partnerships, and other entities may be beneficiaries as well as individuals. In addition, inter vivos trusts may be created for charitable purposes even though there is no definitely ascertainable beneficiary.253 On
the other hand, custodial trusts can be created only for individuals.\textsuperscript{254} A competent custodial trust beneficiary, however, has the power to control the distribution of trust property upon death and thus could designate a charity or other non-individual as the recipient of the balance of the trust property.\textsuperscript{255}

b. Spendthrift Protection

In most jurisdictions, an inter vivos trust may contain a spendthrift provision that dramatically restricts the ability of the beneficiary to sell, give, or otherwise transfer the interest and prevents the beneficiary's creditors from attaching or otherwise reaching the beneficiary's interest in the trust.\textsuperscript{256} Spendthrift provisions are exceedingly common,\textsuperscript{257} being used to protect persons who are actually prone to use property in an excessive or frivolous manner and to protect those without any actual spendthrift tendencies. The assets in a custodial trust, however, receive very little protection from the beneficiary's excesses or his creditors.

A competent beneficiary of a custodial trust has the power to dictate the administration of the trust,\textsuperscript{258} obtain payments of any or all of the trust income and principal,\textsuperscript{259} and terminate the trust and receive the balance of trust property.\textsuperscript{260} It is possible, however, for the transferor to direct in the trust instrument that the trust be administered as if the beneficiary were incapacitated.\textsuperscript{261} This will permit the transferor to prevent the beneficiary from exercising the
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tremendous control given to competent beneficiaries. However, the direction by the transferor can be overridden by the trustee. The trustee may determine that the beneficiary's ability to manage property and business affairs has changed since the creation of the trust and thereafter administer the trust as if the trust instrument did not contain the restrictive clause.262

Another way for the beneficiary's transfer rights to be restricted is for the beneficiary to be deemed incapacitated. If the beneficiary is considered incapacitated, the beneficiary loses the tremendous control rights granted by the Act and becomes subject to the discretion of the trustee.263 The key issue thus becomes whether the character trait of being a spendthrift is sufficient to deem a person incapacitated. To be incapacitated, the spendthrift would have to "lack the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabbling cause."264 Merely being foolish, careless, or extravagant may not be sufficient to justify a trustee or court determination that a person is incapacitated unless an expansive reading is given to the catch-all provision "other disabling cause."265

Examining the other aspect of a spendthrift clause, it is unlikely that the Uniform Act will provide the beneficiary
with a shield to protect against his creditors. The following language from the Act's comment is instructive:

This Act does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act. 266

2. Flexibility and Control of Asset Distribution and Administration

"Perhaps the chief advantage of a trust . . . is that its provisions can allow flexibility in the estate plan arrangements with respect to the disposition of trust income and principal and to the ultimate distribution of the settlor's estate." 267 An inter vivos trust permits the settlor to be the master of his agreement allowing any distribution plan formulated by the settlor as long as it is within recognized legal parameters. For example, benefits may be spread over time, the trustee may be given discretion as to whom to pay and under what conditions, and standards for administration and distribution may be established. With a custodial trust, however, the transferor has little control over the terms of the trust; the statutory provisions are incorporated by reference into the trust agreement. 268 Thus, the transferor is bound by the dispositive and administrative scheme established by the Act. 269

The transferor does have, however, some choices to make concerning applicable rules when executing the trust
instrument. First, as discussed above, the transferor may designate that the trust be administered as if the beneficiary is incapacitated. Second, the transferor may specify survivorship rights among multiple beneficiaries. However, this designation will not be effective if the beneficiary has delivered a signed writing to the trustee with contrary instructions. Third, provided there is no contrary designation by the beneficiary, the transferor may provide in the trust instrument where the balance of the trust property is to pass upon the beneficiary's death. Fourth, the transferor may alter the Act's presumptions regarding the trustee's right to reimbursement for reasonable expenses, to charge a reasonable compensation, and to avoid posting bond.

The only option expressly provided for on the suggested forms for creating custodial trusts is the naming of a distributee to take on trust termination if the beneficiary failed to make a designation.

3. Protection Against Settlor's Incompetence

An inter vivos trust may be an effective tool for the settlor to plan for his own disability. "[T]he existence or continuance of his trust would be unaffected by the settlor's later incompetency and the trust provisions for his support and care may make appointment of a guardian or conservator of his estate unnecessary." Not only may this save the expense of court proceedings but may also help avoid the embarrassment and public humiliation that can accompany a formal
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Perhaps the custodial trust's best feature is its ability to provide this type of protection. The drafters anticipated that "the most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity."[277] The custodial trust makes this protection available to a greater number of people because it is considerably easier, faster, simpler, and cheaper to create and administer than an inter vivos trust.[278]

4. Professional Management of Property

An inter vivos trust provides the settlor with an opportunity to divest himself of the burdens of managing property and to place those burdens on a trustee who has expertise in the efficient and profitable management of property.[279] The custodial trust technique also gives the transferor the same ability to secure professional management of trust property because any competent individual, corporation or partnership may serve as a custodial trustee.[280]

5. Probate Avoidance

Property that has been transferred to an inter vivos trust which provides for its ultimate distribution is no longer in the settlor's probate estate. Thus, an inter vivos trust is often used as a technique for transferring property at death without the necessity of incurring the delay, cost, and lack of privacy that often accompany the probate process.[281] Whether or not property transferred to a custodial
trust avoids probate depends on the actions that have been taken by the parties. The balance of trust property remaining upon the death of the beneficiary will avoid probate in the beneficiary's estate if any one of the following are true: the beneficiary made a proper designation of an at-death distributee; the trust instrument provided for survivorship between multiple beneficiaries; or instructions for at-death distribution were provided in the original trust instrument. If none of these situations exist, the remaining trust property passes into the estate of the deceased beneficiary and probate will not be avoided. The Act does not deal with the availability of custodial trust assets to satisfy the claims of creditors of an estate of a deceased beneficiary.

6. Tax Benefits

An additional potential benefit of inter vivos trusts is the ability to structure the trust to achieve income, gift, and estate tax savings. The settlor may decide what tax benefits, if any, he wishes to achieve and then plan the trust accordingly. With the custodial trust, however, practically all of the trust terms are established by statute so little, if any, tax planning is available. Conversely, the "extensive control and benefit in the beneficiary who is not incapacitated . . . avoids tax complexity." If the transferor establishes the trust for his own benefit, the existence of the trust is unlikely to have any tax ramifications; he has the power to terminate the trust at
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will, control all aspects of its administration, and dictate to whom the property will pass upon his death. Accordingly, from a tax viewpoint, it will usually be treated as if no transfer occurred.

On the other hand, if the transferor gratuitously establishes the trust for someone else's benefit, the following tax scenario is likely. Because the transfer is irrevocable, the transferor will be deemed to have made a gift that may be subject to gift tax if it exceeds the annual exclusion and the transferor has already exhausted his unified credit. Unless the property consists of life insurance, the property will no longer be treated as part of the transferor's estate upon death. Because a competent beneficiary has the right to terminate the trust, control its administration, and appoint the remainder of the property upon death, the beneficiary will be taxed on all subsequent income. This may result in considerable income tax savings for the transferor if the beneficiary is over fourteen years old and is in a lower income tax bracket than the transferor. Because a competent beneficiary has the power to terminate the trust and appoint the remainder upon death, the balance of the trust property will be part of the beneficiary's gross estate for estate tax purposes.

Certain technical but important tax matters regarding custodial trusts have yet to be resolved; for example, will the trust need to obtain a different taxpayer identification number or will the beneficiary's social security number
The problem becomes more acute in the case of an incapacitated beneficiary who lacks the right to receive all the trust's income. One commentator believes that "[i]n the case of an incapacitated beneficiary, it appears that the trust would become a discretionary trust which would be required to have a taxpayer identification number and be treated as a separate income tax-paying entity." This and other uncertainties will be resolved as the use of custodial trusts increase.

7. Potential of Statutorily Supplied Fill-in Forms for Traditional Inter Vivos Trusts

California and Wisconsin have included fill-in forms for testamentary trusts in their statutory will forms but no jurisdiction has yet to expand the trend of supplying estate planning forms by statute to encompass traditional inter vivos trusts. There is some evidence that a movement to draft inter vivos trust fill-in forms is gaining momentum. A general discussion of the advisability of fill-in forms is found in Parts Three and Four of this dissertation; this section examines the advisability of fill-in trust forms vis-à-vis other estate planning forms.

As demonstrated in the previous subdivisions of this section, inter vivos trusts are an extremely powerful and versatile estate planning technique. A great many, if not a majority of, people could benefit by having trusts included in their estate plans. Because trusts may be used by a wide segment of the population, it would be consistent for
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legislatures to provide fill-in forms as they have for wills,\textsuperscript{314} powers of attorney,\textsuperscript{315} self-declarations of guardians,\textsuperscript{316} directives to physicians,\textsuperscript{317} and others.\textsuperscript{318}

Arguments may be made in opposition to trust fill-in forms which are unlike those for the other estate documents. It could be argued that trusts are intrinsically a more difficult legal relationship for the non-legally trained person to understand than those reflected by other documents such as wills and powers of attorney. Notice may probably be taken that if a group of non-lawyers were asked to define a "will" and a "trust," more of them would be familiar with a will. However, fill-in forms could begin with explanations of the purposes and uses of trusts in plain English so that the average person would be able to comprehend the trust relationship and make informed decisions.

Another potential difficulty is the tremendous variation between inter vivos trusts and other estate documents. The argument could be made that because inter vivos trusts require a great deal of individualization to be effective, they would not be good subjects for statutory fill-in forms. This argument is probably weak because inter vivos trusts, especially those for a spouse or for children, frequently contain very similar dispositive and administrative provisions. Standardization of provisions in inter vivos trusts is probably as common as in wills.

Accordingly, it seems that the potential for the successful use of fill-in statutory forms for trusts will turn
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on the resolution of the advisability of statutory fill-in forms in general. There is little reason to distinguish fill-in trusts from fill-in wills, powers of attorney, and so forth.

F. RECOMMENDATIONS

1. Enactment of Uniform Custodial Trust Act

As detailed earlier, the Uniform Act provides a useful tool for both attorneys and non-attorneys. It makes many of the benefits of trust management, especially being able to provide for one's own or a loved one's incapacity, within the reach of those who may not be able to afford a traditional inter vivos trust or who lack the sophistication necessary to realize that a traditional trust would be appropriate. Custodial trusts are inexpensive to create and permit the beneficiary to retain complete control over the property until death or incapacity. They will also reduce the need for a court appointed conservator. In many situations, the assets in the trust will escape the probate process and its attended costs and delays. Additionally, the Act provides attorneys with an economical, easy-to-use, predictable, and relatively safe technique which would be of particular benefit to those who do not specialize in trust preparation and who therefore do not have a comprehensive set of inter vivos trust forms on hand.

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The drafters realized that there may be problems with the Act. Some were worried about the risk of having a management arrangement which was not drafted and supervised by an attorney. Others feared opposition to the Act because it might reduce the amount of work available to practicing attorneys. Another group of drafters were concerned about allowing health care providers to be named as custodial trustees for fear of a conflict of interest. Still other drafters felt that the custodial trustee should be bonded or that greater court supervision should be required. The conclusion of the drafters, as stated by one commentator, is commendable: "The drafting committee felt that the potential benefits would outweigh the risks of abuse and that these risks of abuse were common to individually drawn revocable trusts, durable powers of attorney and some kinds of court supervised arrangements."

Another concern with the Act was whether custodial trusts were needed because durable powers of attorney or traditional inter vivos trusts would be preferable. The drafters concluded that it would be beneficial to provide another alternative for individuals to use, especially because custodial trusts would most likely be used by people who would not tend to consult an attorney and receive advice on other techniques for disability planning.

It is highly recommended that all jurisdictions adopt the Uniform Custodial Trust Act. The Act was designed to be free standing and thus may be enacted in states which have not
adopted the Uniform Probate Code or the Uniform Transfers to Minors Act.\textsuperscript{333} It is also important for the laws governing custodial trusts to be uniform "[a]s a consequence of the mobility of our population, particularly the mature persons who are most likely to utilize this Act."\textsuperscript{334}

2. Serious Consideration of Statutory Fill-in Inter Vivos Trust Forms

Because the primary goal of estate planning is to effectuate the individual's intent,\textsuperscript{335} statutory fill-in forms should be given serious consideration. They would give the general public another method of achieving this goal. As with the Uniform Act, there are problems with supplying fill-in forms by statute, but these risks may be minimal when compared to the benefits that can result. The risks and benefits are detailed in Parts Three and Four of this dissertation.
1. See infra § B(1) & (2).

2. UNIF. CUSTODIAL TRUST ACT (1987). See infra § C.

3. Statutory trust forms that contain blanks, boxes, etc. for the user to complete or check are hereafter referred to as "fill-in forms."

4. See infra § D.


8. Id.

9. See Haskell, Some Problems With the Uniform Trustees' Powers Act, 32 LAW & CONTEMP. PROBS. 168, 169 (1967) (without statutory powers, law "penalize[s] those whose counsel did not anticipate the particular power that subsequently seemed to be called for").

10. See, e.g., 3 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 186, at 10 (4th ed. 1988); Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 742 (1964) ("statutory powers for fiduciaries designed to simplify the task of drafting wills and trusts by eliminating the need for spelling out those boilerplate provisions that take so many pages of single-spaced type"); Dunham, Uniform Laws on Estates, 103 TR. & EST. 818 (1964) (Uniform Trustees' Powers Act as containing "a large number of powers customarily granted to trustees in well-drafted trust instruments").


13. See Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, § 69(2) (powers apply "if and so far only as a contrary intention is not expressed in the instrument"). But see Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18, § 108(2) ("In
case of conflict between the provisions of a settlement and the provisions of this Act . . . , the provisions of this Act shall prevail . . . )


16. See, e.g., ILL. ANN. STAT. ch. 17, paras. 1651-90 (Smith-Hurd Pamp. 1988) ("The provisions of this Act apply to the trust to the extent that they are not inconsistent with the provisions of the instrument." Id. at para. 1653, § 3(1).); TEX. PROB. CODE ANN. §§ 113.001-.024 (Vernon Pamp. 1988) ("A power given to a trustee by this subchapter does not apply to a trust to the extent that the instrument creating the trust . . . conflicts with or limits the power." Id. § 113.001.). See generally 3 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 186, at 11 nn.8-9 (4th ed. 1988) (citing 13 states as having automatic incorporation by reference but not Uniform Act).

17. See Fratcher, Trustees' Powers Legislation, 37 N.Y.U. L. REV. 627, 627-28 (1962), citing Nat'l Conf. Comm'n on Unif. St. L., 1933 HANDBOOK 80-82, 310-36 (trustee to have statutory powers only if the trust instrument expressly granted "full statutory powers"; id. at 628).


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Fiduciary Powers" would incorporate by reference a list of statutory powers).


21. See Lacovara, "Unless Otherwise Provided" -- Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964).

22. See generally Chapter II(C)(1) (discussion of the two approaches and suitability of incorporation by reference as a statutory estate planning technique).


24. Id.

25. Id. at 840 (committee unaware of any counterparts in existing statutes to its dispositive provisions to be incorporated by reference).

26. Id. at 852 (§ 3-102 of proposed uniform short form clauses for wills and trusts act).

27. Id. at 852-53 (§ 3-103 of proposed uniform short form clauses for wills and trusts act).

28. Id. at 840.

29. Id.

30. Id.


33. Id. at 839, 847 (§§ 2-101 & 2-102 of proposed act).

34. Id. at 847 (§ 3-101 of proposed act).

35. Id. at 848 (§ 3-102 of proposed act).
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36. Id. at 847-48 (§ 3-101 of proposed act).

37. Id. at 847 (§ 2-101(b) of proposed act retaining basic community nature of property).

38. Id. at 848 (§ 3-102 of proposed act requiring annual accountings).

39. Id. (§ 3-101 of proposed act granting trustee reasonable compensation unless otherwise provided in writing by the settlor).

40. Id. (§ 3-104 of proposed act dealing with resignation and removal of the trustee and the ability of the settlor to name a successor).

41. Id. (§ 4-101 of proposed act granting trustee statutory fiduciary powers).

42. Id. (§ 4-102 of proposed act waiving bond for the trustee unless the settlor or court provides otherwise).

43. Id. (§ 4-103 of proposed act authorizing trustee to apply to court for power to deal with trust property in the same manner as a court would authorize a guardian or conservator).

44. Id. at 847 (§ 3-101 of proposed act; note that trustee could expend funds for settlor's dependents but that the dependents could not be directly named as beneficiaries).

45. Id. at 839.

46. Id.

47. Id.

48. Id.


54. Id. (approved on July 31 - August 7, 1987 after a line-by-line reading).


56. Id. at prefatory note.


58. See infra § C(2) for a detailed description of the Act.


60. Id.

61. Id.

62. Id. § 1(1).

63. Id. § 1(2).

64. Id. § 1(3).

65. Id. § 1(4).

66. Id. § 1(4) comment.

67. Id. at prefatory note.

68. Id. at prefatory note.

69. Id. § 1(5).

70. Id. § 1(6).

71. Id. § 1(7).

72. Id.

73. See infra § C(2)(o) & (p).

74. UNIF. CUSTODIAL TRUST ACT § 1(8) (1987).

75. Id. § 1(9).
76. Id. § 1(10).
77. Id. § 1(11).
78. Id. § 1(12).
79. Id. § 1(13).
80. Id. § 1(14).
81. Id. § 1(15).
82. Id. § 2 comment.
83. Id. § 2(a).
84. Id.
85. Id. § 18(a)(1).
86. Id. § 18(b).
87. Id. § 2(b).
88. Id.
89. Id. § 18(a)(2).
90. Id. § 18(b)
91. Id. § 3(a).
92. Id.
93. Id. § 3(c). If the designation is in some other form, it "must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right." Id.
94. Cf. UNIF. TRANSFERS TO MINOR ACT § 3(a) (1983) (permitting designation of custodian for minors by will).
95. UNIF. CUSTODIAL TRUST ACT § 3 comment (1987).
96. Id. § 5(a).
97. Id.
98. Id.
99. Id. § 5(b).
100. Id. § 5 comment.
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101. Term "may" is used in creation methods and no section indicates that the specified methods are exclusive.

102. UNIF. CUSTODIAL TRUST ACT § 2 comment (1987).

103. Id. § 2(h).

104. Id. § 4(a).

105. Id.

106. Id. § 4 comment.

107. Id. § 4(b).

108. Id. § 4(c).

109. Id. § 19(a).

110. Id. § 13(a).

111. Id.

112. Id.

113. Id. § 13(c).

114. Id.

115. Id.

116. Id. § 13(d).

117. Id. § 13(e).

118. Id. § 2(f). See supra § C(2)(b).

119. UNIF. CUSTODIAL TRUST ACT § 2(c) (1987).

120. Id. § 6(a).

121. Id. § 6(c).

122. Id. § 6(a).

123. Id.


125. UNIF. CUSTODIAL TRUST ACT § 17(b) (1987).

126. Id.
127. *Id.* § 7(b).
128. *Id.* § 12(c).
129. *Id.*
130. *Id.* § 12(d).
131. *Id.* § 7(a).
132. *Id.* § 7(b).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* § 7(c).
139. *Id.* § 7(d).
140. *Id.* § 7(d) (the recommended form of the designation is "as custodial trustee for [name of beneficiary] under the [Enacting state] Uniform Custodial Trust Act").
141. *Id.* § 7(e).
142. *Id.*
143. *Id.* § 7(f).
144. *Id.*
145. *Id.* § 8(a).
146. *Id.* § 8 comment.
147. *Id.* § 6(b).
148. *Id.* § 12(a).
149. *Id.*
150. *Id.* § 12(b)(1).
151. *Id.* § 12(b)(2).
152. *Id.* § 12(d).
153. *Id.* at prefatory note.
154. *Id.* § 11.
155. *Id.*
156. *Id.* § 14(1) & (2).
157. *Id.* § 14(2).
158. *Id.* § 14 comment.
159. *Id.* § 14(3).
160. *Id.* § 14.
161. *Id.* § 15(a). This requirement helps assure that a beneficiary is on notice that a custodial trust has been created in his favor.
162. *Id.* § 15(a)(i).
163. *Id.* § 15(a)(ii) (the request must be at reasonable times).
164. *Id.* § 15(a)(iii).
165. *Id.*
166. *Id.* § 15(a)(iv).
167. *Id.* § 15(b).
168. *Id.* § 15(c).
169. *Id.* § 15(a).
170. *Id.*
171. *Id.* § 15 comment.
172. *Id.* § 16 comment.
173. *Id.* § 16(a)(1).
174. *Id.* § 16(a)(2).
175. *Id.* § 16(b).
176. *Id.* § 16(c)(1).
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177. Id. § 16(c)(2).
178. Id. § 16(c)(3).
179. Id. § 2(g).
180. Id. § 3(b).
181. Id. § 13(c).
182. Id. § 13(c) & (e).
183. Id. § 13(f).
184. Id. § 13(c).
185. Id.
186. Id.
187. Id. § 13(d).
188. Id. § 9(a).


190. UNIF. CUSTODIAL TRUST ACT § 9(a) (1987).
191. Id.
192. Id. § 10(a).
193. Id. § 10(c).
194. Id. § 9(c).
195. Id. § 10(a).

196. Id. § 9(b). The drafters recognized that some states may wish to incorporate by reference their laws regarding the distributive powers of a conservator instead of having a separate provision. Id. § 9 comment.

197. Id. § 9(b).
198. Id. § 9(c).
199. Id. § 9 comment.
200. Id. § 10(b)(i).
201. Id. § 10(b)(ii) & (iii).
202. Id. § 10(c).
203. Id. § 10(d).
204. Id. § 10(e).
205. Id. § 10(f).
206. Id. § 2(e).
207. Id.
208. Id. § 7(f).
209. Id. § 2(d). If the transferor retained the power to revoke, the trust may still be effective under the state's usual trust law. Id. § 2(h).
210. Id. § 2(d) & (e).
211. Id. § 2(e).
212. Id. § 17(a)(1).
213. Id. § 17(a)(2).
214. Id. § 17(a)(3)(i).
215. Id.
216. Id. § 17 comment.
217. Id. § 17(a)(3)(ii).
218. Id. § 17(a)(3)(iii).
219. Id. § 17(a)(3)(iv).
220. Id. § 17(b).
221. Id. § 17(c).
222. Id. § 13(f).
223. Id. § 15(f).
224. Id.
225. Id.
226. Id. § 15(d).
227. Id. § 10(d).
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228. Id. § 13(d).
229. Id. § 5(a).
230. Id. § 19(a).
231. Id.
232. Id. § 19(b).
234. 7A U.L.A. 5 (Supp. 1988) (indicating, however, that Missouri Act "departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by statutory notes"); 21 MO. ANN. STAT. 18 (Vernon Supp. 1988) (material immediately preceding § 404.400). See also MO. ANN. STAT. § 404.404.630 (Vernon Supp. 1988) (statute to be applied and construed to make uniform the law among states enacting a similar law).
237. This listing is provided to demonstrate the types of differences involved, not as a comprehensive list of the variations between the Missouri law and the Uniform Act.
241. Compare MO. ANN. STAT. § 404.404.490(2) (Vernon Supp. 1988) (court approval needed if more than $10,000 going to custodian that is not a financial institution) with UNIF. CUSTODIAL TRUST ACT § 5(a) (1987) (court approval needed for all transfers exceeding $20,000).
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premiums under certain circumstances) with UNIF. CUSTODIAL TRUST ACT § 9(b) (1987) (custodian authorized to do what he considers advisable for beneficiary's use and benefit).


245. Compare MO. ANN. STAT. § 404.580(2) (Vernon Supp. 1988) ("If an election [to receive compensation] is not affirmatively made during the calendar year, the right to compensation for that year shall lapse.") with UNIF. CUSTODIAL TRUST ACT § 14(2) (1987) (election by trustee to receive compensation may be made no later than six months after the end of the calendar year).

246. Compare MO. ANN. STAT. § 404.610 (Vernon Supp. 1988) (custodian must reveal his fiduciary capacity and identify the personal custodianship in the contract to avoid liability) with UNIF. CUSTODIAL TRUST ACT § 12(b)(1) (1987) (trustee must reveal only his fiduciary capacity or identify the custodial trust in the contract to avoid liability).


248. See, e.g., id. § 18-13-1(12) (omission of word "a" before phrase "decedent's estate"); id. § 18-13-3 (omission of colon after phrase "followed in substance by"); id. § 18-13-7(b) (third sentence contains phrase "the the" rather than "in the").


253. Id. § 364.

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(indicating that beneficiary must be "adult person"; definition of "adult" limited to "individual").


257. See generally E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDE


258. UNIF. CUSTODIAL TRUST ACT § 7(b) (1987).

259. Id. § 9(a).

260. Id. §§ 2(e) & 17(a)(1).

261. Id. § 10(a)(ii).

262. Id. § 10(c).

263. Id. § 9(b).

264. Id. § 1(8).

265. But cf. V.I. CODE ANN. tit. 15, § 861 (1964) (guardian may be appointed for a spendthrift person, i.e., someone who "by excessive drinking, gaming, idleness or debauchery of any kind, so spends, wastes or lessens his estate as to expose himself or his family to want or suffering").

266. Id. § 2 comment. See Wade, Uniform Custodial Trust Act, PROB. & PROP., Nov.-Dec. 1987, at 37, 38 (policy difficulties in providing spendthrift feature in a uniform act).


268. See UNIF. CUSTODIAL TRUST ACT § 2 comment (1987).

269. See generally supra § C(2).


271. UNIF. CUSTODIAL TRUST ACT § 6(a) (1987).

272. Id. § 17(a)(3)(i) & (ii).

273. Id. § 17(a)(3)(iii).
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274. Id. § 14.

275. Id. § 18(a).


278. Inter vivos trusts usually necessitate the involvement of a drafting attorney while custodial trust designations are short and may be pre-printed on bank account contracts, insurance policies, etc. as an alternative method of holding title.


283. Id. § 17(a)(3)(ii).

284. Id. § 17(a)(3)(iii).

285. Id. § 17(a)(3)(iv).


289. Id. § 2(e).

290. Id. § 7(b).

291. Id. § 17(a)(3)(i).

292. I.R.C. § 676(a) (West 1988) (grantor treated as owner for income tax purposes if grantor may revest title in himself); I.R.C. § 2038(a) (West 1979) (revocable transfers part of grantor's gross estate).
293. If the beneficiary is the transferor's spouse, no gift tax liability will exist. I.R.C. § 2523 (West Supp. 1988).

294. UNIF. CUSTODIAL TRUST ACT § 2(d) (1987) (transferor may not terminate the trust unless transferor and beneficiary are the same person).


296. Id. § 2503 ($10,000 per year per donee plus certain transfers for educational and medical expenses).

297. Id. § 2505 (providing a $192,800 gift tax credit which is equivalent to a $600,000 exclusion).

298. Id.

299. UNIF. CUSTODIAL TRUST ACT § 2(e) (1987).

300. Id. § 7(b).

301. Id. § 17(a)(3)(i).


303. Id. § 1(i). Generally, all net unearned income, regardless of its source or when the property was obtained, of a child who has not reached 14 years of age by the end of the taxable year, is taxed at the parents' top marginal rate if that rate is higher than the child's. The Code contains rules for computing the child's net unearned income.

304. UNIF. CUSTODIAL TRUST ACT § 2(e) (1987).

305. Id. § 17(a)(3)(i).

306. I.R.C. § 2041(a)(2) (West 1979) (value of gross estate includes property over which decedent has at the time of his death a general power of appointment).


308. UNIF. CUSTODIAL TRUST ACT § 9(b) (1987).


310. Id. (e.g., will an "information" fiduciary income tax return be needed; if a trust taxpayer identification is used, will the pass through of the tax treatment of the
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custodial trust be reflected by a Form 1099 or a K-1 form).


314. See supra Chapter III.

315. See infra Chapter V.

316. See infra Chapter VI.

317. See infra Chapter VII.

318. See infra Chapter VIII.

319. See supra § C(1).


322. UNIF. CUSTODIAL TRUST ACT § 7(b) (1987).

323. Id. § 10 comment; Nat'l Conf. Comm'n on Unif. St. L., Why States Should Adopt the Uniform Custodial Trust Act 1 (undated).


326. Id.

327. Id.

328. Id.

329. Id.

330. Id.
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331. Id.


334. Id.

335. See, e.g., W. CASEY, NEW ESTATE PLANNING IDEAS 1 (1958) (estate planning "involves the selection, arrangement and disposition of family assets in a way best calculated, not only to save death taxes, but to fit the needs and the aptitudes of family beneficiaries"); E. GERTZ, T. GERTZ & R. GARRO, A GUIDE TO ESTATE PLANNING ix (1983) ("Estate planning is really a lifetime process of arranging assets (property) so that a person may dispose of them during his lifetime and at his death in a manner that best carries out his desires for his family (or other objects of his bounty) consistent with a minimizing of income, gift, and death taxes, and an easing of transfer."); H. TWEED & W. PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 1 (1959) (estate planning is "the process of working out for a client the best ways of using and disposing of all of his properties during his life and after his death, having in mind his wishes and the welfare of his family"); cf. University of Illinois, College of Law Catalog 1 (1987-89) (attorney should develop "an ability to find solutions to human problems"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of possible advantages to family of dying testate).
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DURABLE POWERS OF ATTORNEY

A. INTRODUCTION

Durable powers of attorney are of very recent origin compared to wills which began to evolve several millennia ago and trusts which started developing shortly after the Norman Conquest. The belief was firmly entrenched in Anglo-American law that an agent's authority terminated upon the principal's incapacity. It was not until the middle of the twentieth century that this traditional viewpoint was seriously questioned. Estate planners began to realize the utility of a power of attorney that would permit the agent to handle the principal's affairs during incompetency, the time when the principal most needs the agent's assistance. This need ultimately led to the durable power of attorney, a power which authorizes the agent to act until the principal's death notwithstanding the principal's incompetency.

This shift in attitude was, to a small extent, reflected by the Restatements of Agency that admitted some exception to the strict common law rule. A comment to the 1933 Restatement stated that a power of attorney would be terminated by the principal's mental incompetency if the incompetency created a legal incapacity but if the incapacity were only temporary, the agent's authority would merely be suspended. The comment explained that the agent retained the authority to act during
very short periods of incompetency, such as when the principal had "a delirium accompanying a fever." In 1957, the Second Restatement added a caveat stating that no opinion was being given "as to the effect of the principal's temporary incapacity due to a mental disease." Although the new commentary echoed the traditional rule that "a declaration by a court having jurisdiction that the principal is insane or otherwise incompetent to act in his own affairs terminates or suspends the authority of his agent," the rule was partially eroded providing that "[v]ery brief periods of insanity caused by the temporary mental or physical illness of the principal do not destroy the power of a previously appointed agent to act in his behalf." The Second Restatement opened the door to durable powers but it stopped short of approving them and left the issue unsettled declaring that the matter was "too amorphous for a statement of a definite rule." In a similar fashion, courts were reluctant to alter the well-established rule.

In 1954, Virginia enacted pioneering legislation that authorized the creation of durable powers of attorney by the principal including language demonstrating "the intent of the principal that such power or authority shall not terminate upon his disability." If the power evidenced this intent, the agent's authority to act would continue "notwithstanding any subsequent disability, incompetence, or incapacity of the principal." Virginia's progressive approach to durable powers did not gain appreciable acceptance until over a decade
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later when durable powers were integrated into the original version of the Uniform Probate Code promulgated in 1969.¹³

Even though jurisdictions were slow to adopt the entire Uniform Probate Code, durable powers of attorney started to enjoy enthusiastic popularity as states began to enact enabling legislation. To make powers of attorney more useful and to encourage adoption of durable power legislation, the National Conference of Commissioners on Uniform State Laws designed a free-standing Uniform Durable Power of Attorney Act. The Act's provisions were identical to the corresponding provisions of the 1979 amendments to the Uniform Probate Code.¹⁴ All fifty states and the District of Columbia now have legislation of a similar nature sanctioning durable powers of attorney.¹⁵

The first durable power of attorney statutes did not contain fill-in forms but rather recommended certain phraseology to annex durability to a normal power of attorney.¹⁶ In the 1980's, however, comprehensive fill-in forms were enacted by a substantial number of states.¹⁷ Additionally, specialized durable power of attorney fill-in forms for health care decisions were developed by several states either independently or in connection with durable power of attorney forms for property management.¹⁸ In 1988, the Uniform Statutory Form Power of Attorney Act, which includes a fill-in form, was approved and recommended for adoption in all states by the National Conference of Commissioners on Uniform State Laws at its annual meeting.¹⁹
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Of the major types of estate planning documents analyzed in this dissertation, the one that has experienced the greatest recent growth in legislatively provided fill-in forms is the durable power of attorney. This chapter begins with an examination of the language suggested by the statutes for creating durable powers of attorney and continues with an extensive analysis of the statutory fill-in forms. The chapter concludes with a critique of how well statutory forms for durable powers of attorney effectuate the purposes for which durable powers are typically created and is followed by recommendations regarding legislation for durable power fill-in forms. A general discussion of the advantages and disadvantages of statutory estate planning forms is reserved for Parts Three and Four of this dissertation.

B. STATUTORILY SUGGESTED LANGUAGE TO CREATE DURABLE POWERS OF ATTORNEY

Enabling legislation for durable powers of attorney usually contains suggested language that is sufficient to create the durability feature when included in a power. Virginia, the first state to enact an enabling statute, recommended the words, "This power of attorney (or his authority) shall not terminate on disability." This section explores how Virginia's language was transformed by the drafters of the Uniform Probate Code and later by the drafters of the Uniform Durable Power of Attorney Act. A comparison of the suggested language of the state enabling statutes will be
presented followed by a discussion of an alternative approach adopted by a few jurisdictions where the durability of a power of attorney is presumed.

1. Development of Language in Uniform Laws

When durable powers were favorably embraced by the drafters of the Uniform Probate Code, the language of the Virginia statute was altered and expanded to provide for springing powers of attorney, i.e., powers that take effect upon disability. The recommended durable language was, "This power of attorney shall not be affected by disability of the principal," and the suggested springing language was, "This power of attorney shall become effective upon the disability of the principal."

The 1979 revisions to the Uniform Probate Code, which also became the free-standing Uniform Durable Power of Attorney Act, further refined the suggested language. The most significant change was the expansion of the conditions through which the power could continue or upon which it could arise. The new version substituted the broader phrase "disability or incapacity" for "disability." The commentary to the amendment did not cite a reason for this change but it is hypothesized that the change was made to resolve disagreement concerning the definitions of the terms "disability" and "incapacity." These terms may encompass different situations; an event could cause the principal to be disabled but not incapacitated. Although the Uniform Durable
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Power of Attorney Act does not define either of these important terms, both terms are discretely defined in the Uniform Probate Code. "Disability" is a less severe condition that may give rise to the appointment of a conservator or to the issuance of a protective order, while "incapacity" is a more severe difficulty that may lead to the appointment of a guardian of the person.

The most recent change to the language suggested by these Uniform Acts came in 1987 when "lapse of time" was added to "disability or incapacity of the principal" as a condition through which the power of attorney could remain effective. No comment accompanied the amendment but it is hypothesized that the new language was added in response to concerns that durable powers of attorney could become stale, i.e., cease to be effective if too great a time period had elapsed since the principal created the power.

The most recent pronouncement from the National Conference of Commissioners on Uniform State Laws was in August 1988 when the Commissioners approved the Uniform Statutory Form Power of Attorney Act. The recommended language reads, "This power of attorney will continue to be effective if I become disabled, incapacitated, or incompetent." As with the changes made to the Uniform Probate Code and the Uniform Durable Power of Attorney Act, no reason was given for the change.

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2. Durable Language Suggested by the States

Although relatively uniform in substance, there is wide diversity between the states concerning the suggested durable power of attorney language. Minor changes in the form language are common even in the states enacting the Uniform laws. The changes typically address the events through which the agent's authority continues. These differences can be significant when technical and precise definitions are given to the threshold terms.

Another noticeable difference between states is that some jurisdictions provide language for both immediately effective and springing durable powers of attorney. The purpose of this duality is to make it clear that springing powers are permitted because without express authorization, the validity of postponing the effectiveness of the power may be questioned. There should, however, be little difficulty with springing powers of attorney because established law permits the agent's authority to begin upon the occurrence of a specific event. The event of becoming disabled should be sufficient to trigger the agent's authority to act because disability no longer terminates the agent's authority under these statutes.

a. Power Continues Despite "Disability"

Almost one-half of the states follow the original Virginia statute and the 1969 version of the Uniform Probate Code by including "disability" of the principal as the only
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condition through which the agent's authority will continue. The legislatures that enacted these statutes probably intended the term "disability" to be sufficiently broad to cover all situations where the principal is unable to act for physical or mental reasons and would have intended the agent to act. These states include Alaska, Arizona, Colorado, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wyoming.

b. Power Continues Despite "Incompetency"

Rhode Island provides for the continuation of the agent's authority only through "incompetency."

c. Power Continues Despite "Disability or Incapacity"

Following the pattern of the original Uniform Durable Power of Attorney Act, over a dozen states have language referring to "disability or incapacity." These states include Arkansas, Delaware, Idaho, Indiana, Kansas, Massachusetts, Nebraska, North Dakota, Oklahoma, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

d. Power Continues Despite "Incapacity"

Although California substantially adopted the Uniform Durable Power of Attorney Act, the term "disability" was omitted from the Act's suggested language. This omission was made because another provision of California law provides that
the principal's incapacity to contract normally terminates a power of attorney and thus to maintain consistency, the term "disability" was dropped.72

e. Power Continues Despite "Disability or Incompetence"

Connecticut,73 Mississippi,74 New Hampshire,75 New York,76 North Carolina,77 and South Carolina78 use slightly different language which refers to "disability or incompetence."

f. Power Continues Despite "Disability, Incompetency, or Incapacity"

One state, Alabama,79 provides the greatest laundry list of conditions that do not terminate the agent's authority; the power will continue despite the principal's "disability, incompetency, or incapacity." This approach was adopted, with only a change in word order, by the Uniform Statutory Form Power of Attorney Act.80

g. Power Continues Despite "Disability . . . or Lapse of Time"

Ohio, taking an approach between the original Uniform Probate Code and its 1987 amendments, provides that the power continues despite "disability . . . or lapse of time."81

h. Power Continues Despite "Disability or Incapacity . . . or Lapse of Time"

The statutes of the District of Columbia82 and Montana83 contain form language that the power continues despite the principal's "disability or incapacity . . . or lapse of time." This wording parallels the 1987 amendments to the
Uniform Probate Code and the Uniform Durable Power of Attorney Act.\textsuperscript{84}

\textbf{i. Express Language for Springing Powers}

Over two-thirds of the states have statutes which include sample language that expressly provides for the creation of springing powers of attorney which take effect only after the principal becomes disabled or incapacitated; until the occurrence of the event on which the power is conditioned, the agent has no power or authority.\textsuperscript{85} These jurisdictions are Alabama,\textsuperscript{86} Alaska,\textsuperscript{87} Arizona,\textsuperscript{88} Arkansas,\textsuperscript{89} California,\textsuperscript{90} Colorado,\textsuperscript{91} Delaware,\textsuperscript{92} District of Columbia,\textsuperscript{93} Hawaii,\textsuperscript{94} Idaho,\textsuperscript{95} Indiana,\textsuperscript{96} Kansas,\textsuperscript{97} Kentucky,\textsuperscript{98} Maine,\textsuperscript{99} Maryland,\textsuperscript{100} Massachusetts,\textsuperscript{101} Michigan,\textsuperscript{102} Minnesota,\textsuperscript{103} Montana,\textsuperscript{104} Nebraska,\textsuperscript{105} Nevada,\textsuperscript{106} New Hampshire,\textsuperscript{107} New Mexico,\textsuperscript{108} North Carolina,\textsuperscript{109} North Dakota,\textsuperscript{110} Oklahoma,\textsuperscript{111} Pennsylvania,\textsuperscript{112} Rhode Island,\textsuperscript{113} South Dakota,\textsuperscript{114} Tennessee,\textsuperscript{115} Utah,\textsuperscript{116} Vermont,\textsuperscript{117} Washington,\textsuperscript{118} West Virginia,\textsuperscript{119} Wisconsin,\textsuperscript{120} and Wyoming.\textsuperscript{121}

\textbf{j. Mere Statement that Power of Attorney is Durable}

A considerably different type of language is provided in the Missouri Durable Power of Attorney Act.\textsuperscript{122} Instead of listing the events through which the power continues, the suggested language is even simpler; the document must contain only the words "This is a durable power of attorney" or a reference to the power as being "durable."\textsuperscript{123} This language will cause the power to remain in effect until terminated by the affirmative act of the principal or the principal's
death.\textsuperscript{124} The definition of durable in the statute is deemed to inform all concerned that the power persists despite disability or incapacity.

3. An Alternative Approach - Powers of Attorney Presumed Durable

Four states have gone beyond the mere authorization of durable powers of attorney. The enabling legislation of Georgia,\textsuperscript{125} Illinois,\textsuperscript{126} Louisiana,\textsuperscript{127} and Oregon\textsuperscript{128} provides that all powers of attorney are durable unless the principal expressly states otherwise. Thus, additional steps or special language is not needed to create a durable power. The legislatures presumably concluded that the majority of people who create powers of attorney would expect or want them to continue during any period of disability. There is, however, some concern that a principal may unknowingly execute a durable power when a non-durable power was intended.

C. STATUTORILY PROVIDED DURABLE POWER OF ATTORNEY FORMS FOR GENERAL USE

1. History

a. The First Statutory Power of Attorney Form - New York

In 1948, New York became the first state to provide by statute a fill-in form that could be used to create a power of attorney.\textsuperscript{129} This simple form begins with a warning that the form grants broad and sweeping powers, provides blank spaces
for the names and addresses of the principal and agent(s), permits the principal to indicate if multiple agents are to act jointly or severally, enumerates a list of powers that the agent is deemed to have unless the principal draws a line through the text of that power and initials in a box opposite the text, provides space for special provisions and limitations, contains an agreement that the principal will indemnify and hold harmless any third party that relies on the provisions of the power, provides blank spaces for the date of execution and signature of the principal, and concludes with a space for an acknowledgement.  

The New York statutory fill-in form is short because it uses incorporation by reference to supply the full text of the powers that are granted to the agent. For each of the thirteen enumerated powers, there is a corresponding statutory provision that expounds, in great detail, the actions that are encompassed by the power. The purpose of these provisions is to grant the agent the most extensive powers possible. As evidence of this, the definition of each power contains a provision stating that the agent has the authority to do not only the specific acts enumerated in the section, but also any other acts that the principal can perform through an agent concerning the type of transaction involved.

The New York form does not contain language regarding the durability of the power upon the subsequent disability or incompetence of the principal. When the form was originally enacted in 1948, durable powers were not yet authorized; the
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New York enabling legislation for durable powers was not passed until 1975.\textsuperscript{134} Despite amendments to the statutory form in 1980,\textsuperscript{135} 1981,\textsuperscript{136} and 1986,\textsuperscript{137} language has not been inserted to provide the principal with the option of making the power durable. However, it appears that the power may be made durable by the principal including durability language in the space provided for special provisions and limitations because "additional language which . . . [m]akes some additional provision which is not inconsistent with the other provisions of the statutory short form power of attorney"\textsuperscript{138} will not prevent the power from being a statutory short form power of attorney.\textsuperscript{139}

New York's progressive approach of providing a fill-in form for powers of attorney did not gain rapid acceptance. In fact, it was not until thirty-five years later in 1983 that another state enacted a statutory power of attorney form.\textsuperscript{140} The idea of statutory fill-in forms then gained quick popularity; four states followed suit by passing similar legislation\textsuperscript{141} and a form is recommended in the Uniform Statutory Form Power of Attorney Act.\textsuperscript{142} Unlike the New York form, each of these newer forms addresses the durability of the power and permits the principal to make the power durable.\textsuperscript{143} Before examining these six forms in detail, a brief discussion of the unique approach used by Pennsylvania is instructive.
b. Incorporation by Reference of Statutory Powers – Pennsylvania

In 1982, at the same time it recognized durable powers of attorney, Pennsylvania enacted statutory power of attorney provisions which the principal could incorporate by reference. A principal may use the statutory wording to describe the power, or other language that shows a similar intent, to trigger detailed statutory descriptions of the authority included within that particular grant of power. The statutory powers include "to make gifts," "to make limited gifts," "to create a trust for my benefit," "to make additions to an existing trust for my benefit," "to claim an elective share of the estate of my deceased spouse," "to disclaim an interest in property," "to renounce fiduciary positions," "to withdraw and receive the income or corpus of a trust," "to authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care," and "to authorize medical and surgical procedures."

The Pennsylvania statute provides valuable assistance to attorneys who can now draft shorter and more readable powers of attorney in less time. Clients should benefit because of lower legal fees and more certainty regarding the powers held by the agent. This approach, however, may not lead to a significant increase in the number of individuals who use powers of attorney to plan for disability. Persons desiring powers of attorney will still need to consult an attorney.
because a complete form with the official sanction of the government was not supplied.

2. Statutorily Supplied Durable Power of Attorney Forms - United States

This section compares and contrasts the important provisions of the statutory durable power of attorney fill-in forms of Alaska, California, Illinois, Minnesota, North Carolina, and the form provided by the Uniform Statutory Form Power of Attorney Act.

a. General Format of Statutory Fill-in Forms

Although the statutorily supplied fill-in forms have significant variations, they follow the same basic format as the New York statutory form previously discussed. Each form begins with various warnings about the use of the form and is followed by blank spaces for the names of the principal and agent. The forms continue with an enumerated list of powers that the agent is presumed to have unless otherwise indicated by the principal or that the agent has only if expressly granted by the principal. The scope of each power is then detailed in statutory provisions that are deemed incorporated by reference. The forms provide for various degrees of individualization by permitting the principal to make choices or to insert special provisions. The forms conclude with signature spaces for the principal and, in most cases, acknowledgment provisions.
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b. Warnings at Beginning of the Form

Each of the statutory power of attorney forms begins with explanatory material and warnings to the prospective principal. There is, however, tremendous variation in detail ranging from very brief statements (Alaska, Minnesota, North Carolina, and Uniform Act)\textsuperscript{154} to extensive explanations (California and Illinois).\textsuperscript{155} The following types of statements are found in the forms:

- Powers granted to the agent are very broad (all forms);\textsuperscript{156}
- Examples of permissible actions that an agent may take (Alaska, California, and Illinois);\textsuperscript{157}
- Whether the agent has authority to make health care decisions (Alaska, California, and Uniform Act);\textsuperscript{158}
- Possibility that the principal may need additional advice before using the form (Alaska, California, Illinois, Minnesota, and Uniform Act);\textsuperscript{159}
- Ability of the principal to revoke the power of attorney (Alaska, California, Illinois, Minnesota, and Uniform Act);\textsuperscript{160}
- Description of where to locate the definitions of the powers that are incorporated by reference (California, Illinois, Minnesota, North Carolina, and Uniform Act);\textsuperscript{161}
- Duration of the power of attorney, e.g., lapse of time and disability (California and Illinois);\textsuperscript{162}
- Ability of the principal to limit powers granted by the form (California);\textsuperscript{163}
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- Formalities required under state law for validity of the power (California);\textsuperscript{164}
- Principal's right to use a non-statutory form to designate an agent (California, Illinois, Minnesota, and North Carolina);\textsuperscript{165}
- Agent is not required to exercise the granted powers (Illinois and Minnesota);\textsuperscript{166}
- Ability of the court to take away the agent's powers if the agent not acting properly (Illinois);\textsuperscript{167} and
- Rules regarding successor and co-agents (Illinois).\textsuperscript{168}

\textbf{c. Identification of the Principal}

All of the forms provide a blank space near the beginning of the form for the principal to identify himself. Only the North Carolina form does not provide an additional space for the principal's address.\textsuperscript{169}

\textbf{d. Designation of the Agent}

Each form provides a blank space for the principal to designate the agent and, except for North Carolina, a place to insert the agent's address.\textsuperscript{170}

\textbf{e. Co-agents}

There is considerable variation between the forms concerning the principal's ability to name co-agents. The Illinois form expressly states that co-agents may not be designated on the form.\textsuperscript{171} Alaska, California, and Minnesota permit the designation of co-agents and give the principal the
option of deciding whether the agents must act jointly or whether they may act separately without the consent of the other agents. The North Carolina and Uniform Act forms do not address the issue of co-agents although it may be implied that only one agent is anticipated because the language of these forms reflect the singular nature of the agent.

f. Successor Agents

The Alaska and Illinois fill-in forms permit the principal to designate successor agents to act for the principal should the original agent be unable or unwilling to serve.

g. Methods of Granting Powers to the Agent

Although the six forms are similar in that each lists powers that are defined in detail in each state's respective statute, two very different methods have developed for the principal to grant the enumerated powers to the agent. The first method, used by Alaska, California, and Illinois, is to presume that the principal is granting the agent all of the enumerated powers. If the principal wishes to limit those powers, the principal must follow precise instructions contained in the form such as drawing a line through the power and initialing in a box opposite the deleted power. The second method, adopted by Minnesota, North Carolina, and the Uniform Act, is the converse; the principal is deemed to grant the agent only the powers from the enumerated list that are
expressly selected by the principal by initialing or checking. 177

h. Powers That Can be Granted to the Agent

i. Enumerated Powers

Each of the six fill-in forms enumerate powers regarding the following: real estate transactions; tangible personal property transactions; stocks (shares), bonds, and commodities transactions; banking (financial institutions) transactions; business operating transactions; insurance transactions; estate, trust, and other beneficiary transactions; and certain benefit transactions (e.g., military, retirement, Social Security, unemployment).

The forms differ, however, in the other types of enumerated powers. For example, all forms except North Carolina provide for the power to handle claims and litigation, 178 all forms but Illinois include the power to handle personal and family relationships and affairs, 179 two-thirds of the forms cover tax related powers, 180 and several forms include other powers such as to make gifts, 181 arrange health care services, 182 prepare, keep and submit records, reports, and statements, 183 borrowing transactions, 184 fiduciary transactions, 185 option transactions, 186 and employment of agents. 187 Because each enumerated power has an extensive definition by statute, certain powers may not appear to be granted because there is no category that matches but will still be included through a definition of a different power.
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For example, several forms enumerate safe deposit box transactions as a separate power while other forms deal with safe deposit boxes under banking transactions.

ii. Ability to Provide Additional Powers or Alter Definitions of Enumerated Powers

The fill-in forms vary greatly in the degree to which they provide the principal with the ability to grant additional powers or to alter the statutory definitions of the enumerated powers. The Minnesota and North Carolina forms are very restrictive; no spaces are provided for additions or alterations. Illinois' form is the most flexible providing separate spaces for the principal to modify or limit the statutory definitions and to provide additional powers. The Illinois form provides several examples to give the non-attorney user an idea of the types of changes and additions that might be appropriate; for example, to add prohibitions on the sale of certain property or to authorize the agent to make gifts or revoke trusts. The remaining forms provide opportunity for some further individualization of the agent's powers.

iii. Ability of the Agent to Delegate Powers

Significant differences also exist in the way the forms treat the issue of further delegation of authority, beyond the hiring of agents to perform ministerial functions. Three approaches have developed. The Alaska and California forms provide as an enumerated power, the agent's ability to delegate any or all of the granted powers. The Illinois and
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North Carolina forms expressly give the principal the option of granting the agent the right to delegate discretionary decisions.\(^{195}\) The final approach, used by Minnesota and the Uniform Act, is not to address the issue on the form.\(^ {196}\)

\[i. \text{ Effectiveness and Duration of the Agent's Authority}\]

\[i. \text{ Date the Agent's Authority Begins}\]

Each statutory form deals differently with the effective date of the agent's authority. Alaska provides the principal with two choices, date of execution or upon disability.\(^ {197}\) The principal indicates a preference by checking a box in front of the desired effective date. The California form does not address the issue but it is possible for the principal to include an effective date in the space available for special provisions and limitations.\(^ {198}\) The Illinois form gives the principal the greatest flexibility by providing a space to indicate an effective date and by giving examples of possible dates or events that may trigger the power.\(^ {199}\) The Minnesota form is the most restrictive because it neither speaks to the issue nor provides any space for the principal to include an individualized provision for the effective date.\(^ {200}\) Immediate effectiveness is presumed by the North Carolina form but optional language is provided so the principal may make the power effective only after the principal becomes incapacitated or mentally incompetent.\(^ {201}\) The Uniform Act's form warns the principal that the power is
effective immediately unless express directions are written in
the space provided for special instructions.\textsuperscript{202}

\textit{ii. Effect of the Principal's Disability or Incapacity}

Each form deals directly with the issue of the durability of the power of attorney but several different approaches are used. The Alaska and Minnesota forms require the principal to decide between termination of the power upon incompetency or disability and durability by making a check in front of the desired option.\textsuperscript{203} California, Illinois, and the Uniform Act presume that the power is durable unless the principal expressly indicates otherwise.\textsuperscript{204} The North Carolina form contains optional language which the principal may include to add durability to the power of attorney.\textsuperscript{205}

\textit{iii. Termination of the Agent's Authority}

The forms of Alaska, California, Illinois, and North Carolina supply the principal with a place to indicate a date, time period, or event after which the power of attorney will terminate.\textsuperscript{206} The Uniform Act's form states that it is effective until revoked unless expressly directed otherwise.\textsuperscript{207} The Minnesota form does not provide the principal with the opportunity to indicate a termination date.\textsuperscript{208}

\textit{j. Nomination of Guardians and Conservators}

Several of the statutory durable power of attorney forms serve multiple purposes by permitting the principal to nominate persons to serve as guardians of the person or
conservators (guardians of the estate). For example, the California form allows the nomination of a conservator of the estate while Illinois' form goes further by also providing for the nomination of both a guardian of the person and a guardian of the estate. The Alaska form may contain optional language allowing the principal to designate one person to serve as guardian, conservator, and in similar representative capacities. These provisions are discussed in detail in Chapter VI of this dissertation which analyzes forms for self-designation of guardians.

k. Notice to Third Parties

Notices to third parties are also contained in several of the statutory fill-in forms. The Alaska notice informs third parties that they will not incur any liability to the principal or his successors as a result of permitting the agent to exercise the authority granted in the power of attorney. In addition, third parties are warned that failure to honor a properly executed statutory form power of attorney may result in a civil penalty plus various damages, costs, and fees. The notice also states that if a springing power is involved, the principal's disability may be established by affidavit under other provisions of Alaska law. The Uniform Act's notice is shorter and addresses similar concerns. The principal agrees that third parties who receive a copy of the power of attorney may act under it and that revocation is not effective for third parties until
they have actual knowledge of the revocation. To further encourage third parties to deal with the agent, the Uniform Act's notice contains an agreement by the principal to indemnify third parties for any claims that arise against them because of their reliance on the instrument.

1. Compensation of the Agent

Illinois has the only statutory form that addresses the issue of the agent's compensation. This form contains a provision that entitles the agent to reasonable compensation. If the principal does not desire this result, the form instructs the principal to strike out the paragraph which grants compensation.

m. Direct Transfers by the Agent

The Minnesota statutory form is the only form that addresses the issue of whether the agent may transfer the principal's property directly to the agent. The principal must check a line in front of a statement either authorizing or prohibiting the agent to receive direct transfers.

n. Execution by the Principal

All six forms provided spaces for the principal to sign and write the date of execution. Some forms have blank spaces for other information such as the situs of the execution and the principal's social security number.
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o. Witnessing

The only state to impose a witnessing requirement is California. Two adult witnesses are required and each must declare that they personally know the principal or that the principal's identity was proved by the types of convincing evidence indicated on the form, that the principal signed or acknowledged the power in their presence, and that the principal appears to be of sound mind and not under duress, fraud, or undue influence. The witnesses must sign, print their names, indicate their residence addresses, and insert the date of the witnessing.

p. Acknowledgment

All of the forms indicate that a notarized acknowledgment is appropriate. The California and Illinois forms require an acknowledgment for the power's validity and include the appropriate language, other states supply only a jurat, such as Alaska, North Carolina, and the Uniform Act, while Minnesota does nothing more than indicate parenthetically the proper location of the acknowledgment.

q. Specimen Agent Signatures

Two states give the principal the opportunity to provide specimen agent signatures. The Illinois provision explains what may be done and requires the principal to sign next to each of the agent's or successor agent's signatures to certify that they are correct. The Minnesota provision provides...
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less guidance and verification; two blanks are provided below the heading "Specimen Signature of Attorney(s)-in-Fact."231

r. Indication of the Document Preparer

If the agent will possess the power to convey any interest in real estate, the Illinois form requires that the name and address of the person preparing the power of attorney be included at the end of the form.232

s. Other Provisions of the Enabling Legislation

i. Detailed Description of Enumerated Powers

The scope of the enumerated powers in the statutory durable power of attorney fill-in forms are described in great detail in the enabling legislation.233 Some of the statutes are relatively short, like those of Illinois and North Carolina,234 while others are lengthy, like those of Alaska, California, Minnesota, and the Uniform Act.235 In all cases, however, very broad grants of power are anticipated because most statutory descriptions include a clause granting the agent the maximum authority that the law permits concerning that type of transaction.236

ii. Interpretation and Construction Rules

Additional provisions are included in the enabling legislation to assist in the construction and interpretation of the statutory fill-in forms. Some statutes have extensive interpretation rules; for example, detailing resolution of common errors a principal could make in completing the form
and how to establish the principal's disability. Other statutes contain fewer rules and some practically none.

3. Statutorily Supplied Durable Power of Attorney Forms - Great Britain

The English legal system was reluctant to accept the concept of a power of attorney that could continue despite the incapacity of the principal. One of the first significant steps towards the enactment of durable power legislation was a 1970 English Law Commission report that recommended that durable powers be given serious consideration. In 1971, the Powers of Attorney Act was passed to govern many aspects of powers of attorney. This Act even provided an extremely brief form that could be used to grant the agent the "authority to do on behalf of the principal anything which he may lawfully do by an attorney." This Act, however, failed to speak to the issue of durable powers.

It took another fifteen years for England to formally approve durable powers of attorney. This development is described by one commentator as follows:

In 1973 the Lord Chancellor asked the Law Commission "To consider the law and practice governing powers of attorney and other forms of agency in relation to the mental incapacity of the principal, and to make recommendations." After issuing a Working Paper in 1976 and going through a lengthy consultation process the Commission made its report on The Incapacitated Principal in 1983 (Law Com 122) and legislation followed in the form of the Enduring Powers of Attorney Act 1985, which received the royal assent on June 26, 1985.
The Enduring Powers of Attorney Act is an extensive piece of legislation and contains many features not found in any of its United States counterparts. Perhaps the single most significant difference is that the durable power must be in the statutory form; failure to use the prescribed form and have it executed by both the principal and the agent results in the power's invalidity. The first time a valid durable power of attorney could be created in England was March 10, 1986 when the Lord Chancellor issued the first form.

This fill-in form, although meeting statutory mandates, was difficult for many non-attorneys to read, understand, and properly complete. The Lord Chancellor responded quickly to this problem by prescribing a revised form in 1987 which English commentators heralded as "a splendid example of a worthy exercise in improved communication." The new form is neatly arranged and easy to comprehend and use. The first page contains instructions and warnings. The remaining three pages are divided roughly into thirds lengthwise with the first third containing instructions and the form itself being partially boxed on the remaining two-thirds. These three pages are divided into two parts; two pages for the principal to complete and one page for the agent. The principal's portion contains blank spaces and instructions for the following: the principal's name, address, and date of birth; the agent's name and address; if multiple agents are named, whether they serve jointly or jointly and severally; the extent of authority given (i.e., general authority to perform
all acts or only certain acts); the property to which the
authority extends (all property and affairs or only
specifically described property); special restrictions and
conditions; the principal's signature and date signed; and the
witness' signature, name, and address. The agent's part of
the form provides for the agent's signature and date as well
as for the signature, name, and address of the witness.

In addition to mandating the use of the statutory form,
the English act contains other elements that set it apart from
its American equivalents. For example, because of the great
care that both the principal and agent appreciate the
serious nature and effect of the durable power, both must sign
and each signature must be witnessed by a third party. The
agent must register the instrument with the court and give
notice to various members of the donor's family before
exercising any powers once the principal becomes
incapacitated. Additionally, the agent may not be given the
authority to appoint a substitute or successor agent.

Although England was slow in recognizing durable powers,
the Enduring Powers of Attorney Act and the most recent
Prescribed Form make it clear that English law is making up
for lost time. The Law Commission studied United States
statutes when designing the Act and considered the creation of
a durable power a very serious matter. Accordingly, there
is no presumption of durability; durability must be provided
for in a separate instrument and the agent must assume
additional burdens to serve under a durable power. There is
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greater protection for the principal because the power must be registered and notice given to the principal's family. These additional restrictions should not limit the use of durable powers, however, because the new Prescribed Form is straightforward and uncomplicated.

4. Experience

Due to the recent enactment of the legislation providing for statutory fill-in durable power of attorney forms, no reported case was located that addressed issues concerning the forms. However, there has been limited litigation concerning the New York statutory short form power of attorney which was enacted in 1948 and served as the basis for the modern statutory forms. A significant portion of this litigation required the court to determine whether the form authorized the agent to perform a particular act. The New York experience indicates that if the principal anticipates that the agent may need to perform an act not expressly mentioned in the statutory definitions of the enumerated powers, it is advisable to include express language granting the agent such authority.

Commentators have been divided concerning the wisdom of the statutory fill-in forms. Some believe that the forms "represent[] a positive step forward for the public" while others assert that the forms "open[] an area of potential abuse that is frightening" and that they "may do more harm than good." These conclusions and their underlying
assumptions are discussed later in this chapter and in Parts Three and Four of this dissertation.

D. STATUTORILY PROVIDED DURABLE POWER OF ATTORNEY FORMS FOR CRITICAL MEDICAL CARE DECISIONS

"One of the most debated issues concerning the durable power is whether it may be used for the . . . discontinuance of medical care for the incompetent principal in accordance with his or her pre-stated wishes." Several reasons have been advanced against allowing agents under durable powers to make crucial medical care decisions such as the withholding or withdrawing of life-sustaining procedures. These arguments are based on the premises that 1) the existence of informed consent is questionable because the principal must make a determination in advance of the actual medical situation and 2) that the decision is too personal to delegate. On the other hand, persuasive arguments are made supporting the principal's right to delegate these important decisions because that may be the only way for the principal's instructions, which may be very specific, to be carried out.

The standard statutory durable power of attorney forms are generally not good vehicles for delegating crucial health care decisions. The majority of these forms, or their accompanying statutes or commentary, state that the forms may not be used to delegate the authority to make the decision to withhold or withdraw life-sustaining procedures. The other statutory forms and the definitions of enumerated powers
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authorize the agent to provide medical care but stop short of granting the power to make crucial medical decisions.264

To resolve the uncertainties surrounding the use of durable powers of attorney to make health care decisions, a growing number of jurisdictions, including California,265 Idaho,266 Illinois,267 Nevada,268 Texas,269 Utah,270 and Vermont,271 have enacted statutory durable power of attorney forms designed specifically to delegate health care decisions to the agent, including the ability to refuse or terminate life-sustaining procedures. These powers of attorney are an outgrowth of the statutory living will or directive to physician forms enacted in most jurisdictions. Detailed treatment of these forms is reserved for Chapter VII which analyzes the different types of statutory forms relating to critical medical decisions.

E. ANALYSIS

The statutorily provided durable power of attorney fill-in forms were designed for use by the non-lawyer public.272 Each form contains warnings and instructions to assist the user in properly completing the form273 and all but one form explain the possibility that the principal may need additional advice before using the form.274 The availability of legislatively sanctioned forms will probably increase the number of people who execute durable powers of attorney. This section examines how well statutory forms effectuate the purposes for which durable powers are typically created.
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1. Designation of the Desired Agent

One of the fundamental reasons a person uses a durable power of attorney is to make certain "his affairs will be managed by persons in whom he has confidence." All of the forms provide the principal with the ability to designate the desired agent. Assuming the designated agent is of legal age and competent, the forms will operate to give the desired agent the authority to handle the principal's affairs. However, situations frequently change after the power is executed. For example, the agent may die, become legally disabled, resign, or simply refuse to serve. Unless provision has been made for an alternate or successor agent in the power of attorney, a principal who has become incapacitated will not be able to select a new agent and the utility of the durable power of attorney will be lost. Only two forms, those of Alaska and Illinois, specifically address this problem by permitting the principal to designate successor or alternate agents. The remaining forms do not provide the principal with the opportunity to make this important designation.

A principal may not wish the same person to act as the agent for all of the principal's affairs. For example, a principal may want her stockbroker to handle her portfolio of securities, her daughter to manage personal relationships and affairs, her accountant to handle tax matters, and her attorney to manage legal affairs. The forms fail to explain that the principal may delegate different powers to different agents. Although a principal may use several form powers and
make appropriate indications thereon, the forms anticipate that the same powers will pass to all designated agents. A statutory form that provides the principal with the opportunity to grant different powers to different agents may be cumbersome but statutory forms should at least indicate that a split in delegation is possible.

2. Avoidance of Guardianship

Perhaps the foremost reason durable powers of attorney are used is that they may reduce or eliminate the need for an incapacitated person to have a court appointed guardian or conservator. Few people would want to have themselves placed under the care of a guardian. "Guardianship is time consuming, expensive, and, at times, humiliating." In addition, some courts will not appoint family members, even if they are the people the incompetent person would have desired to serve. Durable powers, however, allow the agent to take action immediately upon the principal's incapacity, without the delay of formal court proceedings. As a result, the principal's business affairs are better protected because there will be no disruption in management.

To the extent that the principal's appointment of an agent is effective, guardianship will be avoided in many situations. Although the existence of an agent managing the person's affairs under a durable power of attorney is no guarantee that guardianship will not be necessary, it is a factor that is given significant weight by the court. As
explained earlier, a troublesome feature of many of the statutory forms is their failure to permit the principal to designate successors or alternates. If something unforeseen occurs that prevents an agent from properly acting under a durable power of attorney, an incapacitated principal is likely to be subjected to protective proceedings.

Several of the forms attempt to solve this problem in a different manner; they permit the principal to nominate persons to serve as guardian or conservator. Although this does not eliminate court proceedings, it does allow for greater effectuation of the incompetent's intent than normal guardianship proceedings because the person's selection will typically be appointed.

3. Delegation of Desired Powers

To effectuate the principal's intent, the powers actually delegated to the agent in the durable power of attorney must match those intended to be delegated by the principal. It has been said that "[t]he most important rule in drafting a durable power is to be explicit in expressing the authority of the agent." Two problems are created by the statutory forms' use of incorporation by reference to provide the detailed powers contained within each of the broad enumerated powers. First, the agent may not have all the powers that the principal intended him to have, and second, the agent may receive powers that the principal did not intend him to possess.
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The statutory forms do very little to alleviate this problem. None of the enabling statutes require the form to contain the explanations of the enumerated powers 286 although each form does contain a reference to the location of the full text of the powers. 287 It is unlikely, however, that non-lawyers executing these forms will attempt to locate the appropriate statutory provisions and then read, study, and comprehend them. Even if the explanations were contained on the form, it is improbable that non-attorneys would carefully evaluate pages of boilerplate language.

Accordingly, when most individuals use these statutory forms, they will see only the phraseology of the enumerated powers and then apply their common understanding to ascertain the types of powers encompassed by these phrases. Critics of these forms quickly point out that "the titles of the categories do not clearly reflect all the powers they contain. For instance, [in California] the power to create a trust of real property is contained under 'real estate transactions' not under 'estate transactions.'" 288 Likewise, the authority to remove the contents of the principal's safe deposit box may be subsumed under banking transactions; 289 is it likely that a person who thinks he is granting an agent the authority to make bank deposits and write checks intends that same person to gain possession of the rare coins and stamps kept in the safe deposit box? The problem is exacerbated if the agent is unscrupulous because the agent's conduct is not normally under anyone's direct supervision. 290
The titles of the categories may not only mislead principals into granting different powers than intended, they may lead the principal into believing powers were delegated which have not been. For example, the Alaska form states in its warning that the agent will have the power to make health care decisions unless the agent marks through the category and initials a box. A reasonable person might deduce that health care decisions include decisions to terminate life-sustaining procedures in appropriate circumstances. However, the statutory definition expressly prohibits the agent from making that type of decision. Likewise, a person could conclude that an agent with authority to enter into insurance transactions would be able to name himself or herself as beneficiary, especially if the agent is the principal's spouse or child. The statutory definitions, however, often preclude the agent from making a self-beneficiary designation. In Illinois, despite broad language in the enumerated powers and the corresponding definitions, e.g., the agent may "exercise all powers . . . which the principal could if present and under no disability," there is a blanket prohibition on the agent's ability to make gifts of the principal's property. This restriction could be damaging to the agent's power to care for the principal's family and to do tax planning.

It is reasonable to assume that the drafters of the durable power of attorney forms realized these potential problems of over- and underinclusiveness. Apparently, these difficulties were counterbalanced by the desire to provide a
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form that would operate according to the principal's intentions in the majority of circumstances. The public's need to have easy access to durable powers and their concomitant benefits outweighed the potential difficulties. The drafters may have recognized that the problems with the enumerated lists are not very different than those which exist when attorneys draft powers of attorney relying heavily on boilerplate forms.

4. Individualization

The durable power of attorney is an extremely flexible estate planning tool. The principal may name any competent agent to handle practically any aspect of the principal's business, financial, family, or personal affairs. The principal may grant the agent limited authority to perform only one particular act or very broad authority to perform any act that the principal could do and which may be delegated. As explained in § C(2) of this Chapter, the degree of individualization varies tremendously between the statutory fill-in forms. For example, the Minnesota form allows a low level of individualization by permitting the principal to check desired enumerated powers, indicate if the power is to be durable, and decide if the agent may transfer property directly to himself. On the other hand, the Illinois form provides for a great deal of individualization by permitting the principal to remove enumerated powers, limit enumerated powers, grant additional powers, state the power's effective

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and termination dates, name successor agents, and nominate guardians of the person and estate.\textsuperscript{296}

The more individualization that is allowed, the more likely the durable power will effectuate the principal's actual intent. Enumerated powers may be expanded and contracted as necessary and provisions included for various contingencies such as an agent refusing to serve or the principal needing a guardian. On the other hand, the more choices provided, the more complex the form becomes possibly leading to the form being used less often or used improperly.

5. Special Problems with Statutory Power of Attorney Fill-in Forms

As demonstrated by the previous subdivisions of this section, durable powers of attorney are an extremely powerful and versatile estate planning tool. A majority of people, if not everyone, could benefit from having a durable power included as part of their estate plans. Because durable powers may be used by a wide segment of the population, it is consistent for legislatures to provide fill-in forms as they have done for wills,\textsuperscript{297} self-declarations of guardians,\textsuperscript{298} living wills,\textsuperscript{299} etc.\textsuperscript{300} While Parts Three and Four of this dissertation examine the advisability of fill-in forms in general, this subsection looks at the special arguments that may be made in opposition to durable power fill-in forms which are unlike those for the other estate documents.

One crucial distinction between a will and a durable power is that the will does not take effect until death; thus,
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if a form will does not function properly, it is merely the
property and the intent of a deceased person that is effected.
With a durable power, however, the agent may take steps which
cause the principal tremendous financial and psychological
hardship, physical pain, and even a premature death. The
argument has been advanced that this potential for abuse
outweighs the advantages of having a statutory form.301
Countering this claim is the concept that the majority should
not suffer for the sins of a few. The benefits of durable
power forms should not be denied because the forms may be
improperly completed by the principal or abused by the
agent.302 The words of one commentator are especially
insightful:

Every device that enables people to act for
themselves is subject to abuse and
misunderstanding. But most people have a basic
store of common sense. They are honest, fair and
intelligent enough to know when they need advice.
[A statutory durable power of attorney form] gives
them and their families the opportunity to control
their own affairs during disability without the
intervention of courts and lawsuits.303

The National Conference of Commissioners on Uniform State
Laws included a fill-in form with warnings and instructions in
its 1988 Uniform Statutory Form Power of Attorney Act.304 The
inclusion of this form clearly reflects the drafters' anticipation that the form would be used by non-lawyers and
probably without legal advice. This is counter to the
approach taken four years earlier in the Uniform Statutory
Will Act where the drafters elected not to supply a statutory
fill-in form fearing that such a form would be "fraught with
opportunities for misunderstanding and mistake by the unwitting." The comments to the Uniform Statutory Form Power of Attorney Act do not provide insight into the Commissioners' retreat from their earlier position. Perhaps it reflects a change in attitude resulting from the significant increase in the number of statutory fill-in forms enacted since 1984 and the growing public sentiment favoring self-help legal techniques.

F. RECOMMENDATIONS

Estate planning is a somewhat morbid process; its foundation is the unfortunate but inevitable fact that each one of us will eventually die. To draft an intent-fulfilling will or trust, attorneys must convince clients, in a tactful manner, to think about the day when they will no longer be alive and how they wish their property to be distributed. In dealing with heirs and beneficiaries, a soft shoulder and a warm heart are often needed to help them accept the death of a family member or friend.

In addition, it is of vital importance for individuals to prepare for incompetency or disability. Statistics demonstrate that approximately one-half of the population will be disabled for ninety days or more. It has been said that "perhaps the most tragic matter that probate courts must deal with is that of a physically, mentally or emotionally disabled person." Until durable powers of attorney were recognized, a person's ability to plan for disability or incompetency was
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severely limited. With the advent of durable powers, individuals may now make substantial plans for the management of their property and affairs should they later suffer from a crippling disease, accident, general deterioration of mental function due to senility, or other disabling cause.308

There has not been widespread public use of durable powers of attorney despite their tremendous benefits.309 In response to the need to make this valuable estate planning technique available to a broad audience, several legislatures have enacted statutory fill-in durable power of attorney forms and the National Conference of Commissioners on Uniform State Laws has approved and recommended the Uniform Statutory Form Power of Attorney Act.310 These forms are relatively simple and may be completed by the average person without the assistance of an attorney. Even when an attorney is consulted, the statutory forms will be a valuable asset to attorneys in providing a reliable power of attorney in a timely and cost-effective manner.311 Although the forms are not adequate for all situations and, like any legal tool, may be misused or abused, the potential benefits of legislatively sanctioned forms demand that they be given serious consideration.312 A detailed analysis of the potential risks and benefits of statutory forms in general is found in Parts Three and Four of this dissertation with recommendations following in Part Five.
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1. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 2 (1953) (testamentary dispositions traceable to Fourth Egyptian Dynasty (2900-2750 B.C.), Assyrian Civilization, ancient Jewish Civilization (Book of Genesis), as well as to Greek and Roman civilizations).

2. See 1 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 1.3 (4th ed. 1987) (although not completely clear when trusts were first used, likely that they were employed shortly after the Norman Conquest and were in general use by the thirteenth century).

3. See, e.g., Davis v. Lane, 10 N.H. 156, 158 (1839) ("the authority of the agent . . . must cease, or be suspended, by an act of Providence depriving the constituent of all mind and ability to act for himself"); Drew v. Nunn, 4 Q.B.D. 661, 666 (1878) ("where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him"); RESTATEMENT OF AGENCY § 122 (1933) ("The authority of the agent to make the principal a party to a transaction is terminated or suspended upon the happening of an event which deprives the principal of capacity to become a party to the transaction or deprives the agent of capacity to make the principal a party to it.").

4. RESTATEMENT OF AGENCY § 122 comment c (1933).

5. Id.


7. Id. at comment d.

8. Id.

9. Id.


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16. See infra § B.

17. See infra § C.

18. See infra § D and Chapter VII, § C(2).


22. Id.

23. Id.


26. UNIF. DURABLE POWER OF ATTORNEY ACT (1979) (only definition in the Act is for "durable power of attorney"); id. § 2 comment (terms disability and incapacity "embrace 'legal incompetence,' as well as less grievous disadvantages").

27. UNIF. PROB. CODE § 5-103 (1979) (definition of "incapacitated person"); id. at § 5-401(c) (discussing "disability").

28. UNIF. PROB. CODE § 5-401(c) (1979) provides as follows:

Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the Court determines that (i) the person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (ii) the person has
property that will be wasted or dissipated unless property management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money.

29. UNIF. PROB. CODE § 5-103(7) (1979) defines "incapacitated person" as

any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

UNIF. PROB. CODE §§ 5-301 to -312 (1979) details the appointment of guardians of the person for incapacitated individuals.


32. Id. § 2.


34. See RESTATEMENT (SECOND) OF AGENCY § 38 (1957).


38. FLA. STAT. ANN. § 709.08(1) (West Supp. 1989) (statute limits the persons who may be designated as the holder of a durable power of attorney to "spouse, parent, child, whether natural or adopted, brother, sister, niece, or nephew").

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41. KY. REV. STAT. ANN. § 386.093 (Michie 1984).
44. MICH. COMP. LAWS ANN. § 700.495 (West 1980).
46. NEV. REV. STAT. ANN. § 111.460 (Michie 1986).
49. OHIO REV. CODE ANN. § 1337.09(A) (Anderson 1987) (alternative language refers to disability or "lapse of time").
51. TEX. PROB. CODE ANN. § 36A (Vernon 1980).
52. UTAH CODE ANN. § 75-5-501 (1978).
56. WYO. STAT. § 3-5-101(a) (1985).
64. NEB. REV. STAT. § 30-2665 (1985).

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67. 20 PA. CONS. STAT. ANN. § 5604(a) (Purdon Supp. 1989).
70. WIS. STAT. ANN. § 243.07(1) (West 1987).
71. CAL. CIV. CODE § 2400 (West Supp. 1988). Under an earlier law, durability was limited to one year from the onset of the principal's incapacity and there were limitations on the delegatable transactions. CAL. CIV. CODE § 2307.1 (repealed 1982). All durable powers of attorney, not in statutory fill-in form, must contain the warning required by CAL. CIV. CODE § 2510 (West Supp. 1988).
73. CONN. GEN. STAT. ANN. § 45-69o(a) (West Supp. 1989).
74. MISS. CODE ANN. § 87-3-13(2) (Supp. 1988).
76. N.Y. GEN. OBLIG. LAW § 5-1601(1) (McKinney 1989).
78. S.C. CODE ANN. § 62-5-501(a) (Law. Co-op. 1987) (statutory language is actually more descriptive; "physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate").
79. ALA. CODE § 26-1-2(a) (1986).
81. OHIO REV. CODE ANN. § 1337.09(A) (Anderson 1987) (alternative language refers only to "disability").
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84. Montana's language was enacted prior to the promulgation of the Uniform Acts' amendments. 1985 Mont. Laws ch. 283.


86. ALA. CODE § 26-1-2(a) (1986).
98. KY. REV. STAT. ANN. § 386.093 (Michie 1984).
102. MICH. COMP. LAWS ANN. § 700.495 (West 1980).
106. NEV. REV. STAT. § 111.460 (Michie 1987).
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112. 20 PA. CONS. STAT. ANN. § 5604(a) (Purdon Supp. 1989).
118. WASH. REV. CODE ANN. § 11.94.010(1) (1987)
120. WIS. STAT. ANN. § 243.07(1) (West 1987).
122. MO. ANN. STAT. § 486.555(2) (Vernon 1987).
123. Id.
124. Id. § 486.580.
125. GA. CODE ANN. § 4-214.1 (Harrison Supp. 1988) ("A written power of attorney, unless expressly providing otherwise, shall not be terminated by the incompetency of the principal.").
126. ILL. ANN. STAT. ch. 110½, para. 802-5(a) (Smith-Hurd Supp. 1989) ("Unless the agency states an earlier termination date, the agency continues . . . notwithstanding any lapse of time, the principal's disability or incapacity . . .").
127. LA. CIV. CODE ANN. art. 3027(B) (West Supp. 1989) ("Unless otherwise provided by its terms, a power of attorney is not terminated by the principal's incapacity, disability, or other condition making express revocation impossible or impractical.").
128. OR. REV. STAT. § 126.407(1) (1987) (if "writing does not contain words which otherwise limit the period of time of its effectiveness, the powers . . . shall be exercisable
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. . . notwithstanding the later disability or incompetence of the principal").


131. Id. (part of mandatory form notice indicates that the powers are defined by New York law and provides relevant citations). See generally Weil, Will Draftsmanship and the New York Statutes, 28 N.Y. ST. B. BULL. 60, 72-73 (1956) (incorporation by reference approach makes drafting of powers of attorney "a simple pleasure").


133. Id.


139. Id.


142. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988).

143. See infra § C(2)(i)(2).


145. Id. §§ 5602-03.

146. Id. § 5602(a).


150. MINN. STAT. ANN. § 523.23 (West Supp. 1989).


152. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988).

153. See supra § C(1)(a).


155. CAL. CIV. CODE § 2450 (West Supp. 1988) (Warning may be omitted if power prepared by attorney and power contains a lawyer's certificate. (Id. § 2451)); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1989).


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162. CAL. CIV. CODE § 2450 (West Supp. 1988) (indefinite and durable unless otherwise indicated); ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1989) (during lifetime and durable unless expressly limited or judicial termination).


166. ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1989) (also explaining that if agent acts, must do so with due care for principal's benefit); MINN. STAT. ANN. § 523.23 (West Supp. 1989).


168. Id. (may name successor agents but not co-agents).


170. Id.

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177. MINN. STAT. ANN. § 523.23 (West Supp. 1989) (grant powers by placing "x" or check on line in front of each power; failure to check construed to mean power not granted unless the power marked is the one which refers to the entire list; delete powers by leaving line blank or, optionally, by drawing a line through it); N.C. GEN. STAT. § 32A-1 (1987) (grant a power by initialing the line opposite the desired power); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988) (to grant one or more, but not all, powers, initial the line in front of each power being granted; to grant all powers, only initial line in front of power which refers to entire list; option to delete by crossing out power).

178. See supra note 177.

179. See supra note 177.


transactions) with UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988) (gift transactions not included).

182. ALASKA STAT. § 13.26.332 (Supp. 1988). The Alaska statute also provides an optional provision in which the principal may indicate whether he has executed a living will. Id. § 13.26.335(1).


185. MINN. STAT. ANN. § 523.23 (West Supp. 1989).


192. Id.


196. MINN. STAT. ANN. § 523.23 (West Supp. 1989); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988). The
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form supplied with the Uniform Act provides a space to extend the agent's authority and a statement permitting delegation could be inserted therein.


199. ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1989) (effective date provision needs to be separately initialed; failure to state an effective date means power effective when signed by principal).


204. CAL. CIV. CODE § 2450 (West Supp. 1988) (space provided to write-in a termination date earlier than principal's death); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1989) (must separately initial and state a termination date earlier than principal's death; example of court determination of disability provided in form); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988) (form language makes power durable and instructions given to strike the durability language if principal does not want the durability feature).


206. ALASKA STAT. § 13.26.332 (Supp. 1988) (certain number of years from date of principal's signature); CAL. CIV. CODE § 2450 (West Supp. 1988) (space for date or event); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1989) (space for date or event; must be separately signed); N.C. GEN. STAT. § 32A-1 (1987) (optional language provided to insert a termination date).

207. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988).

208. MINN. STAT. ANN. § 523.23 (West Supp. 1989).

209. CAL. CIV. CODE § 2450 (West Supp. 1988) (court will appoint nominated person unless to do so would be contrary to principal's best interests).
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210. ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1989) (court will appoint nominee if it will serve the principal's best interests and welfare).


212. Id. § 13.26.332.

213. Id.

214. Id.


216. Id.

217. Id.


219. Id.

220. MINN. STAT. ANN. § 523.23 (West Supp. 1989).


223. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988).


225. Id.

226. Id.


229. MINN. STAT. ANN. § 523.23 (West Supp. 1989).
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231. MINN. STAT. ANN. § 523.23 (West Supp. 1989).


238. CAL. CIV. CODE § 2451-57 (West Supp. 1988); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT §§ 1, 2, 5, 6 (1988).


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243. Id.


250. Enduring Powers of Attorney Act, 1985, ch. 29, § 1(1) & sched. 1. In emergency situations, the agent may act without prior registration or notice.

251. Id. § 1(9).


253. See supra § C(1)(a).

254. See, e.g., Bismark v. Incorporated Village of Bayville, 21 A.D.2d 797, 250 N.Y.S.2d 769, 771 (1964) (agent under statutory short form had power to sign a protest against a proposed zoning change); Mallory v. Mallory, 113 Misc. 2d 912, ___, 450 N.Y.S.2d 272, 274 (Sup. Ct. 1982) (agent under statutory short form did not have power to obtain a divorce on behalf of the principal); Reboult, MacMurray, Hewitt, Maynard & Kristol v. Quasha, 90 A.D.2d 466, 455 N.Y.S.2d 86, 87 (1982) (agent under statutory short form did not have power to swear or sign an affidavit in the name of the principal).

255. Some acts may not be delegated to an agent even if the power expressly authorizes the agent to perform the act. Examples of acts which are normally deemed non-delegatable include making statements under oath, voting in public elections, making wills, and acts that are contrary to public policy. See H. REUSCHLEIN & W.
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GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 8(A) (1980).


258. Id. at 76.

259. See infra § E.


262. Id. at 25; Spitler, Using the New Durable Power of Attorney as a Planning Tool, CAL. LAW., May 1982, at 38, 39.

263. ALASKA STAT. § 13.26.344(k) (Supp. 1988) (authority to make health care decisions exists but "the agent may not authorize the termination of life-sustaining procedures"); CAL. CIV. CODE § 2450 (West Supp. 1988) (warning preceding the form states, "This document does not authorize your agent to make medical and other health care decisions for you."); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1988) (statutory form only for "property and financial matters"); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT prefatory note (edited draft of May 31, 1988) ("Health care matters are not included. Since they involve intensely controversial personal as well as economic considerations, they are left to other legislation.").

270. UTAH CODE ANN. § 75-2-1106 (Supp. 1988).
272. For example, the Illinois statute contains a statement of purpose which includes the following:

The General Assembly finds that the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent to act for them in dealing with their property and financial affairs.

A short statutory form offering a set of optional powers is necessary so that the individual may design the power of attorney best suited to his or her needs in a simple fashion . . . .

273. See supra § C(2)(b).
274. See supra note 159.
276. See supra § C(2)(d).
278. See UNIF. DURABLE POWER OF ATTORNEY ACT prefatory note (1979) (indicating the durable power legislation often intended to provide alternative to court-oriented, protective procedures); Spitler, Using the New Durable Power of Attorney as a Planning Tool, CAL. LAW., May
1982, at 38, 39 (durable power as "convenient substitute for an expensive court-supervised conservatorship").


281. Id. at 29-30.

282. See Conover, Incompetent, 4 Fid. Rep. 2d 200, 202 (Pa. Orphans' Ct. 1984) ("Because the evidence revealed that Mrs. Conover's affairs are being managed in an efficient manner under a durable power of attorney, we see no necessity for the appointment of a guardian.").

283. See supra § C(2)(j).

284. See id.; see also Chapter VI.


286. Note that the Illinois form contains a parenthetical note in the warning which indicates that the full text of the relevant statute may be found on the back of the form. ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1988).

287. See supra note 161.


289. See supra note 189.


292. Id. § 13.26.344(1)2).

293. See UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 4(g)(2) (1988) (exception provided "to extent the agent was named as a beneficiary under a contract procured by the principal before granting the power of attorney in which case the agent can continue to be named as the beneficiary under the contract or an extension, renewal, or substitute for it"). See also MINN. STAT. ANN. § 523.24(6)(2) (West Supp. 1988).


295. MINN. STAT. ANN. § 523.23 (West Supp. 1988).


297. See Chapter III.

298. See Chapter VI.

299. See Chapter VII.

300. See Chapter VIII.


303. Id. at 553.

304. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988).


306. See Lombard, 10 Reasons Why You Should be Recommending the Durable Power of Attorney to Clients, PROB. & PROP., Jan.-Feb. 1987, at 28, 28; see also Bos, The Durable Power of Attorney, 64 MICH. B.J. 690, 690 (1985) (after reviewing various insurance industry statistics, conclusion that disability is "far more likely for persons under age 60 than death").
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308. Durable powers of attorney have been called "a cornerstone of long-range planning for the older client." Strauss & Wolf, Law and Aging -- Durable Power of Attorney: New York Applications, N.Y.L.J., June 3, 1985, at 1, 17, col. 5.

309. See Bos, The Durable Power of Attorney, 64 MICH. B.J. 690, 690 (1985) ("Attorneys and clients have long failed to pay adequate attention to the possibility that a client may incur a serious mental or physical disability and the problems that such a disability can create.").

310. See supra § A.


CHAPTER VI

SELF-DESIGNATIONS OF GUARDIANS

A. INTRODUCTION

"Man individually and as a race is possible on earth only because, not for weeks or months but for years, love and the guardianship of the strong over the weak has existed."  

The early history of recorded law provides evidence of the existence of legal protection for adults lacking the capacity necessary to act for themselves. The Roman Law of the Twelve Tables in 449 B.C. contained a type of guardianship for mentally disabled persons who were thought to be capable of having lucid intervals. The Praetors later extended similar protection to all adults suffering from mental incapacity, even if the incapacity was permanent.  

Early English law also contains references to the special protections extended to incompetent individuals. A distinction was made between the guardianship of two categories of disabled adults; "idiots" or "born fools" and "lunatics." "Idiots" were individuals so mentally disabled that they were unlikely to regain sufficient mental capacity to act independent while "lunatics" had the potential of regaining their mental faculties at a later date. Initially under common law, lords were entitled to become the guardians of the land and person of incompetents. The lord could actually seize the land of an incurable idiot but he could
only administer the real property of a lunatic because the
land would have to be restored to the lunatic should he
recover.\textsuperscript{11}

In approximately 1216, near the end of the reign of King
Henry III, the Crown acquired the right of guardianship over
incompetent persons, to the exclusion of the lords, by virtue
of a statute or ordinance.\textsuperscript{12} The Crown's right was documented
in the statute \emph{de Praerogativa regis} which has been traced to
the early years of King Edward I.\textsuperscript{13} The king was granted
custody of the lands of idiots and the right to take the
profits produced from the lands without waste and had the
reciprocal duty of providing for the idiots' necessaries.\textsuperscript{14}
Upon the death of an idiot, the lands were returned to the
idiot's rightful heirs.\textsuperscript{15} In a similar manner, the king
managed the lunatic's lands and tenements and maintained the
lunatic and his household with the profits.\textsuperscript{16} If the lunatic
regained competency, the residue of the lunatic's estate was
then returned to him; the king was not permitted to claim
anything for his own use.\textsuperscript{17}

Originally, jurisdiction over persons of unsound mind was
regarded as a valuable right and was therefore vested in the
Court of Exchequer.\textsuperscript{18} As time passed, the management of
incompetents and their estates was considered a duty. By
1660, jurisdiction was almost always delegated to the
Chancellor.\textsuperscript{19} The Chancellor would typically appoint a
committee to oversee the affairs of the incompetent person and
to carefully administer his property.\textsuperscript{20}
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In the United States, jurisdiction over incompetent persons was originally exercised by equity or law courts under specific statutory authority. As the law developed, most, if not all, matters that involved the guardianship of incompetent persons became highly regulated by statute. Upon a proper petition and a finding that the person was incompetent, a guardian or committee was appointed by the court to care for the person and his estate. Today, state statutes typically prioritize the persons who may be appointed as guardian of the ward's person and estate. The incompetent's spouse and adult children are favored in these statutory preferences as evidenced by their placement at or near the top of the list. These statutes codify the public's belief that close relatives are the most likely individuals to be solicitous of the ward's personal and financial welfare.

The central issue for consideration in this chapter is the extent to which incompetent persons may influence or control the court's selection of the persons who will be charged with the management of their persons and estates. Once a person is deemed incompetent by the court, unpleasant ramifications from that finding may impact the incompetent's right of self-determination; important decisions regarding personal and business matters once made by the incompetent are now made by the guardian. Most state statutes which originally guided the court in the appointment of a guardian did not require the court to consider the incompetent's preference for a guardian. Thus, the appointment of a person
with statutory priority, such as a spouse or adult child, may not be in the best interest of the incompetent because of conflicting interests or personal grudges against the incompetent which do not typically surface during the appointment process. Even if the incompetent would approve of the person with priority as guardian of the person, the incompetent may prefer a different person as guardian of the estate, especially if the estate consists of assets requiring special management skills.

The case law which developed in the United States in the nineteenth and early twentieth centuries was inconclusive in determining the ability of an incompetent to influence the court's decision regarding the person to be appointed as his guardian. Most courts held that they were not required to give weight to the incompetent's preferences. Other courts, however, gave serious consideration to the incompetent's recommendation believing that the incompetent's best interests are often served by the appointment of a self-preferred guardian. For example, the Massachusetts Supreme Court stated:

A man may be insane so as to be a fit subject for guardianship, and yet have a sensible opinion and strong feeling upon the question who that guardian shall be. And that opinion and feeling it would be the duty as well as the pleasure of the court anxiously to consult, as the happiness of the ward and his restoration to health might depend upon it.

The right of an incompetent to determine his fate to the greatest extent possible is increasingly recognized in the
For example, the Utah Supreme Court recently stated that "a court in appointing a guardian must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing a guardian . . .."\textsuperscript{29} Likewise, one Illinois court emphasized that "[g]uardianship is to be used to encourage self-reliance and independence."\textsuperscript{30}

In an effort to provide the incompetent person with greater input during the court's decision-making process, most states have enacted statutes granting the incompetent the right to express a non-binding preference concerning the person to be appointed as his guardian.\textsuperscript{31} Despite the incompetent's right to have his desires considered, one study has concluded that "in a majority of guardianship proceedings, little or no thought is given to whether the particular guardian to be named is one who would be personally acceptable to the ward."\textsuperscript{32}

In recent years, commentators have urged and legislatures have recognized that during the selection of a guardian, attention should focus on guardian preferences expressed by the incompetent while still competent, rather than nominations made while incompetent.\textsuperscript{33} Nonetheless, it must also be recognized that an incompetent person's expression of preference is inherently suspect; a person lacking the capacity to handle personal and property matters may also lack the capacity to select a proper guardian. Likewise, an incompetent person is usually more susceptible to influence
from those who wish to be appointed as guardian but who do not actually have the person's best interests in mind.

This chapter discusses the growing trend in the United States to permit competent individuals to select their guardians before the onset of incompetency. After reviewing the different methods which have evolved for self-designation, the forms provided by state legislatures for self-designation will be analyzed. This chapter concludes with a critique of the effectiveness of these statutory fill-in forms followed by recommendations for legislation for self-designation of guardian fill-in forms. A discussion of the advantages and disadvantages of statutory estate planning forms in general is reserved for Parts Three and Four of this dissertation.

B. METHODS TO SELF-DESIGNATE GUARDIANS PRIOR TO INCOMPETENCY

This section discusses and analyzes six different methods developed by legislatures to enable a person to nominate guardians prior to incompetency or disability. The methods vary considerably and some jurisdictions authorize several disparate techniques.

1. Appointment of a Guardian While Competent

At least one state permits individuals to secure court-appointed guardians prior to incompetency. In Vermont, a competent adult may petition the court for the appointment of a guardian. The petitioner's preference of a guardian will
be approved if the court finds that the petitioner (1) is not mentally ill or mentally retarded, (2) has not been coerced, and (3) understands the nature, extent and consequences of the guardianship over his person and estate as well as the procedures for revoking the guardianship. The guardian will receive only the powers which the petitioner has specified in the petition and the petitioner may file a motion to revoke the guardianship at any time.

This procedure provides tremendous flexibility: individuals may secure the immediate appointment of guardians without being required to demonstrate an inability to care for themselves or their property; the guardianship may be revoked without proving a just cause; and the guardian receives only those powers requested by the petitioner. This technique provides the petitioner with a degree of certainty because the petitioner dictates the person who is originally appointed as guardian as well as giving public notice of the petitioner's true intent. However, a person may be reluctant to submit to this procedure while competent; he may not wish to relinquish control over his property and/or person or may be unwilling to incur the court costs and guardian fees that may accompany the voluntary guardianship. This type of statute is similar to a durable power of attorney. It was probably designed to allow a person to obtain immediate assistance with some aspect of his personal or business affairs without a complicated or embarrassing guardianship proceeding rather than as a method
to obtain the appointment of a guardian who is to stand in the wings until actually needed.\textsuperscript{42}

2. Standby Guardianship and Conservatorship

A somewhat recent approach adopted by several states authorizes a competent person to prepare and file a petition for the appointment of a guardian of his person or conservator of his estate before the need arises but delays court action on the petition until the occurrence of a specified triggering event.\textsuperscript{43} The Iowa statute, enacted in 1963, is discussed in detail because Iowa was the first state to provide for standby guardianships or conservatorships\textsuperscript{44} and because the Iowa statute has become the model for other states considering the enactment of similar provisions.\textsuperscript{45}

Under Iowa law, a competent adult may execute a verified petition for the voluntary appointment of a conservator or guardian on a standby basis.\textsuperscript{46} The petition must specify the event or the level of mental or physical health which will trigger the effectiveness of the petition.\textsuperscript{47} The petition may nominate the guardian or conservator and may contain other requests and recommendations, such as the amount of bond.\textsuperscript{48} The person using this technique either deposits the petition with the court clerk in his county of residence\textsuperscript{49} or gives the petition to any person, firm, bank or trust company he selects.\textsuperscript{50} A competent petitioner may revoke the petition at any time by physically destroying it or by executing an acknowledged instrument of revocation.\textsuperscript{51}
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Once the threshold event occurs or the condition stated in the petition arises, the petition may be heard upon the filing of a verified statement by any person showing that the requisite event or condition has occurred. The court must give due regard to the petitioner's nomination of guardian or conservator and, because there is no requirement of notice, may promptly appoint the fiduciary indicated in the petition.

A similar procedure was established in Wyoming in 1985. The major difference in the Wyoming procedure is the absence of the petitioner's ability to deposit the petition with the court. In the majority of cases, this difference is of little practical significance because most individuals deliver the petition directly to the person they have named as guardian. Depositing the petition with the court reduces the chance of accidental or unauthorized destruction, although it may be considered inefficient and wasteful of the court's valuable resources. Merely because the petition is filed with the court, however, is no guarantee that it will be found when it is needed unless the petitioner has made its existence and location of its filing known to someone who will bring it to the court's attention at the appropriate time.

3. Nomination by Durable Power of Attorney

The most common method adopted by state legislatures to permit individuals to select their own guardians is by express nomination in a durable power of attorney. This technique
permits the principal to nominate both a guardian of his person and a guardian of his estate (conservator). Many of these state statutes are based on the virtually identical provisions of the Uniform Probate Code and the Uniform Durable Power of Attorney Act, both of which permit the principal to include fiduciary nominations in a durable power of attorney. Under these Uniform Acts, the principal is authorized to nominate the individuals he desires as his guardian and conservator. The court which hears the petition must appoint the named persons unless there is good cause for not doing so or the selected person is disqualified. The drafters opined that the best reason for making a guardian self-designation was that such action would warrant the authority granted to the agent against future challenges by "arranging matters so that the likely appointee in any future protective proceedings will be the [agent] or another equally congenial to the principal and his plans."

4. Nomination in Living Will

Minnesota has recently enacted legislation which permits competent adults to nominate a guardian in a declaration of preferences regarding health care decisions. This legislation provides instructions regarding the application or non-application of artificial life-sustaining procedures and forced administration of food and water should the declarant be in a terminal condition. It also allows the declarant to designate a proxy to carry out these wishes when the declarant
becomes unable to communicate them. Unless the declaration expressly provides otherwise, the designation of a proxy is deemed to be a nomination of a guardian of the person.

5. Nomination in Will-like Document

The second most common method by which a state grants a person the ability to designate his own guardian is through a document which must be executed with many, if not all, of the formalities of a valid will. Some states refer directly to their will statutes and incorporate those requirements while other jurisdictions list requirements similar to those for a will. Some states permit the self-declaration to control other aspects of the guardianship; for example, waiver of bond, designation of successors, grant of guardianship powers, and disqualification of named individuals. The enabling legislation may also govern other aspects of the self-designation process such as the method of resolving a conflicting designation in a durable power of attorney, evidentiary presumptions, revocation methods, the effect of the declarant's divorce from a designated guardian, and the recommendation of the format of the self-designation document.

States that employ will-like documents provide an easy method for a person to designate a guardian before the need arises as do jurisdictions that provide for nomination in a durable power of attorney. However, the will-like document technique may contain difficulties because of the rigid
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formalities associated with their execution. To be valid, will-like documents must comply with the technical requirements for wills or with similar formalities such as attestation and are susceptible to invalidation for minor errors in their execution, e.g., one witness signing rather than the required two witnesses, witness attesting out of the declarant's sight, witness signing the self-proving affidavit rather than the declaration, etc. No case was located where a formality problem led to an ineffective guardian designation but cases are legion where a technical error has caused an otherwise valid will to fail.78

In contrast to this formal will-like procedure which is wrought with hazards, durable powers of attorney have few formal requirements; a writing signed by the principal and properly notarized is often sufficient.79 Durable powers may thus be more effective in carrying out the desires of the declarant because of their ease of execution and the decreased chance of inadvertently failing to fulfill all of the necessary formalities.

6. Other Written Designations

Rather than impose a formalistic set of requirements for a valid self-declaration of a guardian, several jurisdictions permit competent adults to nominate a guardian in a simple written document.80 The technical requirements of these written designations vary: some must be signed,81 some must be acknowledged,82 while others merely need to be written.83 The
statutes authorizing these written designations also vary with respect to the time at which the declarant may make the designation: some must be made while the declarant is still competent, while others may be made after the person becomes incompetent provided he has sufficient mental capacity to make an intelligent selection at the time the designation is executed. In addition, some statutes expressly permit the nomination of alternate guardians and provide rules of interpretation for use if the same person has executed multiple self-declarations.

These written designations are straightforward and relatively simple to use. They avoid many of the problems which accompany the will-like designations because technical formalities are eliminated or are considerably reduced. The lack of formalities, however, may make these designations easier to forge or alter and may increase the chance that undue influence, duress, or fraud will go undetected. Thus, jurisdictions considering the two approaches may conclude that the protective aspect of the formalities outweighs the potential frustration of intent that may occur if a self-declaration is executed with proper intent but fails to comport with the required formalities. On the other hand, if forgery, undue influence, or other evil conduct is involved, there will usually be a person contesting the designation and the contest will often expose this improper behavior.
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C. STATUTORY SELF-DESIGNATION OF GUARDIAN
FILL-IN FORMS

Several states have enacted statutes that contain fill-in forms for designating a guardian before the need arises. These states have utilized four different approaches when drafting self-designation forms which reflect the approach taken by the jurisdiction regarding self-designation, i.e., as part of a statutory durable power of attorney, as part of a living will, as a will-like document, or as a separate written designation.

1. Durable Power of Attorney

Three states, Alaska, California, and Illinois, have provided for self-designation of guardians in their durable power of attorney fill-in forms. There are, however, significant differences between the approaches of these states.

The standard Alaska statutory power of attorney form does not contain a provision relating to self-declaration of guardians; rather, appropriate language is provided as an option which may be included in the form. The suggested clause permits the principal to nominate one person to serve as both guardian and conservator should the need arise. The provision does not permit different individuals to be named as guardian of the person and conservator of the estate nor is any place provided for the designation of alternate
fiduciaries should the named person be unwilling or unable to serve.94

California provides two different statutory power of attorney forms which may be used to effect a guardian self-declaration.95 The general statutory power of attorney fill-in form permits the principal to nominate one person to serve as conservator of the principal's estate. Like Alaska's provision, no opportunity is provided for the principal to nominate a successor or alternate conservator.96 The form contains a plain-language description of what a conservator does and when one will be appointed.97 In addition, the California form explains that the principal may, but need not, nominate the same person selected as the agent.98 If the principal also wishes to nominate a conservator, a separate statutory durable power of attorney fill-in form designed specifically for health care decisions must be used.99 The relevant form language regarding nomination is basically the same as for a conservator of the estate, i.e., only one person may be nominated and plain-language descriptions and instructions are included.100

California's bifurcated approach is unnecessarily cumbersome by requiring that separate forms be used to nominate conservators and guardians. This inconvenience and added expense could easily be alleviated by implementing Illinois' practice of combining the two options in one form. The Illinois statutory short form power of attorney for property provides the principal with the opportunity to
nominate both types of guardians in a single document; one person as guardian of his person and the same or a different person as guardian of his estate. Like the Alaska and California forms, the Illinois form is deficient in its failure to provide for the nomination of alternates or successors. In language similar to the California forms, the Illinois form contains plain-language explanations and instructions. Illinois also has a statutory short form power of attorney for health care in which the principal may nominate a guardian of his person but not a guardian of his estate.

2. Living Will

Minnesota is the only state to include provisions for guardian pre-selection in its statutory living will form. However, the ability to self-designate is buried deep within the boilerplate of the form and may easily be overlooked. Clause eight of the living will form is labeled "Proxy Designation" and begins with a two paragraph explanation of the declarant's opportunity to name a person to make health care decisions for the declarant should the declarant be unable to communicate his desires. The last sentence of the second paragraph states that the person designated as a health care proxy is simultaneously nominated as guardian or conservator of the declarant's person if a guardian or conservator becomes necessary. This provision is neither conspicuous nor is it explained in the notices and warnings.
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supplied at the beginning of the form. In addition, the form fails to give the declarant the option of naming a different guardian of the person or to strike the language concerning guardian selection despite a statutory mandate that the declaration may provide that a proxy designation is not to be deemed a guardian designation. It may often be appropriate to have the declarant's health care proxy and guardian of the person be the same individual, but this decision should be consciously made by the declarant and not be the result of inadvertence.

The remainder of the self-designation provision is adequate. The declarant is given the opportunity to designate a primary and alternate guardian. The designations provide for detailed descriptions of the selected individuals to increase the chance that they may be located when needed; the declarant is provided with blank spaces for the guardians' names, addresses, telephone numbers, and relationships, if any, to the declarant.

3. Will-like Document

In comprehensive landmark legislation that took effect August 26, 1985, Texas became the first, and so far the only, state to enact a will-like statutory fill-in form for guardian self-designation. This form is not incorporated into another type of estate planning form; it is a free-standing document devoted entirely to a person's ability to designate a guardian in the event of later incompetency or need for a
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The declarant may designate different persons to serve as guardian of the person and guardian of the estate. Unlike the Alaska, California and Illinois forms which incorporate self-designation of guardians in durable powers of attorney, the Texas form provides the declarant with the option of naming up to three alternate guardians of the person and of the estate should any guardian be unable or unwilling to serve. The form also provides blank spaces for the date of execution and the signatures of the declarant and the witnesses.

The Texas form is unique in allowing the declarant to expressly disqualify up to three persons from serving as guardian of the person and three persons from serving as guardian of the estate. Anyone properly disqualified, including those who would otherwise have statutory priority such as a spouse or an adult child, may not be appointed as the declarant's guardian "under any circumstances." The absolute preclusion of these individuals is justified "under the theory that there are millions of people . . . from which to choose potential guardians." Providing the declarant with the chance to disqualify certain individuals is perhaps equally as important as the ability to nominate guardians. Scenarios exist where a person would not want those with statutory priority to control his personal or financial destiny, e.g., an unfaithful spouse or a greedy, hateful, or spendthrift child.
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To be effective, the declaration of guardian form must be "attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration"121 and be accompanied by a self-proving affidavit.122 Unlike wills where the use of self-proving affidavits is optional, the guardian designation may be ineffective without the self-proving affidavit. Together, the declaration and self-proving affidavit are "prima facie evidence that the declarant was competent at the time he executed the declaration and that the guardian named in the declaration would serve the best interests of the ward."123 The statute also contains a form for the self-proving affidavit which has blank spaces for the declarant's and the two witnesses' signatures as well as the proper notarial jurat.124

4. Written Designation

From its enactment in 1961 until 1988, Oklahoma's self-designation of guardian statute required that the document be executed in the same manner as a will.125 On December 1, 1988 amendments to this statute took effect which provide for self-designation by a simple written designation.126 In addition to changing the method of self-selection, the statute became the first of its type to supply a fill-in form which may be used to make the nomination.127

The recommended form is concise and requires only a minimum number of formalities. The form provides the
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declarant with the opportunity to designate one person to serve as guardian of the person, guardian of the estate, or both. If an individual wishes to designate different persons as guardian of the estate and of the person, separate forms must be used or the statutory form altered. Blank spaces are supplied for the declarant to indicate the nominee's name and current residence, the declarant's relationship to the nominee, and the city, state, and date of execution. As with the durable power of attorney forms of Alaska, California, and Illinois, no provision is made for alternate or successor guardians. The nominations made by the declarant are binding on the court unless the court disqualifies the nominee.

D. ANALYSIS

The statutory declaration of guardian fill-in forms appear to be designed for use by attorneys and the non-lawyer public. The availability and low cost of legislatively sanctioned forms is likely to increase the number of individuals who choose to nominate their own guardians before the need arises. This section examines how effectively statutory self-designation forms carry out the primary goal of guardianship, i.e., to do what is in the best interest of the ward.
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1. Increased Chance of Desired Person Serving as Guardian

Perhaps the most important reason a person would elect to use a self-declaration of guardian is to increase the likelihood that a specific person will be appointed as guardian in the event of later incompetency or incapacity. Without such a designation, there is no assurance that a court-appointed guardian will be the person the disabled individual would have desired to control his person or estate. To the contrary, the person the court appoints could be someone the incompetent person would have never wanted to serve as his guardian.

The psychological benefits of self-selection are considerable, both before and after the declarant needs a guardian. After designating a guardian, a person may be more secure about the future, knowing that should anything happen to him, his personal affairs and business concerns would be handled by a trusted family member, friend, or financial institution. Just as a will may relieve some of the fears that accompany the anticipation of death, a self-declaration of guardian may alleviate the stress associated with accepting the prospect of becoming unexpectedly disabled or that a current disease or injury will worsen and subsequently lead to incapacity. Likewise, a disabled person will gain strength from knowing that he is still having an effect on his situation by seeing a guardian appointed in accordance with his wishes. The self-selected guardian may have more detailed
knowledge of the ward's desires and thus may be able to provide a more supportive environment as well as one more conducive to comfort and perhaps even recovery.

2. Reduced Chance of Undesired Person Serving as Guardian

The possibility of a person being appointed as guardian who is unsuitable to the ward is greatly reduced if a valid self-declaration of guardian exists. Presumably, the declarant would give careful thought to nominations so that undesirable family members, friends, and institutions are not listed. If the court believes it is in the ward's best interests, however, others may be appointed in contradiction to the ward's intent, albeit unexpressed.¹³⁶

Accordingly, the best method to prevent a particular person from serving as guardian is for the declarant to include a statement in the designating document which indicates that specific person's unsuitability without requiring the declarant to detail the reasons behind his decision to exclude that individual. Inclusion of such information could open the door to the court making an evaluation of the declarant's reasoning. This would be unproductive because the only issue concerning a non-nomination is whether the declarant had sufficient mental capacity when he excluded the named person; it is irrelevant whether the court agrees with the wisdom of the declarant's decision.

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The effect of a non-nomination is questionable in most jurisdictions because most statutes and accompanying fill-in forms fail to address the issue; only the Texas form provides for express disqualification. The inclusion of an express disqualification provision is especially important in cases where the ward is disabled to the point that he is unable to express his displeasure with a particular guardian.

3. Conservation of Resources

Self-declarations of guardians may also conserve valuable resources. When a guardian is pre-selected, the court's expenditure of time in ascertaining the identity of a proper guardian is reduced. The court will be able to handle guardian appointments quickly and efficiently unless the appointment of the nominee is contested for cause. Should reasons for the preferred guardian's disqualification be discovered from evidence presented in court, that same evidence is likely to indicate the reasons the court should appoint the designated alternate, again conserving the court's resources. Because less court time will be required, fewer assets of the declarant's estate will be dissipated for court costs and attorney's fees. The accelerated appointment procedure also places the ward's person and estate into competent hands more rapidly and perhaps before serious personal or business problems arise.
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4. Potential for Abuse

The most significant difficulty with self-declaration of guardian fill-in forms is similar to the one discussed in Chapter V concerning durable power of attorney fill-in forms, i.e., the ramifications of a document arising from fraud, duress, or other coercion. If, for example, a statutory fill-in will form is obtained through improper means, only the property and the intent of a deceased person are affected. However, with self-declarations of guardians, as with durable powers of attorney, the designated person has the opportunity to abuse his power and cause the declarant tremendous financial and psychological hardship, physical pain, and even a premature death.

Some critics may argue that the price of greater self-determination encouraged by the existence of a simple statutory form is not worth the risk. Conversely, others will urge that the significant advantages of a self-designation should not be restricted because the forms may be improperly completed or abused by a few unscrupulous individuals.

E. RECOMMENDATIONS

The ability of a person to nominate a guardian before the need arises, coupled with the likelihood of a court appointing that person, is an important part of a comprehensive estate plan. It is foreseeable that many individuals would choose to exercise this right to obtain the benefits discussed
previously. Because self-designations may be used by a broad segment of the population, it would be consistent for legislatures to provide fill-in forms as they have for wills, durable powers of attorney, living wills, and other estate planning documents. Although a detailed discussion of the advisability of fill-in forms is reserved for Parts Three and Four of this dissertation, this section focuses on various aspects of fill-in self-designation of guardian forms which are unlike those for most other types of estate planning documents.

1. Method of Self-Designation

Jurisdictions have employed two basic methodologies in enacting self-designation of guardian fill-in forms: as part of a statutory durable power of attorney form or as a separate document. No state supplies forms for both methods although some states authorize several techniques for guardian self-designation. Instead of a state resolving the debate as to which methodology is "better," both options should be provided to its citizens. Each method has its own positive and negative characteristics which are best left to be evaluated by the individual who will select the best form for his own particular needs.

Providing for the self-designation of a guardian as part of a durable power of attorney fill-in form encourages more thorough planning for a person's incompetency. To complete the durable power of attorney form, a person is forced to
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examine a broader range of issues rather than just the
appropriate person to nominate as guardian. The best plan
for incompetency often involves both a durable power of
attorney and a guardian self-designation so that the same
person designated as agent also serves, if needed, as the
principal's guardian. Conversely, consolidation of
authority in one person may increase the risk of abuse. Also,
durable power of attorney fill-in forms are complex and may be
confusing to a person who has not received legal advice.

If a separate fill-in form dealing only with the
nomination of guardians is provided by statute, the length and
complexity of the form is reduced. This may increase the
number of individuals who will use the form and receive the
benefits of self-designation. However, a person using such
a form may be misled into believing that additional planning
for incompetency is not needed. The person may be well-
advised to execute a durable power of attorney and thus, in
many instances, avoid the necessity of guardianship and its
concomitant problems of expense, publicity, embarrassment, and
delay. Self-designation makes guardianships less
troublesome but does not eliminate the need for additional
incompetency planning techniques.

As stated above, a jurisdiction should elect to provide
forms for both alternatives rather than resolve the debate
between whether a self-declaration of guardian should be
subsumed within a durable power of attorney or exist
independently. Although no state has thus far provided
alternative forms, several jurisdictions authorizing different methods of self-designation have enacted rules to resolve the problem which arises when the durable power of attorney names one person as guardian and the separate self-designation nominates a different person. Generally, these provisions give preference to the most recently executed document.\textsuperscript{156}

If a jurisdiction elects to provide a separate fill-in form for the predesignation of guardians, either alone or in conjunction with a durable power of attorney, the decision must be made as to what type of separate form should be adopted. As detailed earlier, two different types of separate forms are gaining in popularity: the will-like document\textsuperscript{157} and the simple written designation.\textsuperscript{158} The will-like document must be executed with formalities which helps reduce the chance of undetected fraud or overreaching, but these formalities may cause designations to be invalidated because of minor technical errors. Other types of written designations are simple to execute but may be more susceptible to abuse.

There is no easy way to ascertain the type of statutory fill-in form which will achieve the best results. Reported litigation concerning the existing statutory forms is scant\textsuperscript{159} and any estimate of their effectiveness is speculative. The separate form should have some formalities such as the signatures of the declarant and the witnesses to decrease the chance for fraud and undue influence,\textsuperscript{160} as well as to impress the seriousness of the occasion on the declarant.\textsuperscript{161} States may be encouraged to implement these proposals should the
National Conference of Commissioners on Uniform State Laws take the lead in proposing such legislation.

The Commissioners should seriously consider drafting a uniform act, complete with a fill-in form, for a separate self-designation of guardian. In addition, the Uniform Statutory Form Power of Attorney Act and the fill-in form provided therein should be amended to provide for guardian self-designation. This would be a consistent step for the Commissioners because the Uniform Durable Power of Attorney Act and the Uniform Probate Code already authorize or recognize the nomination of guardians in a durable power of attorney.

2. Contents of a Self-Designation Form

The current self-designation of guardian forms are inadequate to resolve the issues which must be addressed in guardianship planning. Many statutory forms fail to provide the opportunity to make separate designations of guardians of the person and guardians of the estate or do not provide for the designation of successors. Even the well-constructed Texas form could be improved to overcome its lack of warnings and instructions to inform non-attorneys of the nature and effect of the form. Regardless of the type of self-designation form adopted by a particular jurisdiction, each fill-in form and its enabling legislation should, at a minimum, provide the following:
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- Ability to name different persons as guardian of the person and guardian of the estate;
- Provisions for alternate or successor guardians should a guardian be unable or unwilling to serve;
- Information, instructions, and warnings in plain language so non-attorney users will better understand how guardianship functions, the correct method of completing the form, and the effect of a properly completed form, along with a statement explaining that disability planning may also require a durable power of attorney;
- Ability to disqualify named persons from being appointed as guardians;
- Explanation of the effect of a declarant's divorce from the designated guardian;
- An option to file the document with the clerk of the court so that the self-designation may be readily located avoiding possible haphazard storage and further reducing the chance of unauthorized destruction;
- Description of revocation methods;
- Method of handling conflicting designations in multiple documents;
- A method to increase the chance of a document's authenticity and the declarant's realization of the importance of executing the document, e.g., requirement of witness(es) or an acknowledgment; and
- Ability to limit or expand the statutorily supplied powers of the guardian.


3. Protective devices for minors and the minor's ability to influence decisions regarding those devices are beyond the scope of this Chapter. See generally H. BEVAN, THE LAW RELATING TO CHILDREN 396-423 (1973) (explaining role of guardians for minors under English law as well as how wishes of minor, if sufficiently mature, were considered by the court (401)); J. LONG, A TREATISE ON THE LAW OF DOMESTIC RELATIONS §§ 271-94 (2d ed. 1913) (history, development, and use of guardians to protect minors; wishes of a minor over fourteen years old concerning selection of guardian are considered by the court but are not controlling (§ 281)); E. PECK, THE LAW OF PERSONS AND OF DOMESTIC RELATIONS § 151 (3d ed. 1930) ("in most if not all of the states statutes have been enacted under the provisions of which an infant who has reached the age of fourteen years, and requires a guardian, is entitled to choose his own guardian. This right of choice is subject to control by the court to insure a suitable appointment . . .").

4. See W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 168 (P. Stein 3d ed. 1963) (lunatic placed in care of their agnates (paternal relatives) or if none, their gentiles (relatives connected by common descent)); see also R. ALLEN, E. FERSTER & H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 2 (1968).

5. Praetors were magistrates appointed by the Emperor to exercise civil jurisdiction. See C. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW WITH CATENA OF TEXTS 34 (E. Whitfield trans. 1886).

6. See W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 168 (P. Stein 3d ed. 1963) (for individuals who fell within the prescription of the Twelve Tables, the Roman Law preferred to appoint agnates but if agnates were absent or deemed unworthy, then the Praetor).

7. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 474 (7th ed. rev. reprinted 1966) (right of guardianship for an idiot was a profitable right analogous to right of wardship, whereas lunacy was in the nature of duty where no profit could be made by the appointed agent). See generally 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 481 (2d ed. 1898).
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9. A lord was "[a] feudal superior or proprietor; one of whom a fee or estate [was] held." BLACK'S LAW DICTIONARY 850 (5th ed. 1979).


13. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 473 n.8 (7th ed. rev. reprinted 1966) (accepted as genuine statute during the Middle Ages but may have been private work or issued by some official upon king's instructions; estimated date is between 1255 and 1290); 1 F. POLLOCK & F. MAITLAND 481 (2d ed. 1898) (while exact origins of this document are unknown, it may have been procured by Robert Walerand, a friend of the king, who foresaw that he was to leave an idiot as his heir and desired to have his lands come into the possession of the king rather than his lords).


15. Id.

16. Id. at 473-74.

17. Id. at 474.

18. Id. The Court of Exchequer is inferior to the King's Bench and the Court of Common Pleas. It was charged with "keeping the king's accounts and collecting the royal revenues." BLACK'S LAW DICTIONARY 322 (5th ed. 1979).

19. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 474-75 (7th ed. rev. reprinted 1966). The Chancellor's jurisdiction rested upon two facts: (1) upon the share he received when writs were issued to inquire into the purported insanity, and (2) the express delegation by the crown of its powers and duties over persons of unsound mind which the Chancellor was to oversee personally. Id.

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20. Id. at 475.


23. See J. LONG, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 318 (2d ed. 1913). Early incompetency statutes, in general, allowed for the appointment of a guardian for mental incompetents in three broad areas: insane persons, idiots, and persons incapable of properly handling their own affairs. See, e.g., In re Daniels, 140 Cal. 339, __, 73 P. 1053, 1054 (1903) (upon petition of relative or friend, a guardian shall be appointed for a mentally incompetent person to manage property); In re Clark, 175 N.Y. 139, __, 67 N.E. 212, 212 (1913) (jurisdiction of county court included resident of county who was incompetent by reason of lunacy (unsound mind), idiocy or habitual drunkenness); Shelby v. Farve, 33 Okla. 612, __, 126 P. 764, 764 (1912) (county court shall appoint guardians of minors, idiots, lunatics, persons non composit mentis and habitual drunkards); In re Northcutt, 81 Or. 646, __, 160 P. 801, 801 (1916) (statute addresses three classes of persons: insane persons, idiots, and persons incapable of properly handling own affairs). Modern adult incompetency statutes are broader in scope and allow the appointment of a guardian or conservator on the petition of a person interested in the welfare of an individual believed to be incapacitated or partially incapacitated. See CAL. PROB. CODE § 1820 (Deering 1981) (proposed conservatee, spouse, relative, interested state or local governmental entity, public officer or employee, or other interested person or friend may petition for appointment of conservator); OKLA. STAT. ANN. tit. 30, § 3-101 (West Supp. 1989) (any person interested in welfare of person believed to be incapacitated or partially incapacitated may file for court appointed guardian alleging degree and nature of incapacity); OR. REV. STAT. § 126.103 (1987) (any person interested in welfare of incapacitated person may file petition for finding of incapacity and appointment of guardian alleging proposed ward's lack of capacity). Oregon defines an incapacitated person as:

an adult whose ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety or to manage the person's financial resources.
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"Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur. "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.


25. There are two basic types of guardians. A guardian of the person ("tutor" under the civil law) is vested with the duty to care for the incompetent's person. A guardian of the estate, often called a conservator ("curator" under the civil law), is in charge of administering the incompetent's estate. See J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS § 144 (1931). Use of the term "guardian" in this Chapter refers to both types of fiduciaries unless otherwise indicated.

26. See, e.g., In re Coburn, 165 Cal. 202, __, 131 P. 352, 359 (1913) (court affirmed appointment of guardian not desired by incompetent because no requirement that court "give any weight to the preference of the ward"); In re Cassidy's Guardianship, 95 Cal. App. 641, __, 273 P. 69, 72 (1928) ("under no existing provision is the court required to give any weight to the wishes of the ward"); Kutzner v. Meyers, 182 Ind. 669, __, 108 N.E. 115, 117 (1915) (lower court did not err in refusing to permit the incompetent to select his own guardian); In re Lynch, 124 Minn. 492, __, 145 N.W. 378, 379-80 (1914) (court did not abuse its discretion when it appointed suitable guardians merely because the incompetent preferred others); In re Estate of Coulter, 406 Pa. 402, __, 178 A.2d 742, 747 (1962) (no error in appointing as guardian a bank which was unacceptable to ward because there was not a scintilla of evidence that the bank was not fully qualified to serve as his guardian).

27. See Broxson v. Spears, 216 Ala. 385, __, 113 So. 248, 249 (1927) (incompetent's wishes considered); cf. In re Green's Guardianship, 125 Wash. 570, __, 216 P. 843, 844 (1923) (incompetent's indication that a particular person should not serve as guardian was one of many factors
court considered in determining that such person was improperly appointed).


29. In re Boyer, 636 P.2d 1085, 1090-91 (Utah 1981). Cf. In re Reed's Guardianship, 173 Wis. 628, __, 182 N.W. 329, 330 (1921) (in determining whether it was proper to appoint a guardian for a spendthrift, court stated that "liberty of the person and the right to the control of one's own property are very sacred rights which should not be taken away or withheld except for very urgent reasons").


31. See, e.g., HAW. REV. STAT. § 560:5-410(a)(2) (1985) (for appointment of conservator, court is to consider "[a]n individual or corporation nominated by the protected person if he is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice"); KY. REV. STAT. ANN. § 387.600(2) (Michie/Bobbs-Merrill 1984) ("Prior to the appointment, the court shall make a reasonable effort to question the respondent concerning his preference regarding the person or entity to be appointed limited guardian, guardian, limited conservator, or conservator, and any preference indicated shall be given due consideration."); MICH. STAT. ANN. § 27.5454(2) (Callaghan Supp. 1988-89) ("In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, designated by the person who is the subject of the petition."); see also UNIF. PROB. CODE § 5-409(a)(2) (1987) (for appointment of conservator, court must consider "an individual or corporation nominated by the protected person 14 or more years of age and of sufficient mental capacity to make an intelligent choice").


33. See supra §§ B & C; see also Gorman, Planning for the Physically and Mentally Handicapped, 11 INST. ON EST. PLAN. 15-1, 15-31 to -32, 15-37 to -39 (1977) (recommendation that a competent person prepare a document nominating a guardian even though instructions may not be legally binding because they would be helpful to the court).
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34. VT. STAT. ANN. tit. 14, § 2671(a) (Supp. 1988).

35. Id. § 2671(b)(3) & (d). Compare UNIF. PROB. CODE § 5-401, 8 U.L.A. 478 (1987) (provisions delineating responsibilities and scope of conservator) with id. § 5-301, 8 U.L.A. 459 (1987) (description of and responsibilities of guardian). Under § 5-401, a conservator may be appointed over the "estate and affairs of a person" if the court finds two conditions: 1) "that the person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance;" and 2) "the person has property that will be wasted or dissipated unless property management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money." Id. § 5-401(c), 8 U.L.A. 478 (1987). In contrast, § 5-301 provides that a guardian of the person may be appointed 1) for a minor (an unmarried incapacitated person) by a parent by will or another writing signed by the parent and attested to by at least two witnesses; 2) a married incapacitated person by a spouse by will or another writing signed by the spouse and attested to by at least two witnesses. See id. § 5-301, 8 U.L.A. 459-60 (1987). Acceptance of the guardianship is effective when the guardian files acceptance of appointment in the court where the will is probated, or if another written instrument is used, in the court where the incapacitated person resides or is present. Id. § 5-301(a), (b). Under both situations, the guardian must give seven days written notice prior to his filing in court noting his intention to accept the guardianship. The appointment of a spouse has priority over the appointment of a parent. Id. § 5-301(b). Termination of the guardianship is made upon written objection to the appointment in the court at the place where the incapacitated person resides or is present. Id. § 5-301(d).


37. Id. § 2671(h).

38. Id. § 2671(d) (court may not appoint a guardian if petitioner is mentally ill or mentally retarded); cf. FLA. STAT. ANN. § 744.341 (West 1986) (a mentally competent person may petition the court for the appointment of a voluntary guardian but only if person "is incapable of the care, custody, and management of his estate by reason of age or physical infirmity").

40. Id. § 2671(f).

41. Id. § 2671(b)(3), (d).

42. Id. § 2671(a) (indication that user of procedure "desires assistance with the management of his or her affairs").


44. 1963 Iowa Acts ch. 326. The Bar Committee commenting on this statute stated that "[t]here appears to be no provision in the statutes of any other state for standby guardianships or conservatorships." The Committee believed that the new provisions would "permit a person of sound mind to plan for the infirmities of advanced age without giving up present control of his property, even to a trustee." Bar Committee Comment to §§ 633.591-.597, reprinted immediately preceding IOWA CODE ANN. § 633.591 (West 1964).

45. WYO. STAT. §§ 3-3-301 to -306 (1985).


47. Id. § 633.591.

48. Id. § 633.592.

49. Id. § 633.593.

50. Id.

51. Id. § 633.594. If the original petition was deposited with the clerk of the court, any written revocation may also be filed with the clerk. Id.

52. See id. § 633.595 (statute imposes no limitation on who may file verified statement that triggering event has occurred).

53. Id. § 633.595.

54. Id. § 633.592.

55. Id. § 633.596. Alternatively, the court "may set the petition for hearing on such notice as the court may prescribe." Id. According to one commentator, notice is generally the rule in most situations regarding guardianships and conservatorships while omission of notice is the exception. See Peters, Conservatorships and Guardianships Under the Iowa Probate Code, 49 IOWA L. 336.
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REV. 678, 680 (1964). Under § 633.596 of the Iowa Probate Code, only four situations exist where notice is not required which include:

1) the ward is a minor and the guardianship or conservatorship is requested by the person having his custody;
2) where the ward individually voluntarily applies for the appointment;
3) where a standby petition has been presented to the court and the stated occurrence or condition has occurred in the court's opinion; and
4) when a foreign conservator seeks ancillary appointment.

Under the second clarification, the petition must state whether notice of involuntary proceedings for a conservator has been served upon the proposed ward. Other than these exceptions, notice pursuant to the Iowa Rules of Civil Procedure is required upon the proposed ward. Id.


57. WYO. STAT. § 3-3-303 (1985) ("petition may be deposited with any person, firm, bank or trust company selected by the petitioner").


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estate, or guardian of his person"; CAL. CIV. CODE § 2402(b) (Deering Supp. 1988) ("conservator of the person or estate or both, or a guardian of the person or estate or both"); D.C. CODE ANN. §§ 21-2043(b); -2083(b) (Supp. 1988) ("conservator, guardian of his or her estate, or guardian of his or her person"); IDAHO CODE § 15-5-503(2) (Supp. 1988) ("conservator, guardian of his estate, or guardian of his person"); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1988) (item 8) ("guardian of your person or a guardian of your estate"); IND. CODE ANN. §§ 29-3-5-5(a)(1), 30-2-11-3(b) (Burns Supp. 1988) ("conservator, guardian of his estate, or guardian of his person"); KAN. STAT. ANN. § 58-612(b) (1983) ("conservator, guardian of the principal's estate or guardian of the principal's person"); MASS. ANN. LAWS ch. 201B, § 3(b) (Law. Co-op. Supp. 1989) ("conservator, guardian of his estate, or guardian of his person"); NEB. REV. STAT. § 30-2667(2) (1985) ("conservator, guardian of the estate, or guardian of the person"); N.C. GEN. STAT. § 32A-10(b) (1987) ("conservator, guardian of his estate, or guardian of his person"); N.D. CENT. CODE § 30.1-30-03(2) (1987) ("conservator, guardian of the principal's estate, or guardian of the principal's person"); OHIO REV. CODE ANN. § 1337.09(B) (Baldwin 1988) ("guardian of his person, estate, or both"); OKLA. STAT. ANN. tit. 58, § 1074B (West Supp. 1989) ("conservator, guardian of his estate, or guardian of his person"); 20 PA. CONS. STAT. ANN. § 5604(c)(2) (Purdon Supp. 1988) ("guardian of his estate or of his person"); TENN. CODE ANN. § 34-6-104(b) (1984) ("conservator, guardian of his estate, or guardian of his person"); WASH. REV. CODE ANN. § 11.88.010(4) (1987) ("guardian or limited guardian of his or her estate or person"); W. VA. CODE § 39-4-3(b) (Supp. 1988) ("conservator, guardian of his estate, or guardian of his person"); WIS. STAT. ANN. § 243.07(3)(b) (West 1987) ("conservator, guardian of his or her estate, or guardian of his or her person").

60. UNIF. PROB. CODE § 5-503(b) (1987).

61. UNIF. DURABLE POWER OF ATTORNEY ACT § 3(b) (1987).

62. UNIF. PROB. CODE § 5-503(b) (1987); UNIF. DURABLE POWER OF ATTORNEY ACT § 3(b) (1987); see also UNIF. PROB. CODE § 5-305(b) (1987) ("Unless lack of qualification or other good cause dictates the contrary, the Court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney."); id. § 5-409(a) (except for fiduciary appointed under law of jurisdiction where protected person resides, court is to give first consideration when appointing a conservator to the individual or corporation nominated by a protected person who is at least fourteen years old and who has "sufficient mental capacity to make an intelligent
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choice"]. Equivalent provisions are found in UNIF. GUARDIAN & PROTECTIVE PROCEEDINGS ACT § 2-205(b) (same as U.P.C. § 2-205(b)) and § 2-309(a) (same as U.P.C. § 5-409(a)) (1982).

63. UNIF. PROB. CODE § 5-503 comment (1987); UNIF. DURABLE POWER OF ATTORNEY ACT § 3 comment (1987) (also noting that existence of a durable power of attorney may preclude necessity for guardians).

64. 1989 Minn. Sess. Law Serv. ch. 3 (West) (to be codified at MINN. STAT. §§ 145B.01-.17).

65. Id. at ch. 3, § 3 (to be codified at MINN. STAT. § 145B.03(2)(b)(2)).

66. Id. (to be codified at MINN. STAT. § 145B.03(3)).

67. See CONN. GEN. STAT. ANN. § 45-70(b) (West 1981) ("designation shall be executed, witnessed and revoked in the same manner as provided for wills"); FLA. STAT. ANN. § 744.312(3) (West 1986) (nomination must be signed "in the presence of at least two attesting witnesses present at the same time"); GA. CODE ANN. § 29-5-2(c)(1) (1986) (nomination must be written, signed, and "attested by at least two witnesses, and must not have been revoked by a later writing signed by such adult and attested by at least two witnesses"); ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1988) (if nomination is "executed and attested in the same manner as a will, it shall have prima facie validity"); MINN. STAT. ANN. § 525.544(1) (West Supp. 1989) (nomination in written instrument "executed and attested in the same manner as a will"); MO. ANN. STAT. § 475.050(2) (Vernon Supp. 1989) (nomination by writing signed by nominator and "by two witnesses who signed at his request, before the inception of his incapacity or disability, at a time within five years before the hearing when he was able to make and communicate a reasonable choice"); OHIO REV. CODE ANN. § 2111.121 (Baldwin 1987) (written nomination must "be signed by the person making the nomination in the presence of two witnesses; signed by the witnesses; contain, immediately prior to their signatures, an attestation of the witnesses that the person making the nomination signed the writing in their presence; and be acknowledged by the person making the nomination before a notary public"); S.D. CODIFIED LAWS ANN. § 30-27-25 (1984) (nomination "in writing with the same formalities including attestation as required to make a valid will"); TEX. PROB. CODE ANN. § 118A(a), (c) (Vernon Supp. 1989) (written declaration "must be attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration"); "declaration must have attached a self-
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proving affidavit signed by the declarant and the witnesses attesting to the competence of the declarant and the execution of the declaration"; WIS. STAT. ANN. § 880.09(7) (West Supp. 1988) (written instrument executed "in the same manner as the execution of a will").

68. See supra note 67.

69. CONN. GEN. STAT. ANN. § 45-70(c) (West 1981); OHIO REV. CODE ANN. § 2111.121(A) (Baldwin 1987); S.D. CODIFIED LAWS ANN. § 30-27-25 (1984).

70. OHIO REV. CODE ANN. § 2111.121(A) (Baldwin 1987); TEX. PROB. CODE ANN. § 118A (Vernon Supp. 1989).


72. See TEX. PROB. CODE ANN. § 118A(b) (Vernon Supp. 1989) (persons disqualified by declarant "may not be appointed guardian under any circumstances").

73. See OHIO REV. CODE ANN. § 2111.121(B) (Baldwin 1987) (court "shall appoint the person nominated as guardian in the writing or durable power of attorney most recently executed if the person nominated is competent, suitable, and willing to accept the appointment").

74. See ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1988) (attested and executed designation has prima facie validity); TEX. PROB. CODE ANN. § 118A(c) (Vernon Supp. 1989) ("A properly executed and witnessed declaration and affidavit are prima facie evidence that the declarant was competent at the time he executed the declaration and that the guardian named in the declaration would serve the best interests of the ward.").

75. TEX. PROB. CODE ANN. § 118A(e) (Vernon Supp. 1989) ("declarant may revoke a declaration in any manner provided for the revocation of a will . . . including by the subsequent reexecution of the declaration in the manner required for the original declaration").

76. Id. § 118A(f) ("If a declarant designates the declarant's spouse to serve as guardian . . . and the declarant is subsequently divorced from that spouse before a guardian is appointed, the provision of the declaration designating the spouse has no effect.").

77. Id. § 118A(g) (suggested, but not required, forms for declaration of guardian and accompanying self-proving affidavit).
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78. See, e.g., Orrell v. Cochran, 695 S.W.2d 552, 552 (Tex. 1985) (signature of testator on self-proving affidavit rather than on will rendered will invalid); Boren v. Boren, 402 S.W.2d 728, 729-30 (Tex. 1966) (signatures of witnesses on self-proving affidavit rather than on invalidated will); Morris v. Estate of C.K. West, 643 S.W.2d 204, 206 (Tex. App.--Eastland 1982, writ ref'd n.r.e.) (will invalid because attestation not in presence of testator where testator could not have seen witnesses sign without walking four feet to office door and fourteen feet down hallway). But cf. Langbein, Substantial Compliance With the Wills Act, 88 HARV. L. REV. 489, 489 (1975) ("insistent formalism of the law of wills is mistaken and needless"); Field, Execution of Wills in Michigan, 16 MICH. ST. B.J. 527, 531 (1937) ("adherence to ritualistic formality in the execution of wills contributes little, if anything, to the social purposes of law").

79. See, e.g., UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1(b) (1988) (signature of principal must be acknowledged).

80. See CAL. PROB. CODE § 1810 (Deering 1981) (nomination of conservator); COLO. REV. STAT. § 15-14-311(2)(b) (1987) (incapacitated person's spouse has priority over written self-declaration); ILL. ANN. STAT. ch. 110 1/2, para. 11a-6 (Smith-Hurd 1988) (however, if writing attested and executed in the same manner as a will, it will have prima facie validity); ME. REV. STAT. ANN. tit. 18-A, § 5-311(1)(b) (1981); MD. EST. & TRUSTS CODE ANN. § 13-707(a)(1) (Supp. 1988) (declarant need not be an adult, just sixteen years of age or older when designation signed); NEV. REV. STAT. ANN. § 159.061(1) (Michie 1987); N.Y. MENTAL HYGIENE LAW § 77.03 (McKinney 1988); OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989) (requiring nomination to be substantially in the form contained in the statute); OR. REV. STAT. § 126.035(1) (1987).

81. See CAL. PROB. CODE § 1810 (Deering 1981); MD. EST. & TRUSTS CODE ANN. § 13-707(a)(1) (Supp. 1988); NEV. REV. STAT. ANN. § 159.061(1) (Michie 1987) (written instrument must be "executed"); N.Y. MENTAL HYGIENE LAW § 77.03(d) (McKinney 1988) (petition or written instrument must be "duly executed"); OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989); OR. REV. STAT. § 126.035(1) (1987) (written instrument must be "executed").

82. See N.Y. MENTAL HYGIENE LAW § 77.03(d) (McKinney 1988).
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86. OKLA. STAT. ANN. tit. 30, § 3-102(C) (West Supp. 1989).

87. Id. § 3-102(D) (most recent nomination controls or "[i]f two or more nominations bear the same most recent date the court may appoint one of the nominees or may appoint more than one of the nominees as cогuardians"); CAL. CIV. CODE § 2402(b) (West Supp. 1988) (court must give effect to most recent writing).

88. But see Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 9-13 (1941) (doubtful that formalities effectively protect the testator).

89. See, e.g., Ohio State Bar Association Probate and Trust Law Section Commentary (1983), reprinted following OHIO REV. CODE ANN. § 2111.121 (Baldwin 1987) (since a self-declaration of guardian is of "such sensitivity and importance" it should be executed with the same formalities as a power of attorney dealing with real estate).


92. Id. § 13.26.335(3).
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93. Id. (name and address of nominated person should be stated).

94. Id.


96. Id. § 2450 (clause 7).

97. Id. ("The conservator is responsible for the management of your financial affairs and your property. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests.").

98. Id. The form also requests the nominee's address. Id.

99. Id. § 2500 (clause 10).

100. Id. (e.g., "The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you.").


102. Id.

103. Id.

104. Id. § 804-10 (clause 6).


106. Id.

107. Id.

108. Id.

109. Id. § 3 (to be codified at MINN. STAT. § 145B.03(3)).

110. Id. § 4 (to be codified at MINN. STAT. § 145B.04).

111. Id.


113. Id. See generally Jorrie & Krier, One Less Worry for Adults Facing Incapacity, 49 TEX. B.J. 28 (1986)
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(discussion of history, purpose, and operation of Texas fill-in form and enabling legislation).


115. Id.

116. Id.

117. Id. (clauses 4 & 5).

118. Id. § 118A(b).


120. Id. (guardian with statutory priority could punish a ward who is trapped in a failing body).

121. TEX. PROB. CODE ANN. § 118A(a) (Vernon Supp. 1989).

122. Id. § 118A(c).

123. Id. The nominee will be appointed unless disqualified or court finds he would not serve the ward's best interests. Id. § 118A(d).

124. Id. § 118A(g).

125. OKLA. STAT. ANN. tit. 58, § 896 (West 1985) (current version at OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989)). The only case interpreting the original statute is In re Guardianship of Campbell, 450 P.2d 203, 206-7 (Okla. 1966) where the court held, inter alia, that the self-designation of guardian must be accomplished by the declarant before being adjudged incompetent.


127. Id. § 3-102(B).

128. Id.

129. Id. (only minor alterations are permitted because nomination must be "substantially" in the statutory form).

130. Id.

131. Id.

132. Id. § 3-102(A).
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133. For example, the Illinois statute contains a statement of purpose which includes the following: "The General Assembly finds that the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent [guardian] to act for them in dealing with their property and financial affairs." ILL. ANN. STAT. ch. 110 1/2, para. 803-1 (Smith-Hurd Supp. 1988).

134. See, e.g., Boylan v. Kohn, 172 Ala. 275, 55 So. 127, 129 (1911) ("The paramount consideration of the law has always been the best interests of the ward and of his estate, and this is peculiarly the case in respect to the selection of his guardian."); In re Estate of Bennett, 122 Ill. App. 3d 756, 461 N.E.2d 667, 671 (1984) ("the primary concern in the selection of a guardian is the best interest and well being of the disabled person"); In re Kane, 66 Misc. 212, 121 N.Y.S. 667, 667 (Thompkins County Ct. 1910) (purpose of court in appointing guardian for incompetent adult is "the welfare and comfort of the incompetent and his interests").

135. See Shaffer, The "Estate Planning" Counselor and Values Destroyed By Death, 55 IOWA L. REV. 376, 377 (1969) (individuals who plan their estates become "more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop").

136. See Jorrie & Krier, One Less Worry for Adults Facing Incapacity, 49 TEX. B.J. 28, 28 (1986) (discussing difficulties arising if declarant not given ability to preclude person from serving as guardian).

137. Even in the absence of a statute authorizing a non-nomination, courts may give consideration to a person's expressed wishes. See In re Green's Guardianship, 125 Wash. 570, 216 P. 843, 844 (1923) (incompetent's indication that a particular person should not serve as guardian was one of many factors the court considered in holding that such person was improperly appointed); see also Gorman, Planning for the Physically and Mentally Handicapped, 11 INST. ON EST. PLAN. 15-1, 15-31 to -32, 15-37 to -39 (1977) (suggestion that nominating document indicate individuals who the declarant does not want appointed as guardian despite the non-binding effect of the request because the statement would be helpful to the court).


139. Studies have shown that most guardianship cases are uncontested and that the judge rarely makes a detailed inquiry into the person nominated as guardian in the petition. See R. ALLEN, E. FERSTER & H. WEIHOFEN, MENTAL
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IMPAIRMENT AND LEGAL INCOMPETENCY 91 (1968). This practice may lead to undesirable persons being appointed as guardian, especially if the incompetent person is unable to articulate his displeasure with the nominee. However, a judge would be able to have greater assurance that a guardian designated by the ward prior to his incompetency would be best suited to the declarant's needs.

140. See 11 D. MALOUF, WEST'S TEXAS FORMS - ESTATE PLANNING § 4A.8 (Supp. 1989) (discussing Texas' fill-in form, author concluded that "[t]he pre-selection of a guardian (and more particularly the prohibition of someone undesirable from serving as guardian) could have prevented some of the really hard-fought and expensive litigation in the past").

141. Cf. Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9 ("statutory will would do great disservice to the families of persons availing themselves of it").

142. See Zartman, The New Illinois Power of Attorney Act, 76 ILL. B.J. 546, 553 (1988) (in discussing statutory durable power of attorney fill-in form which provides for guardian nomination, author concludes that potential for abuse and misunderstanding is counterbalanced by ability of people to control their own affairs); cf. Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8 (statutory will fill-in forms as "a great service to the Bar and to the public").

143. See § D(1)-(3). The author's personal experience reflects that more than 80% of people desiring estate plans are very excited about the prospects of selecting their own guardian and, under Texas law, disqualifying certain individuals from possible appointment.

144. See Chapter III.

145. See Chapter V.

146. See Chapter VII.

147. See Chapter VIII.

148. See supra § E.

149. Compare OHIO REV. CODE ANN. § 1337.09(B) (Baldwin 1988) (nomination in durable power of attorney) with OHIO REV. CODE ANN. § 2111.121(A) (Baldwin 1987) (nomination in will-like document); OKLA. STAT. ANN. tit. 58, § 1074B (West Supp. 1989) (nomination in durable power of attorney) with OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989) (nomination in written designation); WIS.
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151. See UNIF. DURABLE POWER OF ATTORNEY ACT comment § 3 (1987) (permits principal to use durable power of attorney to designate guardian so "that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans"); R. CAMPFIELD, ESTATE PLANNING AND DRAFTING 53-54 (1984) ("To avoid having someone try to vitiate the power by instituting incompetency proceedings, we can name the same individual as agent and conservator.").

152. See supra § D(1)-(3).

153. See R. CAMPFIELD, ESTATE PLANNING AND DRAFTING 52 (1984) ("Conservatorships are expensive and time consuming. There is a stigma attached to incompetence and the proceedings are a matter of public record.").

154. Id. at 53 ("Predesignation of [c]onservator . . . does not solve all of the problems but at least the client will have some choices.").


156. See OHIO REV. CODE ANN. § 2111.121(B) (Baldwin 1987) ("court shall appoint the person nominated as guardian in the writing or durable power of attorney most recently executed"); OKLA. STAT. ANN. tit. 30, § 3-102(D) (West Supp. 1989) (statute also provides that if several nominating documents "bear the same most recent date the court may appoint one of the nominees or may appoint more than one of the nominees as coguardians").

157. See supra § B(4).

158. See supra § B(5).

159. The lack of reported case law may be due to the time required for the technique to gain acceptance among estate planning attorneys and the public. See 11 D. MALOUF, WEST'S TEXAS FORMS - ESTATE PLANNING § 4A.8
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(Supp. 1989) ("It will probably take a considerable time before this new device becomes well known among estate planners.").

160. But see Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 9 (1941) (doubtful that formalities associated with a will effectively protect a testator).

161. See id. at 5 ("ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion").

162. See Chapter V(2).

163. UNIF. DURABLE POWER OF ATTORNEY ACT § 3(b) (1987); UNIF. PROBATE CODE §§ 5-503, -305(b), -409(a)(2) (1987).


CHAPTER VII
FORMS RELATING TO CRITICAL MEDICAL DECISIONS

A. INTRODUCTION

Among the most significant and personal decisions an individual may make are those regarding health care. As long as a person is competent, adequately informed, and not acting under duress or coercion, courts are anxious to protect an individual's right of self-determination, even if the exercise of that right may hasten death. This right is of little use, however, if an individual lacks the ability to make decisions regarding critical health care matters because a debilitating injury, progression of a disease or illness, or other unanticipated misfortune has caused the person to lack the requisite capacity. If such a condition exists, "the physician must assume that the patient wishes to be treated to preserve his [or her] life." Although this anomaly has always existed, only recently has its devastating effect on a person's intent regarding health care matters grown to significant proportions.

Modern medical technology can prolong some bodily functions well beyond their natural limits; machines may support breathing and blood circulation long after the brain is severely or totally destroyed although "there is no realistic possibility that the patient will ever be able to
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regain cognitive sapient life." This artificial extension of "life" has several consequences: it may be contrary to the person's wishes; it may result in a loss of the individual's dignity; it may cause unnecessary pain and suffering; and ironically it may not provide anything medically necessary or beneficial. Consequently, methods had to be developed that would allow a person to make medical treatment decisions prior to the time that such decisions were actually required.

Within approximately the last fifteen years, two techniques have evolved to address this problem. First, legislative sanction has been given to "living wills" or "declarations to physicians." These documents are used by individuals to indicate their wishes regarding the type of medical treatment, or lack thereof, desired after the onset of disability or incapacity. Thus, if the declarant becomes incompetent, comatose, or otherwise unable to communicate his or her desires, the document may be used as a statement of intent. A second method to ascertain and effectuate the person's wishes is to permit the person to delegate the authority to make medical decisions to a trusted individual, such as a family member or close friend, in a living will or durable power of attorney.

Statutory forms for living wills are the rule rather than the exception, unlike for other estate planning techniques such as wills, trusts, general durable powers of attorney, and self-designation of guardians. All states that expressly provide for durable powers of attorney for health care also
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supply statutory forms. This chapter examines these statutory forms, critiques their effectiveness, and makes recommendations concerning legislation for forms relating to critical medical decisions. A general discussion of the advantages and disadvantages of statutory estate planning forms is reserved for Parts Three and Four of this dissertation.

The decision to use a living will or to delegate the authority to make a critical medical decision is intensely personal. Legal ramifications are not the sole or even primary concern of many individuals making these decisions. Religious, moral, ethical, and philosophical attitudes and beliefs also play crucial roles in determining whether these techniques should be used by any particular person. This chapter will not debate the advisability of these techniques but will attempt to ascertain whether the legislative intent in approving these techniques may be better fulfilled through the use of statutorily enacted forms.

B. EXPRESS STATEMENT OF TREATMENT DESIRES - LIVING WILLS

The concept of a living will received its first major impetus in 1969 when the Indiana Law Journal published a provocative article by Luis Kutner, who was the chair of the World Habeas Corpus Committee, World Peace Through Law Center. Kutner pled for legislative and judicial sanction of an instrument that would provide a competent and communicative
individual with the opportunity to indicate desires regarding medical treatment in a document that would be available as persuasive evidence of the patient's intent should the patient later be unable to give or withhold consent.\textsuperscript{16} Although Kutner did not propose a specific form for the living will document, he did provide suggestions regarding its contents, both substantively and procedurally.\textsuperscript{17}

In 1976, California became the first state to enact living will legislation.\textsuperscript{18} This statute, which borrowed heavily from Kutner's suggestions, included a simple fill-in form.\textsuperscript{19} This form easily fits on one typewritten page and contains blank spaces for only essential information such as the declarant's name and address, date of execution, doctor information, and signatures of the declarant and witnesses.\textsuperscript{20} A person using the form is not given the opportunity to make choices between possible treatment alternatives and has no chance to alter its terms or provide additional instructions.\textsuperscript{21}

This California statute was the model used by other states in designing their living will legislation and accompanying statutory forms. Of the forty-one jurisdictions with living will legislation, all but two provide a statutory fill-in form.\textsuperscript{22} This section analyzes these statutory forms as well as the form provided in the Uniform Rights of Terminally Ill Act (URTIA) which was approved by the National Conference of Commissioners on Uniform State Laws in 1985.\textsuperscript{23} A comparison of all aspects of living will statutes is beyond the scope of this dissertation.\textsuperscript{24}
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1. Statutory Regulation of Living Will Forms

The statutes that provide fill-in forms vary in the degree to which the forms must be used by persons who wish to obtain valid living wills. The statutes are almost equally divided between those that mandate the use of the statutory form or one that is "substantially" or "essentially" similar, and statutes that make the use of the statutory form optional. This latter approach was adopted by the URTIA which provides that the living will "may, but need not, be" in the statutory form. One state's statute is unclear stating that the provided form "is specifically determined to meet the requirements" of a living will but the statute lacks an express statement of the acceptability of other forms.

South Carolina is the only state to mandate technical requirements for the living will form. Living wills in South Carolina must contain language explaining the procedure and requirements for revocation in boldface print or in all upper case letters at least the same size as those used in the rest of the document. Failure of the document to comply with these requirements could cause the living will to be ineffective because it would not be substantially in the requisite form.

The Wisconsin statute does not merely authorize living wills; it also imposes a duty on the state to provide wide dissemination of the statutory form reflecting the apparent state policy that a living will is an estate planning option that should be readily accessible to its citizens. The
Wisconsin Department of Health and Social Services must prepare and provide sufficient copies of the living will form for quantity distribution to "health care professionals, hospitals, nursing homes, county clerks and local bar associations and individually to private persons." The Department may charge a reasonable fee for the preparation and distribution cost.

A person contemplating the execution of a living will is well-advised to use the statutory form, making only those changes or additions that are permitted by the enabling legislation. This is especially true in jurisdictions that appear to mandate the use of statutory forms because seemingly insignificant errors could prevent the declarant's intent, as reflected in the document, from being effectuated. For example, under a prior version of the Georgia statute, every declarant had to indicate that the living will would have no force and effect during the course of a pregnancy, even if the declarant was a man, because the living will had to be exactly in the statutory language. Accordingly, jurisdictions contemplating the enactment or revision of living will legislation should consider expanding the amount of deviation from the statutory form that will be permitted. Although the use of a statutory form insures standardization, improves predictability, and simplifies administration, it would be ironic if a statute enacted to carry out a person's important wishes is actually used to defeat those same desires.
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2. Contents and Complexity of Statutory Forms

The contents of statutory living will forms reflect the requirements and formalities required under the enabling legislation of each state. Thus, the forms contain the substantive and technical elements necessary to qualify them as effective living wills such as a description of the conditions that will trigger the withholding or withdrawal of life sustaining procedures, a statement of the declarant's intent not to artificially prolong the dying process, and appropriate provisions for any required attestation and notarization. The forms differ significantly, however, in the manner in which this is accomplished.

The length of the statutory form varies tremendously between jurisdictions. At one extreme is the lengthy and comprehensive provision adopted by South Carolina in its Death With Dignity Act. This form occupies two and one-half pages in the South Carolina Code and contains not only statements of the declarant's intent but also an exhaustive description of the methods of revocation. The Minnesota form is approximately the same length but its contents are significantly different. This form begins with a list of warnings and notices and provides the user with ample opportunity to provide individualized instructions.

At the other end of the spectrum are the concise forms adopted by states such as Connecticut, Iowa, Maine, Missouri, Montana, and North Carolina. The substantive
language of the North Carolina form, for example, is contained in two sentences with a total of less than forty-five words:

I, __________, being of sound mind, desire that my life not be prolonged by extraordinary means if my condition is determined to be terminal and incurable. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means.50

However, the total length of this form is significantly longer due to an extensive attestation provision.51 The total length of the living will forms of some states is extremely short resulting from abbreviated boilerplate language preceding the witnesses' signatures. For example, the Maine form has less than sixty words in its operative language and only fourteen words in its attestation clause.52

The drafters of the URTIA form provided a simple document that was used as the basis of some of the short forms previously cited.53 The commentary to the Act is instructive in understanding the drafters' decision.

The drafters rejected a more detailed declaration for two reasons. First, the form is to serve only as an example of a valid declaration. A more elaborate form may have erroneously implied that a declaration more simply constructed would not be legally sufficient. Second, the sample form's simple structure and specific language attempts to provide notice of exactly what is to be effectuated through these documents to those persons desiring to execute a declaration and the physicians who are to honor it.54

Arkansas provides multiple living will forms for use in different situations. One form takes effect when the person becomes incurable or has an irreversible condition that will cause death within a relatively short time.55 Another form is
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effective only when the declarant becomes permanently unconscious.\(^{56}\)

Practically all of the statutory forms are written in a formalistic or legal style. Although the forms are designed to be understood by non-attorneys, it is apparent that lawyers played a significant part in their drafting. The language is often direct and unemotional. Vermont, however, has adopted a more sensitive and caring approach. Vermont's form begins on a personal note by stating that the document is directed toward the person's family, physician, lawyer, and clergyman, as well as anyone who may be responsible for the declarant's health, welfare, or affairs.\(^{57}\) General philosophical statements are also included such as, "Death is as much a reality as birth, growth, maturity and old age—it is the one certainty of life."\(^{58}\) The moral character of the declaration is made evident by statements requesting that medication be "mercifully administered" to alleviate suffering even though it may shorten the declarant's remaining life and that the persons to whom the living will is addressed should be "morally bound" by its provisions even though its directions may not be legally enforceable.\(^{59}\)

3. Degree of Individualization Permitted by Statutory Forms

Jurisdictions vary greatly in the amount of individualization provided for or encouraged by their living will statutes and accompanying forms. The statutes reflect four basic approaches ranging from no express authority for
individualized instructions to those that request extensive personalized information.

a. Form and Statute Silent About Individualization

A substantial number of living will statutes do not expressly state whether the statutory living will form may be altered to include individualized instructions. However, some statutes imply that additional instructions may be included because the statute indicates that the living will may, but need not, be in the statutory form or it states presumptions that automatically apply unless the living will provides otherwise. On the other hand, some statutes appear to make individualization difficult or impossible by mandating the precise text of the form or by requiring the living will to be substantially in the statutory form.

b. Statute Permits Individualization But Form Silent

Seventeen jurisdictions permit declarants to include specific instructions beyond those found in the boilerplate language of the statutory living will forms. However, the forms of these states typically do not encourage the use of additional instructions; the forms fail to provide blank spaces in which these instructions may be written and do not indicate that the possibility to provide other directions exists.
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c. Form Provides Opportunity for Minimal Individualization

The statutory forms of a few states give declarants the power to make limited personal choices. The Alaska form provides boxes for the declarant to check to indicate whether nutrition or hydration should be provided by gastric tube or intravenously. Users of the Idaho living will form are presented with the opportunity to select one of three options: to have all medical treatment, nutrition and hydration provided; to have artificial life-sustaining procedures withdrawn but to receive nutrition and hydration; or to have both artificial life-sustaining procedures and nutrition and hydration withdrawn. The Utah form allows the declarant to list specific procedures deemed life-sustaining so the user may indicate that the administration of medication and sustenance or procedures performed to provide comfort, care, or to alleviate pain may be withdrawn or withheld. Several other forms also provide the opportunity to designate an agent to make health care decisions. These provisions are discussed in detail later in this chapter.

d. Form Provides Extensive Opportunity for Individualization

Minnesota's statute provides individuals with extensive opportunity to document individualized directions. The form contains seven areas, each consisting of two to four blank lines, for express indications of intent. Declarants are asked to provide explanations regarding the following:
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feelings and wishes concerning health care, i.e., when the living will is to apply; types of health care desired; types of treatments not desired; kinds of life-sustaining treatment desired if the declarant is diagnosed to have a terminal condition; kinds of treatments not wanted if the declarant is diagnosed to have a terminal condition; feelings regarding artificially administered sustenance, i.e., whether the declarant wishes to receive food and fluids other than by mouth if a terminal condition occurs; personal thoughts relevant to the instructions based on religious beliefs, philosophy, or other personal values; and preferences regarding the location of the declarant's care. 71

The Minnesota form reflects a significant departure from traditional living will forms by providing for extensive individualization. Despite the seeming progressiveness of this form and its ability to document a person's true intent, at least one organization has stated that it is uncertain whether the statute and accompanying form "improves the existing situation or has the effect of making it more difficult for patients to exercise their rights." 72

4. Statutory Forms For Revocation

Several states provide statutory forms that may be used to revoke a previously executed living will. The major difference between these forms is whether the revocation form is a separate form or merely a part of the original living will form. For example, the Mississippi statute provides a
separate revocation form that has blank spaces for the date, the declarant's name, address, and social security number, and the date on which the original living will was executed. The declarant must sign the form as well as obtain the signatures of at least two witnesses. The living will form of Missouri demonstrates the other approach. After the attestation clause, the statutory form contains a brief revocation provision which provides lines for the declarant's signature and date of execution underneath the statement "I hereby revoke the above declaration."

5. Life-Prolonging Statutory Forms

The statutes of several states provide declarants with the opportunity to express their intent to have life-sustaining procedures applied to the maximum extent possible. The most comprehensive of these provisions is found in the Indiana Living Wills and Life-Prolonging Procedures Act. The statute permits a person to execute an "anti-living will" document called a Life-Prolonging Procedures Declaration which requests the use of procedures that would extend life, including appropriate nutrition, hydration, and administration of medication. A person residing in Indiana thus has the choice to express the desire either to shorten or to extend life by the selection of the appropriate statutory form.

A somewhat different approach is taken by Idaho which provides three alternatives regarding treatment options in its living will form. The first of these choices directs that
"all medical treatment, care, and nutrition and hydration necessary to restore . . . health, sustain . . . life, and to abolish or alleviate pain or distress" should be provided when the person becomes unable to communicate instructions. The remaining two choices allow the declarant to expressly decline artificial life-sustaining procedures either with or without nutrition and hydration.

The North Dakota statute specifies that a declaration to direct the use of life-prolonging treatment must be substantially in the statutory form. This form is essentially a mirror image of the declaration to withdraw or withhold life-prolonging treatment. The form provides that the declarant directs the use of life-prolonging treatment that could extend life if the declarant is in an incurable condition caused by injury, disease, or illness which is certified to be a terminal condition by two physicians.

The living will form of Minnesota adopts a unique approach. This statutory form does not provide boilerplate language regarding health care decisions nor provide specific options. Instead, the form gives a person tremendous latitude to indicate his feelings and wishes concerning health care in eight categories. The person must use his own words to describe the types of treatment wanted and not wanted. The form, rather than supplying language to carry out the presumed intent of the declarant, provides only an organized vehicle for him to memorialize his intent in a legal document. The form is not biased toward any specific end result and thus may
effectively be used to reflect a desire for life-sustaining procedures to be implemented as well as to show an intent for such procedures to be withheld or withdrawn.

6. Other Applicable Statutory Forms

Living will statutes frequently contain suggested language or entire forms to assist persons in complying with the specific requirements of the jurisdiction's enabling legislation. If witnessing or notarization is required, the form contains the language necessary to comply with the statute. In addition, some statutes provide separate forms that are required at some stage in the process of effectuating a living will such as a doctor's certification of the declarant's incompetence and terminal condition and a notarial certificate stating that a living will is genuine and was duly executed.

C. DELEGATION OF AUTHORITY TO MAKE TREATMENT DECISIONS - LIVING WILLS

In addition to providing the declarant with the opportunity to express his desires regarding medical treatment, the living will statutes of a growing number of jurisdictions also permit the declarant to appoint a proxy who may decide whether life-sustaining procedures should be withheld or withdrawn. The degree to which this delegation of decision-making authority is encouraged varies considerably between the jurisdictions. While some statutes merely
indicate that proxies may be appointed, others provide statutory forms with blank spaces for declarants to fill-in the names of the desired proxies.91 Declarants in jurisdictions adopting this approach are more likely to be aware of their right to appoint a proxy because the form focuses the declarants' attention on this alternative.

The recently enacted Minnesota form provides the declarant with extensive opportunity to delegate treatment decisions.92 The proxy designation provision contains a plain language explanation of the purpose of the provision and urges the declarant to discuss his wishes with the designated proxy.93 The declarant may limit the proxy's powers in any desired manner.94 In addition, the person named as proxy is simultaneously nominated as guardian or conservator of the declarant's person.95 The declarant is instructed to provide a detailed description of the proxy, i.e., the proxy's name, address, telephone number, and relationship. This procedure increases the likelihood that the person designated by the declarant will be quickly located should the need arise.96 To further effectuate the declarant's intent, the declarant is given the chance to designate an alternate proxy should the first-named proxy be unable or unavailable to act on the declarant's behalf or if the declarant later revokes the original designee's authority to act as his proxy.
D. DELEGATION OF AUTHORITY TO MAKE TREATMENT DECISIONS - DURABLE POWERS OF ATTORNEY

"One of the most debated issues concerning the durable power [of attorney] is whether it may be used for the care, custody, and control of the person, including the discontinuance of medical care for the incompetent principal in accordance with his or her pre-stated wishes." 97 Several arguments have been advanced against permitting agents to make critical medical decisions such as directing physicians to withhold or withdraw life-sustaining procedures from the principal. One of these arguments is that the principal must make a determination in advance of the actual time that such a decision would be needed so the existence of informed consent is questionable, and that critical health care decisions are too personal to delegate. 98 There are persuasive arguments to counter these criticisms and support the principal's right to delegate these important decisions. For example, a delegation may be the only way for the principal's instructions, which may be very specific, to be made known and carried out. 99

The first significant attempt to settle this debate was the National Conference of Commissioners on Uniform State Laws' approval of the Model Health-Care Consent Act in 1982. 100 Motivated by a concern for personal autonomy and recognizing that a competent person may want to delegate health-care decision authority to a relative or friend, 101 the Commissioners included a provision permitting a person to transfer this power to a "health-care representative." 102
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Act requires the appointment to be in writing, signed by the appointor and a witness, and accepted in writing by the health-care representative.103

The Commissioners recognized that this power of appointment was unique and thus drafted a suggested form for the appointment of a health-care representative.104 The form provides blank spaces for the appointor to indicate the representative's name, address, and telephone number as well as to make the appointment subject to special provisions as enumerated by the appointor. The appointor decides whether the appointment takes effect immediately or only upon disability or incapacity, whether disability or incapacity terminates the appointment, and whether the health-care representative may delegate decision-making power to another individual.105 Despite the form's obvious usefulness, the Commissioners relegated the form to the comments and hence it is not a true statutory form.

Legislatures have not greeted the Model Act with much enthusiasm; it was not until 1987 that Indiana became the first, and so far only, state to adopt the Act.106 Although minor changes were made to the provisions providing for the appointment of a health-care representative, the Indiana version permits the appointment in the same manner as the Model Act.107 The Commissioners' suggested form was not enacted.

In 1983, California became the first jurisdiction to enact legislation specifically dealing with this sensitive
area when it passed a separate statute authorizing a durable power of attorney for health care.\textsuperscript{108} Several jurisdictions have followed California's lead.\textsuperscript{109} An alternative approach taken by some states is to include a reference to health care decisions in general power of attorney statutes.\textsuperscript{110} These references are, however, not "clearly aimed at granting authority to withdraw life-sustaining treatment"\textsuperscript{111} or to making other critical decisions and thus are unpredictable methods of carrying out the principal's intent.

A unique approach was taken by the Utah Legislature when it enacted a "special power of attorney" as part of the Personal Choice and Living Will Act.\textsuperscript{112} Rather than being a true power of attorney authorizing the agent to deal with all aspects of health care, this special power limits the agent's authority to the execution of a living will on the principal's behalf.\textsuperscript{113} This authority exists only after the principal's attending physician certifies that the principal has incurred a physical or mental condition that renders him unable to give immediate instructions to health care providers.\textsuperscript{114} A directive executed by the agent under this special power of attorney takes precedence over any directive that may have been previously signed by the principal.\textsuperscript{115}

Each jurisdiction that has a specific enabling statute for a durable power of attorney for health care has included a statutory fill-in-the-blank form.\textsuperscript{116} This section provides a detailed review of these forms.
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1. Statutory Regulation of Durable Power of Attorney for Health Care Forms

The enabling statutes for durable powers of attorney for health care (DPAHC) vary in the degree to which the form must be used by a person wishing to delegate health care decisions. The majority of DPAHC statutes mandate the use of the statutory form or a form that is "substantially" similar. A minority of statutes permit the use of other forms.

The California DPAHC statute provides a complex set of rules that must be followed when using the statutory form. Certain provisions of the form must be included in the exact wording of the statute. Other provisions of the form are optional and need not be included. However, if a DPAHC form is sold or distributed for use by persons who will not obtain legal advice, the form must mirror the exact wording of the statutory form and contain no supplemental material.

2. Warnings and Instructions Given to Principal

Because legislatures contemplated that DPAHC forms would frequently be used without the advice of an attorney, each statutory DPAHC form provides warnings and instructions to the principal to insure the document's proper use and completion. In addition, emphasis is placed on drafting the warnings and instructions in plain language to increase the likelihood that they will be understood by the average non-attorney. Several approaches are used to supply these warnings and instructions.

Most jurisdictions place an extensive set of instructions and warnings at the beginning of the form before the blank.
spaces that the principal needs to complete. Examples of these warnings and instructions include the importance of the document, what the document does, the potential of the agent to use his authority to cause life-sustaining procedures to be withheld or withdrawn, the period during which the document is effective, the methods of revocation, and a recommendation to consult an attorney if there are questions. Idaho is the only state that does not require a warning/instruction statement.

One of the more comprehensive sets of instructions and warnings is found in the California form. The California warning statement must be included in any DPAHC form sold or distributed for use by a person who does not have legal advice and it must be printed in not less than ten-point boldface type or in a reasonable equivalent. Even if the DPAHC is individually prepared, i.e., not on a pre-printed form, the substance of the warnings must be included in capital letters or the principal's attorney must sign a statement certifying that he fully advised the principal concerning the applicable law and the consequences of signing the DPAHC.

Texas and Vermont take a slightly different approach. Although the Texas and Vermont DPAHC forms do not begin with warnings and instructions, the statutes require that an extensive disclosure statement be given to the principal prior to the execution of the DPAHC. The principal must sign a statement, usually included in the DPAHC, acknowledging that
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he received the disclosure statement and has read and understood its contents.¹²⁹

3. Contents and Complexity of Statutory Forms

The contents of statutory DPAHC forms reflect the requirements and formalities (such as witnessing and notarization) required under the enabling legislation of each state. Unlike living wills, however, most statutory DPAHC forms are lengthy, often occupying more than five pages in the statutes.¹³⁰ The length of the forms may make non-attorneys reluctant to use them because they fear complexity or lack the desire to read through pages of material. Nonetheless, the forms are designed with the non-attorney user in mind and are written in simple language to provide understandable explanations of what is being done as well as to recommend to the principal factors that should be considered regarding disability planning.¹³¹

4. Degree of Individualization Permitted by Statutory Forms

Statutory DPAHC forms are generally designed to permit the principal to explain his wishes and to make choices from various alternatives. The principal may individualize, to some extent, the DPAHC to accurately reflect his actual desires. This is the case although the format of the document is usually rigidly predetermined by statute.¹³² This section explores the areas where principals are permitted to include their specific instructions and make their own decisions.

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a. Designation of Alternate Agent

Unless an alternate agent is designated, the DPAHC will be of little or no value if the designated agent is unable, unwilling, or ineligible to serve. To avoid this eventuality, the statutory DPAHC forms provide the principal with the opportunity to designate alternate agents. The forms of most states provide spaces for two alternates, one state's form is open-ended allowing the principal to name as many alternates as will fit within the given space, and another state's form provides space for only one alternate.

b. Statements of Authority Delegated to Agent

The statutory DPAHC forms reflect a high regard for the rights of the principal to individualize the authority delegated to the agent. Each of the forms asks the principal to provide a narrative of his desires concerning life-prolonging care, treatment, services and procedures, a description of any limitations of authority, or a statement of other health care desires.

Because of the vital importance of life-sustaining treatment, the forms of three states offer assistance to the principal in expressing his desires concerning the withholding or removal of such treatment. Two states provide the principal with options that may be selected by the principal initialing next to or beneath the appropriate statement. The Illinois DPAHC form sets forth three mutually exclusive choices: no life-sustaining procedures if the burdens of
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treatment outweigh the benefits; life-sustaining procedures withdrawn only if the principal is in an irreversible coma; and all life-sustaining procedures applied without regard to condition, chances of recovery, or cost of the procedures.\textsuperscript{137} The Nevada form supplies four choices and the principal may select one or more of them to reflect his wishes: life prolonged at all costs; life-sustaining procedures removed if the principal is in an irreversible coma; life-sustaining procedures removed if the principal has an incurable or terminal condition or illness and there is no reasonable hope of long term recovery or survival; and no treatment if the burdens of treatment outweigh the expected benefits.\textsuperscript{138} The Vermont form takes a different approach by supplying three options that the principal may physically copy into the designated areas for his statement of desires.\textsuperscript{139} These options include to withhold life-sustaining procedures when there is no reasonable prospect of the principal regaining the ability to think and act for himself, either including or not including artificial nutrition and hydration, or to have life sustained by reasonable medical measures regardless of the principal's condition.\textsuperscript{140}

c. Effective Date and Duration of DPAHC

Some DPAHC forms permit the principal to designate a future date or event to trigger the agent's authority, such as upon court determination of disability.\textsuperscript{141} Some statutory
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forms also permit the principal to indicate when the DPAHC will expire. 142

d. Nomination of Guardian or Conservator of the Person

The forms of two states allow the principal to designate a health care agent and to nominate guardians. 143 The California 144 and Illinois 145 forms permit the principal to name one person as guardian or conservator of the person. This approach allows for the integration of a person’s incompetency plan because the principal may wish to nominate the same person as agent and guardian.

e. Other Provisions

Some state forms provide additional minor opportunities for individualization. For example, the Illinois form permits the principal to obtain specimen signatures of the agent and alternates and to certify that the signatures are correct by signing next to them. 146 The Texas and Vermont forms provide the principal with the opportunity to specify where the original DPAHC form is kept and the persons and institutions who have signed copies. 147

E. EXPERIENCE

The available empirical evidence regarding the use of forms for critical medical decisions fails to distinguish between living wills and durable powers of attorney for health care that are in the statutory forms and those that are in other forms. As discussed previously, many states mandate the
use of the statutory form or one that is substantially similar. It is likely that the forms used in the states which have statutes that do not require use of the statutory form are also in the statutory form or one modeled closely thereafter. Accordingly, the authority regarding the use of livings wills and DPAHCs in general is likely to accurately reflect the use of statutory forms. This section reviews the available evidence concerning the public use of these forms and the results thereof.

1. Use of Statutory Forms by Public

Living will legislation was partially a response to public awareness of the ability of medical technology to keep a person "alive" well after any chance for recovery had passed. The public recognized that "[t]he ultimate horror is not death but the possibility of being maintained in limbo, in a sterile room, by machines controlled by strangers." It seems logical that once enabling legislation was passed, a large number of individuals would have executed living wills. At first, however, this was not true. In a case decided in California, the first state to enact living will legislation, the court indicated that there was a "lack of generalized public awareness of the statutory scheme." The court noted that "the typically human characteristics of procrastination and reluctance to contemplate the need for such arrangements however makes this a tool which will all too often go unused by those who might desire it." One commentator also
concluded that "[a]dvance directives may be as little used as traditional last wills and testaments, particularly by the less educated segments of the population."\textsuperscript{153}

There now appears to be a dramatic growth in the public's awareness of living wills and DPAHCs. It has been estimated that "millions of people have signed some kind of living will."\textsuperscript{154} The popular press often features living wills and related statutes,\textsuperscript{155} and some bar associations have taken measures to disseminate relevant information to the public.\textsuperscript{156} Several national organizations have been formed to educate the public about living wills, lobby state legislators, and appear as amicus curiae in court cases affecting the rights of terminally ill individuals.\textsuperscript{157}

2. Effectiveness of Forms - Studies

Merely having a properly executed form regarding critical medical decisions is of little value to a person if the instructions contained therein are not followed at the appropriate time. Several studies have been conducted in an attempt to determine whether living wills are successful in leading to the withdrawal or withholding of life-sustaining procedures when the declarant is in a terminal condition.

The first study was conducted by Murray Klutch, who was the research director of the California Medical Education and Research Foundation.\textsuperscript{158} This study was conducted in California one year after the legislation authorizing living wills took effect. A survey was taken of physicians who had ordered at
least one hundred copies of the statutory living will form. Over one-half of the responding physicians stated that the living will legislation was helpful in improving relationships with patients and their families. They also remarked that it was "now easier to withhold or withdraw life-sustaining procedures." Less than one-half of the physicians believed that living will legislation served no useful purpose. Although most of the respondents had not encountered an occasion to comply with a living will by actually withholding or withdrawing life-sustaining procedures, the respondents reported following a living will in approximately sixty-seven cases. Klutch concluded that "[a]lthough the survey results [were] not based upon the replies of a representative sampling of physicians, the fact that the majority of respondents have not had occasion to utilize the Directive suggests that an insufficient period of time has elapsed to evaluate the effect of this legislation." The next major empirical study took place one year later in 1978 and was conducted by students at Stanford University. Questionnaires were mailed to 920 physicians who were members of the Santa Clara County Medical Society and who specialized in areas that directly involved the care of terminally ill individuals. Responses to 275 of the returned questionnaires provided the raw data. The study revealed that doctors were generally familiar with living wills but lacked a comprehensive understanding of the enabling legislation. Approximately two-thirds of the doctors
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indicated that some of their patients had executed living wills. However, the existence of a directive seemed to have little effect on the physicians' treatment decisions; only 6.5% of the physicians reported that they withdrew or withheld treatment that they previously would have administered. This data does not support the conclusion that 6.5% of the doctors actually complied with the living wills of their patients. Other data from the study, however, indicates that the potential effect of living wills is great because "[t]wo-thirds of the doctors reported that a directive would make a difference in their decision to withhold or withdraw treatment." Several subsequent studies were conducted but they failed to elicit information on the treatment of individuals who had executed living wills. In an attempt to obtain this important data, Joel M. Zinberg, a physician as well as an attorney, conducted a study "based on personal interviews with eighteen Vermont and thirty-nine California physicians in the spring of 1985." From these interviews, Zinberg discovered that the physicians were generally acquainted with living wills but only marginally familiar with DPAHCs. Although a considerable number of interviewees had treated terminally ill individuals who had executed living wills, living wills rarely had an effect on the course of treatment. None of the Vermont interviewees had altered their treatment because of the living will and living wills affected the care of only five people in California from among the seventy-two patients.
with living wills treated by the California interviewees.\textsuperscript{177} In only two of these cases did the directive persuade the doctor to withhold treatment that would not have otherwise been withheld.\textsuperscript{178} In the other three cases, the directives were used "to defuse the constraint of family opposition to withholding or withdrawing treatment."\textsuperscript{179}

Zinberg concluded that living wills are rarely used and that their effect is minimal.\textsuperscript{180} He believes that only a "small informed minority" will execute living wills to document their intent regarding critical medical decisions.\textsuperscript{181} Zinberg also concluded that individuals who execute living wills do so "with little or no information about their eventual incapacitating illness and the risks and benefits of accepting or rejecting alternative treatments."\textsuperscript{182} There is an allusion to "anecdotal evidence that some patients do not discuss treatment preferences with the surrogate they designate in a durable power or notify the surrogate of the designation."\textsuperscript{183}

3. Effectiveness of Forms - Cases

There has been only scant appellate court activity regarding living wills and the few cases that exist do not involve statutory forms.\textsuperscript{184} Two cases are illustrative. Prior to the enactment of the Life-Prolonging Procedure Act of Florida, Francis Landy executed a "Mercy Will and Last Testament" expressing his desire that he not "be kept alive through the use of extraordinary life support equipment such
as a respirator." Landy was declared incompetent and his wife requested that all extraordinary life support systems be discontinued. The hospital filed a declaratory relief action fearing liability if such procedures were withdrawn. Notwithstanding Landy's death, the court heard the case because of the numerous other patients who were in a similar condition. The court indicated that a living will should be given "great weight" and that physicians need not obtain prior court approval before removing life-sustaining procedures provided they act in good faith.

In an analogous case, a New York court was confronted with a document entitled "Instructions Relating to Medical Treatment and Death/Refusal of Further Care." Declarant Saunders executed this living will in Pennsylvania prior to her move to New York. Neither of these states have living will statutes so she petitioned the court to make a determination of the document's validity and effectiveness. The court viewed the document as an informed medical consent statement that is "evidence of the most persuasive quality" that Saunders did wish to decline certain medical treatment and thus it "should be given great weight by the hospital authorities and treating physicians." The court also held that the living will could be acted upon without further judicial proceedings if all steps complied with accepted medical practices and the terms of the document.

A Florida court recently cast some doubt on the effectiveness of a living will. The court denied a petition
to discontinue the artificial feeding of an elderly woman who had executed a living will that specifically requested that such treatment not be administered if she was in a terminal condition.\textsuperscript{195} The court held that the woman's condition was not "terminal" and that a nasogastric tube is not a "life-prolonging procedure."\textsuperscript{196} The living will was thus rendered inapplicable.\textsuperscript{197}

\textbf{F. ANALYSIS}

Statutorily provided living will and durable power of attorney for health care forms are designed for use by the non-lawyer public as well as attorneys. Living will forms are generally straightforward and require minimal effort to complete. Although DPAHC forms are usually more lengthy and complex, as well as require greater effort to complete, they typically contain instructions and warnings in plain language to encourage their proper use by the non-lawyer community. The availability of legislatively mandated or sanctioned forms is likely to increase the number of people who execute living wills and DPAHCs. This section examines the ability of the statutory forms to enable persons to adequately exercise their right of self-determination regarding health care decisions.

As stated at the beginning of this chapter, no attempt is being made to analyze the advisability of these techniques in general. Instead, the goal of this section is to determine whether statutorily enacted forms effectuate legislative intent and the desires of the individuals who use them.
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1. Mandatory vs. Optional Statutory Forms

Statutes containing living will forms are almost evenly divided between those that require the use of the statutory form, or one that is substantially equivalent, and those that merely suggest or recommend an optional statutory form. Likewise, jurisdictions vary in the degree to which statutory DPAHC forms must be used although the majority of DPAHC provisions mandate the use of the statutory form or one that is substantially similar. The issue is thus raised as to which of these methodologies best effectuates the user's intent.

Several reasons have been advanced for requiring the use of a statutory form to make critical health care decisions. First, a standardized form helps to insure that the user is "aware of the nature of the document he is executing." This is especially true in jurisdictions that have forms containing plain language warnings and instructions. Second, a required form helps insure that all technical requirements are satisfied thereby increasing the chance that the document will be valid. For example, the form may contain the proper recitations for the attestation clause and notarization provision. Third, mandatory forms sanctioned by state government may be more readily honored by health care professionals who fear liability if treatment decisions are made that may hasten the patient's death. Fourth, mandatory forms help "prevent the declarant from attempting to enlarge
the scope of the directive beyond the circumstances contemplated by the statute."\textsuperscript{204}

Jurisdictions that adopt mandatory forms may, however, actually risk defeating the intent of the same individuals for whose benefit the statutes were enacted. For example, problems of validity may arise if the document clearly expresses intent but is not in the prescribed form.\textsuperscript{205} Such a failure could cause health care providers to refuse to honor the living will or DPAHC and courts to hold that the form is ineffective. Another problem, discussed in more detail below, is that some mandatory forms fail to provide any significant opportunity for individualization.

2. Opportunity for Individualization

Statutory living wills vary in the amount of individualization permitted. Some statutes do not provide for the inclusion of any specific instructions in the form while others allow a wide range of personalization.\textsuperscript{206} Although the structure of statutory DPAHC forms are usually rigidly predetermined, the forms typically provide greater latitude for the principal to explain the nature and scope of authority delegated to the agent.\textsuperscript{207} Because the primary purpose behind these statutes is to recognize "the right of the individual to control all aspects of his or her personal care and medical treatment,"\textsuperscript{208} it is consistent for the statutes to permit individualization. The more individualization authorized, the
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more likely the living will or DPAHC will accurately reflect the intent of the declarant or principal.

3. Understandability of Form

Perhaps the most significant concern with statutory health care forms is whether the non-attorney user will comprehend the contents of the form and fully appreciate the ramifications of executing the document. Living will forms range in length and complexity from a few words to a few pages.209 DPAHC forms are usually longer documents and frequently require greater effort and thought to properly complete.210 Although the forms are drafted for a non-attorney audience, the language is still formalistic and riddled with legal jargon, especially in the case of living wills. DPAHC forms, however, appear to be more attuned to the needs of non-attorneys because they use simple language and include explanations of the use and effect of the forms.

It is uncertain whether users of statutory forms actually take the time to read the forms and, if they do, whether they understand what they read. This is a significant problem when courts attempt to effectuate intent because the life and death significance of the subject matter of the forms makes it essential to know, with the greatest degree of certainty possible, that the forms' contents accurately reflect the users' true intent.
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G. RECOMMENDATIONS

The ability to control important medical decisions and to designate the person who is authorized to make those decisions in situations where one is unable to do so are extremely valuable rights. The legal and medical community, as well as the press, are making significant strides to make the public aware of these rights and such efforts need to be continued. Additionally, legislatures continue to enact statutes aimed at providing a safe, easy, inexpensive, and effective method for the exercise of these rights through living wills and durable powers of attorney for health care. A significant part of this effort is to provide statutory fill-in forms. Statutory forms have gained widespread acceptance; all but two states that authorize living wills and all states that authorize DPAHCS have statutory forms. This section focuses on the aspects of statutory forms that are of particular importance in critical medical decisions. A detailed discussion of the advisability of using statutory forms in general is reserved for Parts Three and Four of this dissertation.

1. Non-biased Living Will Form

The majority of living will forms are inadequate to express a person's intent with sufficient clarity. Most forms merely contain boilerplate language that a declarant may agree to without a full appreciation of the meaning and effect of the language. Because the application of a living will may lead to a premature death, extreme care must be taken when
designing statutory forms to be certain the declarant is fully aware of the nature and effect of the form. Accordingly, the preferred form should be neutral on its face regarding any decision that the declarant may wish to make; it should neither encourage nor discourage the declarant to accept life-sustaining procedures if he is diagnosed as having a terminal condition. Likewise, the ideal form should permit a broad spectrum of individualization so the form contains an accurate reflection of the declarant's intent. Unfortunately, most forms provide for little or no individualization and are slanted toward the withholding of life-sustaining procedures.

The most enlightened form currently enforce is the Minnesota form because it is not biased toward consenting to or withholding life-sustaining procedures. The form provides a format that the declarant uses to explain in detail his individualized treatment desires as well as his religious beliefs, philosophy, and personal values. Although this methodology requires greater effort by the declarant because more than a signature is required, it stands the greatest chance of accurately reflecting the person's health care desires.

A living will form also needs to be drafted in language that may be easily understood by a non-legally trained individual. Likewise, the form should contain adequate instructions and warnings to provide guidance to the declarant.
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2. Unified Living Will and Durable Power of Attorney for Health Care Form

Planning for medical treatment decisions requires more than a living will; an agent with specific directions is often needed to handle circumstances that are unanticipated or not covered by the living will. DPAHCs are more flexible than living wills and may be used for a variety of health care decisions, not just the withholding or withdrawal of life-sustaining procedures. Thus, they are powerful tools for effectuating intent.

Jurisdictions that have recognized the importance of expressly authorizing the appointment of a health care agent use different methods to permit the delegation of treatment authority; some include appropriate language in living will statutes and forms, others supply separate durable power of attorney forms, while the statutes of many jurisdictions fail to directly address the issue. As a result, several forms are necessary to handle treatment decision issues in many jurisdictions.

To simplify procedures regarding health care decisions, the preferred approach is to include all health care matters in one form which would be accepted in all states. A unified form would permit a person to state his desires and appoint an agent at the same time. It is anticipated that this would better document intent and provide a greater chance of that intent being accurately carried out.
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3. Amend Suggested Form Contained in the Uniform Rights of the Terminally Ill Act

The National Conference of Commissioners on Uniform State Laws should give serious consideration to amending the URTIA and its accompanying form.\textsuperscript{222} Rather than suggesting a short biased form, the Commissioners should draft an open-ended and comprehensive form so the living will contains sufficient indication of intent. The Model Health-Care Consent Act should be integrated into the URTIA and the living will form expanded to include a designation of an agent to make health care decisions.\textsuperscript{223}
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1. See Pecquet & French, Helping Your Client With Long-Term Healthcare Decisions, OHIO LAW., Nov./Dec. 1988, at 16, 16 ("Decisions about health care are among the more personal and significant for which an older person can plan.").

2. See, e.g., In re Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435, 442 (1965) (competent adult may refuse life-saving blood transfusion on religious grounds); In re Farrell, 529 A.2d 404, 416 (N.J. 1987) (competent patient may choose to have life-supporting treatment discontinued; patient's "right to live the remaining days of her life as she chose outweighed any interests the state had in compelling her to accept treatment"); In re Conroy, 486 A.2d 1209, 1236 (N.J. 1985) ("competent patient has the right to decline any medical treatment"). See generally Zinberg, Decisions for the Dying: An Empirical Study of Physicians' Responses to Advance Directives, 13 VT. L. REV. 445, 445-47 n.2 (1989) (extensive compilation of authority demonstrating the right of a person to "consent to, or refuse, medical treatment even if his decision seems unreasonable, ridiculous, or life threatening").


4. 3 J. BORRON, PROBATE FORMS MANUAL 125 (Mo. Prac. Supp. 1989). See generally, Comment, Comparison of the Living Will Statutes of the Fifty States, 14 J. CONTEMP. L. 105, 105 (1988) ("Technology in the treatment of illness and injury has advanced so rapidly that life may now be extended far beyond the ability to perform any function normally associated with living or being alive."); Comment, The Living Will: Already a Practical Alternative, 55 TEX. L. REV. 665, 666 (1977) ("Modern technology, however, can also ventilate a corpse or prolong death when life as we know it has long passed."); Note, Equal But Incompetent: Procedural Implementation Of a Terminally Ill Person's Right to Die, 36 U. FIA. L. REV. 148, 149 n.4 (1984) ("Technical advances in medicine now permit maintenance and support of cardiac and respiratory function in man long after massive or even total destruction of the brain occurs."). But cf. Halpern, Twilight Zones, MS., Sept. 1989, at 26 (accounts of individuals in alleged irreversible comas who recovered).

5. See In re Jobes, 529 A.2d 434, 460 (N.J. 1987) ("in some cases treatment to perpetuate life . . . has gone beyond any conceivable medical or moral purpose, its perpetuation offends fundamental sensibilities, and it should stop") (Handler, J., concurring). See generally Marcotte, Wrongful Life, A.B.A. J., Mar. 1990, at 31
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(Ohio man sued hospital for ignoring order not to resuscitate).


7. See infra § B. The term "living will" is used in this Chapter to refer to the document executed under a state's natural death, rights of the terminally ill, health care decision, or related statutes.

8. The person executing a living will is referred to as the declarant.

9. Euthanasia, i.e., affirmative acts to cause a person's death, are not permitted under living will statutes. However, some commentators urge that living will statutes be expanded to permit euthanasia under certain circumstances. See Kutner, Euthanasia: Due Process for Death with Dignity; The Living Will, 54 IND. L.J. 201, 201-28 (1979) (extensive discussion of pros and cons of euthanasia). Kutner suggested an euthanasia form in his article. Id. at 226-27, n.174.

10. See infra § C.

11. See infra § D.

12. See infra § B.

13. See infra § C.


15. Kutner, Due Process of Euthanasia: The Living Will, A Proposal, 44 IND. L.J. 539, 539-54 (1969). This article is frequently cited as the origin of living wills. See, e.g., Comment, Living Wills--A Need for Statewide
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17. Id. (e.g., "document would provide that if the individual's bodily state becomes completely vegetative and it is certain that he cannot regain his mental and physical capacities, medical treatment shall cease"; "document would be notarized and attested to by at least two witnesses").


19. Id. § 7188.

20. Id.

21. Id.

22. Jurisdictions with statutory forms include ALA. CODE § 22-8A-4(c) (1984); ALASKA STAT. § 18.12.010(c) (1986); ARIZ. REV. STAT. ANN. § 36-3202(c) (1986); ARK. STAT. ANN. § 20-17-202(b) & (c) (Supp. 1987) (two forms are provided; one for use when patient is in a terminal condition and another for use when patient is permanently unconscious); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1989); COLO. REV. STAT. § 15-18-104(3) (Supp. 1986); CONN. GEN. STAT. ANN. § 19a-575 (West Supp. 1989); D.C. CODE ANN. § 6-2421(c) (1989); FLA. STAT. ANN. § 765.05(1) (West 1986); GA. CODE ANN. § 31-32-3(b) (1985 & Supp. 1989); HAW. REV. STAT. § 327D-4 (Supp. 1987) (form for physicians' certification of patient's terminal condition also provided; id. § 327D-10(b)); IDAHO CODE § 39-4504 (Supp. 1989); ILL. ANN. STAT. ch. 110½, para. 703(e) (Smith-Hurd 1987 & Supp. 1989); IND. CODE ANN. § 16-8-11-12(b) (Burns Supp. 1988) (form for a life-prolonging procedures will declaration form also provided; id. § 16-18-11-12(c)); IOWA CODE ANN. § 144A.3(3) (West 1989); KAN. STAT. ANN. § 65-28,103(c) (1985); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1989); ME. REV. STAT. ANN. tit. 22, § 2922(4) (Supp. 1988); MD. HEALTH-GEN. CODE ANN. § 5-602(c) (Supp. 1988); 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04); MISS. CODE ANN. § 41-41-107(1) (Supp. 1988) (statute also provides a form for revocation of a declaration; id. § 41-41-109(1)); MO. ANN. STAT. § 459.015(3) (Vernon Supp. 1989) (form also contains a revocation clause); MONT. CODE ANN. 390
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28. To the same effect is the Idaho statute that requires the living will to be either in the statutory form or "in another form that contains the elements set forth in this section." IDAHO CODE § 39-4504 (Supp. 1988).

29. ALASKA STAT. § 18.12.010(c) (1986); ARK. STAT. ANN. § 20-17-202(b) & (c) (Supp. 1987); COLO. REV. STAT. § 15-18-104(3) (Supp. 1986); FLA. STAT. ANN. § 765.05(1) (West 1986); HAW. REV. STAT. § 327D-4 (Supp. 1987); ILL. ANN. STAT. ch. 110½, para. 703(e) (Smith-Hurd 1987); IOWA CODE ANN. § 144A.3(3) (West Supp. 1988); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1989); ME. REV. STAT. ANN. tit. 22, § 2922(4) (Supp. 1988); MO. ANN. STAT. § 459.015(3) (Vernon Supp. 1989); MONT. CODE ANN. § 50-9-103(3) (1987); N.H. REV. STAT. ANN. § 137-H:3 (Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4590h, § 3(d) (Vernon Supp. 1988); VT. STAT. ANN. tit. 18, § 5253 (1987); VA. CODE ANN. § 54.325.8:4 (Supp. 1987); WIS. STAT. ANN. § 154.01(2) (West Supp. 1988) (indicating the declaration "is not limited in form or substance to that provided" by statute).


33. Id. § 44-77-40(1).

34. WIS. STAT. ANN. § 154.03(2) (West Supp. 1988).

35. Id.
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36. See infra § B(3).


38. GA. CODE ANN. § 31-32-3(b) (1985) (amended 1986) (current version only requires living will to be in "substantially" the statutory form and qualifies the clause regarding pregnancy with the phrase "[i]f I am female"). See also Letter from Robert M. Cunningham to Gerry W. Beyer (May 9, 1989) (discussing Georgia living will statute).

39. At least two states have recently amended their statutes to move from a mandatory form to one substantially similar (compare GA. CODE ANN. § 31-32-3(b) (1985) with GA. CODE ANN. § 31-32-3(b) (Supp. 1989)) or one containing the same elements (compare IDAHO CODE § 39-4504 (1985) with IDAHO CODE § 39-4504 (Supp. 1989)).

40. See supra note 22.


42. 1989 Minn. Sess. Law Serv. ch. 3 (West) (to be codified at MINN. STAT. ANN. §§ 145B.01-.17).

43. Id. § 4.

44. CONN. GEN. STAT. ANN. § 19a-575 (West Supp. 1988).

45. IOWA CODE ANN. § 144A.3(3) (West Supp. 1988).


50. Id.

51. Id.


53. UNIF. RIGHTS OF THE TERMINALLY ILL ACT § 2(b) (1985). The operative language of the form is:
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If I should have an incurable or irreversible condition that will cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

54. Id. § 2 (comment).

55. ARK. STAT. ANN. § 20-17-202(b) (Supp. 1987).

56. Id. § 20-17-202(c).


58. Id.

59. Id.


61. UNIF. RIGHTS OF THE TERMINALLY ILL ACT § 6 & comment (1985) (no effect given to living will of a pregnant patient as long as it is probable the fetus could develop to the point of live birth unless living will provides otherwise).


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64. ALA. CODE § 22-8A-4(c) (1984); ARIZ. REV. STAT. ANN. § 36-3202(C) (1986); D.C. CODE ANN. § 6-2422(c) (Supp. 1988); FLA. STAT. ANN. § 765.05(2) (West 1986) (designation of agent to make treatment decisions given as example of a specific direction); HAW. REV. STAT. § 327-4 (Supp. 1987); ILL. ANN. STAT. ch. 110½, para. 703(e) (Smith-Hurd 1987); IND. CODE ANN. § 16-18-11-12 (Burns Supp. 1988); KAN. STAT. ANN. § 65-28,103(c) (1985); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1989) (designation of agent to make treatment decisions given as example of a specific direction); MD. HEALTH-GEN. CODE ANN. § 5-602(c)(2) (Supp. 1988); MO. ANN. STAT. § 459.015(3) (Vernon Supp. 1989); N.D. CENT. CODE § 23-06.4-03(d) (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 4590h, § 3(e) (Vernon Supp. 1988) (designation of agent to make treatment decisions given as example of a specific direction); VA. CODE ANN. § 54.325.8:4:1 (Supp. 1987) (designation of agent to make treatment decisions given as example of a specific direction); WASH. REV. CODE ANN. § 70.122.030(1) (Supp. 1989); W. VA. CODE § 16-30-3(d) (1985); WIS. STAT. ANN. § 154.01(2) (West Supp. 1988) (living will "not limited in form or substance to that provided" by statute); cf. TENN. CODE ANN. § 32-11-105 (Supp. 1988) (living will must be "substantially" in statutory form "but not to the exclusion of other written and clear expressions of intent to accept, refuse, or withdraw medical care"); WYO. STAT. § 35-22-102(d) (1988) (form does contain place to designate agent to make treatment decisions).

65. ALASKA STAT. § 18.12.010(c) (1986).


68. See § C.


70. Id.

71. Id.


74. Id. If the person is physically unable to execute a revocation form, other revocation methods may be used.
such as a clear oral expression that revocation is desired.  Id. § 41-41-109(3).


76. Id. Other revocation methods are also allowed.  Id. § 459.020.

77. IND. CODE ANN. § 16-18-11-12(c) (Burns Supp. 1988).

78. Id.


80. Id.

81. N.D. CENT. CODE § 23-06.4-03(b) (Supp. 1989).

82. Id.

83. Id.


85. Id.

86. Id.

87. See generally supra note 22.

88. HAW. REV. STAT. § 327D-10 (Supp. 1987).


90. ARK. STAT. ANN. § 20-17-202(b) (Supp. 1987); DEL. CODE ANN. tit. 16, § 2502(b) (1983); FLA. STAT. ANN. § 765.05(2) (West 1986); IDAHO CODE § 39-4504 (Supp. 1988); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1989); 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04); TEX. REV. CIV. STAT. ANN. art. 4590h, §§ 3(e) & 4B (Vernon Supp. 1988); VA. CODE ANN. § 54.325.8:4 (Supp. 1987); WYO. STAT. § 35-22-102(d) (1988).  Cf. IND. CODE ANN. § 16-8-11-14(g)(2) (Burns Supp. 1988) (reference for attending physician to consult with person designated in writing to make a treatment decision); IOWA CODE ANN. § 144A.7 (West Supp. 1988) (in absence of living will, consent of attending physician and attorney in fact designated to make treatment decisions may cause life-sustaining procedures to be withheld or withdrawn from a patient who is in a terminal condition and is incapable of communication).
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91. ARK. STAT. ANN. § 20-17-202(b) (Supp. 1987); IDAHO CODE § 39-4504 (Supp. 1988) (form also provides blank space for proxy's address); 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04) (form also provides blank spaces for proxy's address, telephone number, relationship, and the nomination of an alternate proxy); WYO. STAT. § 35-22-102(d) (1988).


93. Id.

94. Id.

95. Id.

96. Id.


98. See Jacobs, Possible Uses of the Durable Power of Attorney, 7 PROB. L.J. 7, 24-25 (1985) (also citing other reasons such as delegation being a significant expansion of present law, historical use of powers of attorney in financial contexts, and availability of living wills to deal with the issue). See generally Moore, The Durable Power of Attorney as an Alternative to the Improper Use of Conservatorship for Health-Care Decisionmaking, 60 ST. JOHN'S L. REV. 631, 654-57 (1986) (discussion of ability to delegate health care decisions focusing on development of law in New York).


100. MODEL HEALTH-CARE CONSENT ACT (1982).

101. Id. comment § 6 and prefatory note. The Commissioners noted that the appointor may want the delegation to take effect while competent or only upon disability.
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102. Id. § 6.

103. Id. § 6(c).

104. Id. comment § 6.

105. Id.

106. IND. CODE ANN. §§ 16-8-12-1 to -12 (Burns Supp. 1988).

107. Id. § 16-8-12-6 (e.g., appointment may be signed by a designee in the appointor's presence; appointment has no effect until appointor becomes incapable of consenting).


112. UTAH CODE ANN. § 75-2-1106 (Supp. 1989).

113. Id.

114. Id.

115. Id.


117. CAL. CIV. CODE § 2503 (West Supp. 1988) (exact wording of certain provisions mandatory); R.I. GEN. LAWS § 23-4.10-1 (Supp. 1988) (statutory form "shall not be altered in any manner and shall preclude the use of any other form").
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119. IDAHO CODE § 39-4505 (Supp. 1988) (authorizing use of "any other form which contains the elements set forth in the [statutory] form"); ILL. ANN. STAT. ch. 110½, para. 804-1 (Smith-Hurd Supp. 1988) (statutory form "is not intended to be exclusive" and other forms "may offer powers and protection similar to the statutory short form" as long as they comply with the statute).

120. CAL. CIV. CODE § 2503(a)(2) (West Supp. 1988) (provisions regarding designation of health care agent; creation of DPAHC; general statement of authority granted; and statement of desires, special provisions, and limitations).

121. Id. § 2503(b) (provisions regarding inspection and disclosure of information relating to physical or mental health; signing documents, waivers, and releases; autopsy, anatomical gifts, disposition of remains; duration; designation of alternate agents; nomination of conservator of the person; and revoking prior designations).

122. Id. § 2503(c) (separate explanatory materials or properly formatted additional pages are permitted).


124. See supra note 123.


126. CAL. CIV. CODE § 2433(a) (West Supp. 1988).

127. Id. § 2433(c).


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131. See, e.g., CAL. CIV. CODE § 2500 (West Supp. 1988) (in section designating health care agent, instructions given to insert name, address, and telephone number of one person to make health care decisions followed by list of those individuals prohibited from serving); IDAHO CODE § 39-4505 (Supp. 1988) (statement that additional pages of instructions may be included and if so, that each must be signed and dated at the same time as the DPAHC form); R.I. GEN. LAWS § 23-4.10-2 (Supp. 1988) (explanation of reasons to appoint alternate health care agents).

132. See supra § D(1).


140. Id.
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142. CAL. CIV. CODE § 2500 (West Supp. 1988) (clause 8; if no specific duration stated, DPAHC expires after seven years from date of execution); ILL. ANN. STAT. ch. 110½, para. 804-10 (Smith-Hurd Supp. 1988) (clause 4); NEV. REV. STAT. ANN. § 449.830 (Michie Supp. 1988) (clause 5; continues indefinitely unless time stated); R.I. GEN. LAWS § 23-4.10-2 (Supp. 1988) (clause 7; if no specific duration stated, DPAHC expires after seven years from date of execution); TEX. REV. CIV. STAT. ANN. art. 4590h-1, § 16 (Vernon Supp. 1990) (continues indefinitely unless time stated).

143. See supra Chapter VI(C)(1).


148. See supra §§ B(1) & D(1).


152. Id. See also Klutch, Survey Results After One Year's Experience With the Natural Death Act, 128 W.J. MED. 329, 330 (1978) (speculating one year after enactment of living will statutes that "perhaps only a small
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...percentage of the population has as yet signed a Directive.


155. See, e.g., Coleman, New Issues Sidetrack Living Wills, AARP NEWS BULL., Feb. 1989, at 1; D. MCCONAUGHEY, WILLS: THE TRUTH ABOUT PROBATE 191-97 (1984). Letter from Abigail Van Buren to Charles R. Adams, III (July 24, 1984), cited in Adams & Adams, An Overview of Georgia’s Living Will Legislation, 36 MERCER L. REV. 45, 46 (1984) ("[e]very time the Living Will is mentioned in my column the response from readers is overwhelming. My mail triples from 10,000 letters a week to 30,000! In fact, this is by far the most popular issue in my column and keeps gathering momentum."); MN Passes 40th Living Will Law, CONCERN FOR DYING NEWSL., Spring 1989, at 2, 2 ("In recent months, media interest in the Living Will has generated thousands of telephone calls and letters to [Concern for Dying’s] New York office - yet another clear indication that the concept of an advance directive for..."
medical treatment decisionmaking is indeed a mainstream American concern.

156. See Medical Ethics Committee of the Vermont State Medical Society, Taking Steps to Plan for Critical Health Care Decisions (1987) (endorsed and distributed by Vermont Bar Association, includes living will and DPAHC forms); WIS. STAT. ANN. § 154.03(2) (West Supp. 1988) (department of health and social services to distribute copies of living will form, in quantity, to local bar associations).

157. Concern for Dying: The Educational Council for the Living Will, 250 West 57th Street, Room 831, New York, NY 10107 (publishes Concern for Dying Newsletter); Society for the Right to Die, 250 West 57th Street, New York, NY 10107.

158. Klutch, Survey Results After One Year's Experience With the Natural Death Act, 128 W.J. MED. 329, 329-30 (1978).

159. Id. at 329.

160. Id.

161. Id.

162. Id.

163. Id. at 330.

164. Id.


166. Id. at 924-25.

167. Id. at 925-26 (284 questionnaires were actually returned but nine were not analyzed because they were from doctors who did not specialize in terminally ill patients).

168. Id. at 931.

169. Id. at 938.

170. Id.

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175. Id. at 472 (all interviewees aware of living wills; 26% of California interviewees aware of DPAHC).

176. Id. at 473-74 (39% of Vermont interviewees and 44% of California interviewees had treated patients with living wills).

177. Id. at 473-74.

178. Id. at 474.

179. Id. at 475.

180. Id. at 484.

181. Id. at 485.

182. Id. at 485-86.

183. Id. at 486.


186. Id.

187. Id.
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188. Id. at 926.
189. Id.
191. Id. at 512.
192. Id. at 517.
193. Id.
195. Id. at 264-65.
196. Id. at 265.
198. See supra § B(1).
199. See supra § D(1).
201. See ILL. ANN. STAT. ch. 110 1/2, para. 804-1 (Smith-Hurd Supp. 1988) (although statute does not mandate use of form, Illinois legislature recognized that statutory forms of DPAHC are "to insure their validity and efficacy").
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206. See supra § B(3).

207. See supra § D(4).

208. ILL. ANN. STAT. ch. 110½, para. 804-1 (Smith-Hurd Supp. 1988). Legislative intent in other states is similar. See, e.g., ALA. CODE § 22-8A-1 (1984) ("adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care"); GA. CODE ANN. § 31-32-1 (1985) (desire to protect individual autonomy); N.H. REV. STAT. ANN. § 137-H:1 (Supp. 1988) ("a person has a right, founded in the autonomy and sanctity of the person, to control the decisions relating to the rendering of his own medical care").

209. See supra § B(2).

210. See supra § D(3).

211. See supra notes 22 & 116.

212. One non-form issue deserves special mention - of what effect is a living will executed under the laws of one state when the declarant is a patient in another state? This conflicts of law question is extremely important because of the highly mobile nature of our society and needs a comprehensive solution.

213. See generally Comment, The Living Will: Already a Practical Alternative, 55 TEX. L. REV. 665, 707 (1977) (living will forms as they existed in 1977 "too vague to offer practical protection").

214. See Coleman, New Issues Sidetrack Living Wills, AARP NEWS BULL., Feb. 1989, at 1, 8 quoting David O'Steen, executive director of the National Right to Life Committee ("living will laws are so slanted to non-treatment and death that they are fraught with danger").

215. See Ahrens, Practitioners Update, 1988 ADVANCED EST. PLAN. WORKSHOP (VERMONT) 3 (recommending alterations of statutory form to fit desires of different individuals).

216. See supra § B(3).

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218. Id. (clauses 1-7).


220. See supra § C.

221. See supra § D.

222. See generally Chapman, The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?, 42 ARK. L. REV. 319, 384-93 (1989) (suggesting three shortcomings of URTIA:

(1) the failure to provide a mechanism for the appointment of a proxy decision-maker for health-care purposes; (2) the lack of procedures governing non-terminal, permanently unconscious patients; and (3) the failure to establish a decision-making process for the abatement of medical treatment on behalf of the patient who lacks decisional capacity and who has neither executed a valid treatment directive nor appointed a health-care proxy.).

223. See generally id. at 391-92 ("The failure of the URTIA to expressly authorize the execution of a health-care directive was extremely shortsighted.").
CHAPTER VIII
OTHER STATUTORY
ESTATE PLANNING FORMS

A. SELF-PROVING AFFIDAVITS

1. Introduction

The probate of a will is frequently a cumbersome procedure involving a significant expenditure of time, effort, and money. One of the first steps to probate or prove a will is for the will proponent to demonstrate the will's validity to the court. A typical part of this hearing is the offering of the testimony of the individuals who attested to the will. Difficulties may arise if the witnesses have died or are difficult to locate because they have moved or changed their names. Additionally, many years may have passed from the date when the will was executed making it unlikely that the witnesses have accurate and comprehensive recollections of what occurred during the ceremony. As one commentator stated, "[a] procedure that contemplates producing witnesses to answer questions about acts that may have occurred years or even decades earlier is obviously burdensome, inefficient, and unreliable."\

To address these problems, many jurisdictions have authorized the use of a self-proving affidavit; a notarized statement made by the testator and the witnesses in which they swear that the requirements of due execution have been
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satisfied. If such an affidavit exists, the will may be admitted to probate without hearing the testimony of the subscribing witnesses and without additional proof that the required will formalities were satisfied. The affidavit does not prevent the will from being contested but it does significantly accelerate the probate process in the vast majority of uncontested cases.

New York was the first state to authorize self-proving affidavits. New York's pioneering legislation permitted each witness to execute an affidavit "setting forth such facts as he would be required to testify to in order to prove such will." In addition, medical examiners could certify "that the maker of said will was of sound mind at the time of its execution." These affidavits could be written on the will itself or attached thereto and then filed with the will under New York's then existing deposit of wills procedure.

Despite the benefits of a self-proved will, this technique did not immediately gain widespread acceptance. In 1932, West Virginia passed a procedure similar to New York's and several other states followed suit in the 1950's. The Uniform Probate Code, which was approved in 1969 by the National Conference of Commissioners on Uniform State Laws, provided for self-proving affidavits. This approval is credited as the event which merged self-proving affidavits into the mainstream of estate planning techniques. Today, over forty states have adopted some type of self-proving procedure.
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The enabling legislation for the first self-proving affidavits, as well as the 1969 version of the Uniform Probate Code, envisioned a two-step process. First, a valid will was necessary, i.e., a will that had already been properly executed by the testator and attested to by the witnesses. Second, the affidavit would be completed verifying that the will was properly executed and attested. As a result, a will would appear to have two sets of identical signatures; one set on the will and one set on the self-proving affidavit. This duality often led to problems when the testator or the witnesses signed the self-proving affidavit but did not sign the will. Despite clear indications of testamentary intent, some courts held that the misplaced signatures caused wills to fail for lack of execution or lack of attestation. Because wills and self-proving affidavits were considered as distinct documents, signatures on the self-proving affidavits could not substitute for missing signatures on the wills.

The enactment of this two-step approach, coupled with the rigid adherence to formalities demonstrated by many courts, led to the frustration of the intent of many testators. Rather than permitting decedents' property to pass under documents that the decedents clearly endorsed as their wills, misplaced signatures caused estates to be distributed under state laws of intestate succession. The unfairness of this result led to the development of a one-step approach to create self-proved wills.
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Many jurisdictions, as well as the Uniform Probate Code, now authorize the use of a one-step procedure in which the "will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses." At least one state has also passed a savings statute providing that unexecuted or unwitnessed wills that contain the appropriate signatures on the self-proving affidavit do not fail on the grounds of improper execution or attestation.

2. Statutory Self-Proving Affidavit Forms

Over 80% of the jurisdictions authorizing self-proved wills have enacted statutory fill-in-the-blank forms for the self-proving affidavit. The forms reflect that particular state's approach to self-proving affidavits; if the state authorizes only the two-step procedure, only a two-step form is provided; if the state permits both the two- and one-step methods, both forms are supplied. The Uniform Probate Code contains both types of forms reflecting its approach of providing the testator with a choice of self-proof methods.

Self-proving affidavit forms are remarkably similar between the states; only slight variations exist. The enabling legislation typically mandates that the self-proving affidavit be substantially in the statutory form, both in content and format. A few states, however, depart from this norm in several respects. For example, the New Hampshire self-proving affidavit must be in the statutory form; no
deviation appears to be contemplated. In addition, the New Hampshire affidavit does not have to be signed by the testator or the witnesses but only by the officer administering the oath and taking their testimony.

The South Carolina self-proving statute permits the greatest deviation from the statutory forms because it authorizes the use of "similar form[s] showing the same intent." South Carolina's self-proving provisions are unusual because only one witness needs to sign the self-proving affidavit, be it one-step or two-step. This provision may result from the practice of using a notary as one of the witnesses to the will and then having that notary complete the self-proving affidavit. In other states, however, this technique would not work because the notary could not notarize his or her own signature. The statute supports this theory because it provides that "[a] witness ... who is also an officer authorized to administer oaths ... may notarize the signature of the other witness of the will." Permitting the notary to double as a witness results in one less person being involved in the will execution ceremony.

Pennsylvania's self-proving procedure also lessens the number of people required to be present during the will execution ceremony. An attorney, even though not a notary, may sign the testator's acknowledgment and the witnesses' affidavit. When this procedure is used, however, an additional step is required. The attorney must certify to a
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notary that the testator's acknowledgment and the witnesses' affidavit were signed in the presence of the attorney. The form for the attorney's certification is provided by the Pennsylvania statute.

3. Analysis and Recommendations

Self-proved wills have tremendous advantages; they permit wills to be probated with greater efficiency and with less expense because the need to bring the attesting witnesses to court in uncontested cases is obviated. The states without self-proving procedures should provide this simple technique for their citizens. The states that approve only a two-step self-proved will should follow the Uniform Probate Code's example and permit a one-step procedure to reduce the chance of a will failing for lack of proper execution or attestation although the affidavit contains the necessary signatures. At a minimum, any statutory two-step form should include a conspicuous provision warning that merely signing the affidavit is insufficient as an execution or attestation of the will. The states that authorize self-proved wills but do not provide a statutory form should seriously consider enacting one to make it easier for their citizens to know that the affidavit is properly drafted and to be certain of its effect.

Caution needs to be exercised when using a self-proving affidavit in a state supplying a statutory form. Although most states indicate that the affidavit only has to be
"substantially" in the suggested form, at least one court has taken a dim view of any deviation. In the Texas case of Cutler v. Ament, the jurat on the self-proving affidavit stated that the testatrix had sworn before a notary and that the attesting witnesses had subscribed and acknowledged. The Texas statute, however, provides that the testator subscribes and acknowledges while the witnesses subscribe and swear. The court held that the clerical error of transposing the two phrases was sufficient to make the self-proving affidavit defective. Nonetheless, the validity of the will was unaffected; the proponent simply had to probate the will as an ordinary attested will that was not self-proved.

Self-proving affidavit forms provide for no individualization beyond blank spaces for the insertion of the testator's and the witnesses' names. Unlike many of the other forms discussed in this dissertation, however, the lack of individualization is not a shortcoming. The forms merely recite the items that state law requires for an effective self-proving affidavit. Most of the forms are written in the masculine gender. Writing the forms in gender neutral language would eliminate the need for the practitioner to maintain two sets of self-proving forms and the problems that may arise if the wrong gender form is used.

4. International Will Certificates

In October 1973, the International Institute for the Unification of Private Law (UNIDROIT) approved the text of a
convention that specified the formalities of a valid international will. The purpose of this convention was "to provide testators with a way of making wills that will be valid as to form in all countries joining the Convention." The convention blends elements of common law and civil law in mandating the requirements that must be satisfied for a will to be in proper form. Although a detailed discussion of these requirements is beyond the scope of this section, attention must be given to the certificate that is executed to establish that the requirements of the convention have been satisfied.

The convention contains the text of the certificate which serves the function of a self-proving affidavit, that is, "[i]n the absence of evidence to the contrary, the certificate of the authorized person [is] conclusive of the formal validity of the instrument as a will." The Deputy Secretary-General of UNIDROIT, Jean-Pierre Plantard, stated that "[i]ncluding the form of a certificate in one of the articles of a Uniform Law is unusual. . . . However, in this way, the authors of the Uniform Law underlined the importance of the certificate and its contents." Only minor deviations are permitted by the convention; the certificate must be in the provided form or one that is substantially similar. Plantard remarked on the "substantially similar" language as follows:

This last phrase could not be taken as authorising [the authorized person] to depart from this form; it only serves to allow for small changes of detail which might be useful in the interests of improving its comprehensibility or presentation,
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for example, the omission of the particulars marked with an asterisk indicating that they are to be completed where appropriate when in fact they do not need to be completed and thus become useless.48

To fulfill the purpose of the convention, the National Conference of Commissioners on Uniform State Laws approved the Uniform International Wills Act (UIWA) in 1977.49 The UIWA closely tracts the convention, including the recommendation of a statutory fill-in-the-blank form for the international will certificate. The certificate provides blank spaces for basic information such as the name, address, and capacity of the person authorized to execute the certificate (typically an attorney), the date and location of the will execution, and the names, addresses, and dates of birth of the testator and the witnesses.50 If the testator is using a proxy to sign the will, the authorized person must also indicate the reason the testator was unable to sign the will and the name and address of the proxy.51 In addition, the certificate must contain the name of the person (testator or proxy) who signed each page of the will as well as any statements that the testator made to the authorized person concerning the will’s safekeeping.52

Five states have enacted the UIWA53 and each state has included a statutory international will certificate form.54 The forms are copied practically verbatim from the convention/UIWA form. The variations that exist are slight such as the gender-neutral changes made by Minnesota55 and North Dakota’s elimination of numbered paragraphs in favor of non-numbered narrative paragraphs.56

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B. ANATOMICAL GIFTS

1. Introduction

Regardless of financial situation, everyone has extremely valuable assets which can be transferred at death, namely one's own body and its parts. "Tissues and organs from the dead can . . . be used to bring health and years of life to the living." As part of a comprehensive estate plan, each person needs to decide whether to make a donation of his or her entire body or of specific organs. Many people will find organ donation an exciting prospect because a high degree of self-satisfaction can come from the knowledge that their anatomical gift may enhance or save lives directly by providing a person with a needed organ, or indirectly by providing a body part needed to facilitate medical research, therapy, and education. In addition, organ donations "that provide[] life to others who might otherwise have died help [individuals] cope with the grief of losing a family member." Some people, however, consider the use of their dead body for such purposes to be distasteful or contrary to their religious beliefs. As one person has written, "I consider my body as the temple that God built to house my soul. It was not meant to be cut to pieces at death as if it were a non-living thing."

Although "[b]ones were transplanted as early as 1878 [and] cornea transplants become common in the 1940s," it was not until the 1950's after the first successful kidney
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transplant was performed that the need to enact laws dealing with organ donations became apparent. The laws initially enacted were a "confusing mixture of old common law dating back to the seventeenth century and state statutes." The failure of then existing law to govern anatomical gifts uniformly and comprehensively led to the approval in 1968 of the Uniform Anatomical Gift Act (UAGA) by the National Conference of Commissioners on Uniform State Laws. The American Bar Association immediately added its endorsement and within five years all fifty states and the District of Columbia substantially adopted the UAGA. In 1987, the Commissioners approved a revised version of the UAGA which, inter alia, simplified the method of making an anatomical gift and made it more likely that the donor's intentions would be carried out.

Neither the 1968 nor the 1987 UAGA contain statutory fill-in forms that a person may use to make anatomical gifts. However, suggested forms were provided in the comments to the 1968 UAGA for anatomical gifts by a living donor and for anatomical gifts by the donor's next of kin or other authorized person. The drafters believed it would "prove helpful if the forms by which gifts are made are similar in each of the participating states." They also urged that the forms "be as simple and understandable as possible." Despite the drafters' seeming approval of statutory forms, they neglected to include statutory forms in the 1987 revision of the UAGA. Instead, the drafters continued the practice of
merely suggesting forms in the comments. They provided revised forms for anatomical gifts by a living donor, anatomical gifts by the donor's next of kin or guardian of the person, and a new form to attach to the donor's driver's license. These forms will be included in the review of statutory anatomical gift forms even though they are not statutory forms.

2. Statutory Anatomical Gift by a Living Donor Forms

Ten jurisdictions have enacted living donor anatomical gift forms. Most of these forms are modeled after the form suggested by the 1968 UAGA. This section examines these forms, focusing on the extent to which they must be used to be legally effective and the degree to which they permit donors to provide individualized instructions. Other aspects of the forms that deal with the specifics of state law concerning the necessary formalities, such as whether witnesses are required, are beyond the scope of this discussion.

a. Optional vs. Mandatory Use of Statutory Form

The majority of jurisdictions providing statutory anatomical gift by a living donor forms do not require that the form be used; the form is optional or supplied only as an example of a form meeting all of the statutory requirements. A few states, however, mandate that the anatomical gift document "conform substantially" to the statutory form.
b. Choice of Items Donated

All but one of the living donor statutory forms provide the donor with the opportunity to choose between three types of gifts: the entire body, any needed organs or parts, or particular organs or parts specifically listed by the donor.\(^{79}\) The donor indicates his desires by checking a box or making a mark on a line in front of the appropriate gift language.\(^{80}\)

The Mississippi form, unusually titled as a "Certificate of Authorization for Post-Mortem Study and Examination or Removal of Tissues or Organs," departs significantly from the forms of other jurisdictions.\(^{81}\) The donor is confronted with blank lines on which to indicate the nature of the anatomical gift, i.e., specific organs or the entire body. No suggested language or alternatives are provided to assist the donor in making a decision. The donor may need to make three separate notations of the donated items: in the introductory paragraph, in the paragraph relating to organ gifts to specific individuals, and in the provision authorizing removal and preservation of the gift.\(^{82}\)

The 1987 UAGA form no longer provides the donor with the opportunity to make a gift of his entire body.\(^{83}\) The drafters recognized that a gift of the entire body is permissible under the UAGA but felt that such a provision was improper for a suggested form because a gift of one's entire body for anatomical study "usually requires an agreement with a medical school before a gift is made."\(^{84}\)
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c. Choice of Donee

There is considerable variation between the statutory forms concerning the ability of the donor to specify the particular donee of the anatomical gift. Several forms follow the lead of the 1968 UAGA by allowing the donor to choose between the following potential donees: the physician in attendance at the donor's death; the hospital in which the donor dies; a specifically named physician, hospital, storage bank or other medical institution; or a specifically named person for treatment.85

Most states, as well as the 1987 UAGA, do not provide the donor with the opportunity to specify a specific donee.86 As a result, any available donee under the enabling legislation may receive the gift.87 Non-donee specific forms may reflect a recognition of the difficulty a donor encounters in specifying a proper donee "[b]ecause of the medical crisis situations under which most transplants take place, it is normally impossible to ascertain an ultimate donee prior to the donor's death."88

A similar philosophy is demonstrated in the Mississippi form, despite the significant difference in its approach.89 Instead of being silent about the identities of potential donees, the form provides an extensive list.90 The donor is not allowed to alter the list other than to include the name of a specific person to receive a specific organ.91 By signing the form, the donor is aware that the gift may be accepted by
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a wide variety of donees, such as hospitals, physicians, medical schools, and organ storage banks.92

d. Choice of Purpose

Statutory forms use several methods that allow the donor to indicate the purposes for which the anatomical gift may be used. The form suggested by the 1968 UAGA,93 as well as the statutory forms of several states,94 provide the donor with purpose options. These choices include: any purpose authorized by law; transplantation; therapy; research; and medical education.95 Most states, however, do not provide the donor with a choice; boilerplate language states that the anatomical gift may be used for any legal purpose such as transplantation, therapy, medical research, and education.96

The 1987 UAGA takes a different approach to the donor's ability to specify the purpose of the anatomical gift.97 The form provides the donor with a blank space to indicate the purposes of the gift.98 Beneath the blank, suggestions are made such as transplant, therapy, research, and education.99 The instructions accompanying the form explain that the donor's failure to indicate the purpose of the gift will result in an unrestricted gift; that is, the gift may be used for any legal purpose.100

e. Opportunity to Provide Special Instructions

Many forms provide the donor with space to indicate special instructions and limitations.101 This technique provides the donor with the opportunity to individualize the
anatomical gift even though other parts of the form may restrict the donor's ability to name a donee or specify purposes.

f. Driver's License Forms

Time is a very critical element regarding anatomical gifts. Organs such as kidneys and hearts must be promptly removed and eyes need to be enucleated within four to six hours of death.\textsuperscript{102} In recognition of the importance of promptly ascertaining a person's wishes concerning anatomical gifts, a prospective donor is well-advised to carry a donation document at all times. A frequently used method to accomplish this purpose is the placement of a donation form on a person's driver's license.\textsuperscript{103}

At least two states have statutory forms designed specifically for inclusion on driver's licenses or other identification cards.\textsuperscript{104} These forms are very short and provide for little individualization because they must fit on a document often no larger than 3¼" x 2".\textsuperscript{105} For example, the Colorado form provides the donor with two choices: to donate any needed organ or only those specifically listed.\textsuperscript{106} The Ohio form not only provides these choices but also a blank to name the donee.\textsuperscript{107} The 1987 UAGA also suggests a driver's license form which is essentially the same as the normal living donor form; the donor may elect to donate any needed organs, tissue or parts, or only the items specifically listed, and to declare the purpose of the anatomical gift.\textsuperscript{108}
g. Forms for Minor Donors

Several jurisdictions permit minors to make anatomical gifts provided they have parental consent.\textsuperscript{109} Delaware is the only state to provide a statutory form for use by a minor.\textsuperscript{110} The form is substantially identical to the form supplied for adult donors in that it gives the minor the choice of items donated, donee, and purposes for which the gift may be used.\textsuperscript{111} The only significant difference is the form's provision for the parent's signature granting permission for the minor to make the anatomical gift.\textsuperscript{112}

h. Refusal Forms

Polls reveal that approximately 25\% of those people questioned do not approve of organ donation.\textsuperscript{113} Many individuals who support the idea of organ donation do not execute anatomical gift documents because they fear that a doctor may hasten death to harvest the organ or harvest before death has actually occurred.\textsuperscript{114} Individuals who do not wish to make anatomical gifts may believe that their failure to make a gift will be interpreted as disapproval. This is, however, not the case. Unless there is appropriate evidence of a person's contrary intent, family members may make a gift of the donor's organs.\textsuperscript{115} Thus, it is of vital importance for a person opposed to anatomical gifts to make his or her intent widely known.

No state has, to date, enacted an "anti-anatomical gift" form. However, the 1987 UAGA suggests two forms which permit
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individuals to refuse to make anatomical gifts. The first form is an express refusal form.\textsuperscript{116} This form is extremely short; it states that "[p]ursuant to the Anatomical Gift Act, I hereby refuse to make any anatomical gift."\textsuperscript{117} The second form is the standard donor form that may be attached to driver's licenses; the last option on the form is an express refusal to make an anatomical gift.\textsuperscript{118}

3. Statutory Anatomical Gift by a Third Party Forms

A deceased person's next of kin are authorized to donate the deceased's organs or body.\textsuperscript{119} This donation method is commonly used and some studies have found "that Americans are more likely to donate the organs of a loved one than to donate their own."\textsuperscript{120} The reason for this may reflect the belief that "relatives would give permission only after death was unavoidable [and thus ensure that] physicians would not give up too early in their efforts to treat the donor."\textsuperscript{121}

Three states have enacted statutory forms for anatomical gifts by next of kin based on the form recommended in the 1968 UAGA.\textsuperscript{122} These forms provide check boxes or blanks for the survivor to indicate his relationship to the deceased, the items donated, the donee, and the purpose of the gift.\textsuperscript{123} The Ohio form also provides the survivor with the opportunity to state how the body is to be disposed of after the donated organs or parts are removed and to indicate the person financially responsible for its disposition.\textsuperscript{124} A similar form is suggested by the 1987 UAGA.\textsuperscript{125} The new form is shorter;
there is no space for the designation of a donee and a choice of purposes is not provided. Instead, the survivor is given the opportunity to specify the purposes for which the gift may be used.

4. Analysis and Recommendations

The public policy favoring anatomical gifts is clear; donations of organs, tissues, and entire bodies have demonstrated value for transplantation, research, therapy, and education. The legislatures of each state, the District of Columbia, and the Virgin Islands have enacted either the 1968 or the 1987 version of the UAGA. There is great public awareness of a person's ability to make anatomical gifts as reported in a 1985 Gallup poll. This poll found that 90% of the respondents were familiar with organ transplantation and that about 75% approved of organ donation. Nonetheless, "most Americans have not filled out organ donor forms." Nonetheless, "most Americans have not filled out organ donor forms." What has prevented Americans from taking positive steps to do something of which they so highly approve? One possibility is the lack of statutory anatomical gift forms - only ten jurisdictions have such forms. The availability of a legislatively sanctioned form could increase the number of donors. The failure of most states to have statutory donor forms is, however, unlikely to be the primary reason few people make anatomical gifts because the forms are widely available from other sources. Instead, a mistrust of the medical profession appears to be the major cause. People
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fear that a doctor may rush the moment of death to obtain an organ needed for transplantation. At least one commentator has suggested that organ donations should be made by an agent under a durable power of attorney.

State legislatures should continue to encourage anatomical gifts. Statutory donor forms are at least slightly beneficial in providing easy access to the method of making donations. The appropriate structure of the forms is debatable. If the form is brief so it may easily be carried and thus more likely to be found when needed, the ability for individualization is reduced. A longer form, however, stands a good chance of not being located until it is too late for many organs to be used for transplantation. The best compromise is a relatively short form that may easily be carried and that provides for some customization, such as the driver's license form suggested by the 1987 UAGA. The form should also give the user the option of refusing to make an anatomical gift. Despite the laudable social policy favoring organ donations, forms should remain neutral to heighten the chance of a person's true intent being effectuated.

Legislatures should also seriously consider giving the principal the option to delegate the authority to make anatomical gifts in their durable power of attorney forms. Likewise, the Uniform Statutory Form Power of Attorney Act should be amended to include anatomical gifts in the itemized list of powers a principal may elect to delegate. One commentator has opined that "[i]f people were given the option
of using such a durable power of attorney for organ donation instead of a donor card, efforts to educate the public about the need for organs might produce more organs." California has taken the lead by expressly providing the agent with the power to make anatomical gifts in the boilerplate language of its durable power of attorney for health care statutory form. California's approach may go too far, however, because it does not give the principal the option of making the delegation.

C. MARITAL PROPERTY AGREEMENTS

Wisconsin was the only state located that provides statutory fill-in-the-blank forms for marital property agreements. Two forms are available for use by spouses or persons intending to marry; one to treat presently owned and future acquired property as marital property, and the other to treat marital property as the individual property of the owner. The language of these property agreements must be identical to the language in the statutory form. Slight deviation in the form's set-up is permitted, however, because the format needs only to be "substantially" as laid out in the statute.

The Wisconsin forms are lengthy and consist mainly of warnings, explanations, and instructions. Because no discretion exists to change the form's wording, the spouses only need to read the form and insert simple information such as their names and addresses. The form also contains
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appropriate provisions for authentication and acknowledgment of each spouse's signature as well as a revocation provision. If the spouses wish the agreement to be effective for longer than three years, an extensive financial disclosure form must also be completed. The disclosure form requires the spouses to list all of their individual and joint assets, obligations, and annual compensation.

The Wisconsin statutory marital property agreement forms are an attempt to standardize how spouses contractually alter the character of their property. The forms reflect a compromise between allowing spouses the freedom to contract as they wish and the policy of protecting one spouse from overreaching by the other spouse. Because these forms have only been effective since May 3, 1988, there is little evidence of their actual use.
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3. See infra note 15.


5. See, e.g., ARIZ. REV. STAT. ANN. § 14-3406(B) (1975); FLA. STAT. ANN. § 733.201(1) (West 1976); GA. CODE ANN. § 53-3-9(c) (Supp. 1988); UNIF. PROB. CODE § 3.406(b) (1987).

6. See, e.g., TEX. PROB. CODE ANN. § 59 (Vernon 1980) ("self-proved will may be contested . . . in exactly the same fashion as a will not self-proved"); Cavers, Ante Mortem Probate: An Essay in Preventive Law, 1 U. CHI. L. REV. 440, 449 n.29 (1934) (discussion of negligible effect of self-proving affidavits on preventing will contests); Schneider, Self-Proved Wills -- A Trap for the Unwary, 8 N. KY. L. REV. 539, 542 (1981) (most usual challenges to will's validity remain such as undue influence, fraud, forgery, and lack of testamentary capacity).


9. Id.

10. Id.

REV. 440, 449 n.29 (1934) (West Virginia procedure did not require a deposit of the affidavits).


17. See, e.g., Boren v. Boren, 402 S.W.2d 728 (Tex. 1966) (signatures of witnesses on self-proving affidavit did not remedy lack of witnesses' signatures on will despite clear intent for document to be a will); Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983) (will invalid where witnesses did not sign will but only signed self-proving affidavit
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despite fact that end of will and self-proving affidavit were on the same page); Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985) (will invalid where testator did not sign will but merely signed the self-proving affidavit); In re Estate of Sample, 572 P.2d 1232 (Mont. 1977) (will invalid because witnesses signed self-proving affidavit but not will). But see, e.g., In re Estate of Cutsinger, 445 P.2d 778 (Okla. 1968) (treated witnesses' signatures which were on self-proving affidavit but not will as sufficient attestation); In re Estate of Charry, 359 So. 2d 544 (Fla. Dist. Ct. App. 1978) (express rejection of Texas approach as reflected in Boren decision); In re Estate of Petty, 608 P.2d 987 (Kan. 1980) (treated witnesses' signatures on affidavit as valid attestation).

18. See supra note 17.

19. Many commentators have criticized the hypertechnicial compliance with will statutes required by those courts which invalidate wills under these types of facts. See, e.g., Mann, Self-Proving Affidavits and Formalism in Wills Adjudication, 63 WASH. U.L.Q. 39 (1985); Schneider, Self-Proved Wills - A Trap for the Unwary, 8 N. KY. L. REV. 539 (1981); Note, Wich v. Fleming: The Dilemma of a Harmless Defect in a Will, 35 BAYLOR L. REV. 904 (1983); cf. Langbein, Substantial Compliance With the Wills Act, 88 HARV. L. REV. 489 (1975) ("insistent formalism of the law of wills is mistaken and needless").


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23. See supra note 22.


25. N.H. REV. STAT. ANN. § 551:2-a (Supp. 1988) ("To qualify as self-proved, the signatures of the testator and witnesses shall be followed by a sworn acknowledgment . . . as follows . . . " (emphasis added)).


28. Id.

29. Id. § 62-2-503(c).


31. Id.


33. The jurisdictions without a self-proving procedure include California, Illinois, Louisiana, Maryland,
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Michigan, Mississippi, Ohio, Vermont, Wisconsin, and the District of Columbia.

34. See supra note 17.


36. 726 S.W.2d 605 (Tex. App. - Houston [14th Dist.] 1987, writ ref'd n.r.e.).

37. Id. at 607.

38. Id. at 607-8.

39. See supra Chapters III(E)(2), (F)(3); IV(E); V(E)(4); VI(D)(1), (2); VII(B)(3), (D)(4), (F)(2).


45. Id. at art. 12.


49. UNIF. INT'L WILLS ACT historical note (1977). The UIWA was designed to be enacted either as a freestanding act.
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or incorporated into the Uniform Probate Code. See UNIF. PROB. CODE §§ 2-1001 to -1010 (1987).


51. Id.

52. Id.


55. MINN. STAT. ANN. § 524.2-1005 (West Supp. 1989) (for example, substituting "his/her" for "his" and "_he" for "he").

56. N.D. CENT. CODE § 30.1-08.2-05 (Supp. 1987).

57. UNIF. ANATOMICAL GIFT ACT prefatory note (1968).

58. Failure to make a decision regarding anatomical gifts during life may result in the decision being made by the person's close family members at the time of death. See UNIF. ANATOMICAL GIFT ACT § 2(b) (1968) (permitting family, guardian of decedent's person, and others to make anatomical gift). Accordingly, a person who does not want an anatomical gift to be made must take steps to reduce the chance of others making the gift upon death. For example, the person should inform close relatives of his desire not to make an anatomical gift or carry an "anti-anatomical gift card" clearly stating that intent. See infra § B(2)(h).

59. See generally Areen, A Scarcity of Organs, 38 J. LEGAL EDUC. 555, 555 (1988) (discussing medical science's need for body parts); UNIF. ANATOMICAL GIFT ACT prefatory note (1968) (overview of beneficial use of anatomical gifts and reference to the 6,000 to 10,000 lives that could be saved each year if sufficient kidneys were available for transplant); San Antonio Express-News, April 24, 1989, at 19-D ("Dear Abby" column quoting essay by Robert N. Test extolling virtues of organ donation).

60. Areen, A Scarcity of Organs, 38 J. LEGAL EDUC. 555, 563 (1988); see also Letter from "A Grateful Family" to Ann Landers, reprinted in San Antonio Express-News, June 14,
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61. See Areen, A Scarcity of Organs, 38 J. LEGAL EDUC. 555, 562 (1988) (one poll indicated that 25% of those questioned disapproved of organ donation).


63. See Areen, A Scarcity of Organs, 38 J. LEGAL EDUC. 555, 555-56 n.4 (1988). California was the first state to pass legislation governing transplantation. Id. at 557 n.11.

64. UNIF. ANATOMICAL GIFT ACT prefatory note (1968).

65. UNIF. ANATOMICAL GIFT ACT historical and prefatory notes (1968) (existing law viewed as confusing, diverse, and inadequate; UAGA "will encourage the making of anatomical gifts").

66. Id.

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69. UNIF. ANATOMICAL GIFT ACT § 4 comment (1968).


71. Id.

72. Id.

73. Id. § 3 comment.

74. Id. § 2 comment.


76. UNIF. ANATOMICAL GIFT ACT § 4 comment (1968).

77. DEL. CODE ANN. tit. 16, § 2719 (Supp. 1988) (form "may" be used); D.C. CODE ANN. § 2-1504(b)(2) (1988).
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(anatomical gift "may be in the following form"); FLA. STAT. ANN. § 732.914(2)(b) (West 1976) (suggested form is "sufficient" to accomplish purpose); IDAHO CODE § 39-3409 (1985) (form "substantially as follows is sufficient"); MD. EST. & TRUSTS CODE ANN. § 4-505 (Supp. 1988) (form "may conform substantially to the following"); MICH. STAT. ANN. § 14.15(10104)(2) (Callaghan 1988) ("document which conforms substantially to the following form is sufficient"); W. VA. CODE § 16-19-4(f) (1985) ("[n]o particular words shall be necessary . . . but the following words, in substance, . . . shall be legally valid").


80. See supra note 79.


82. Id.

83. UNIF. ANATOMICAL GIFT ACT § 2 comment (1987).

84. Id.

85. UNIF. ANATOMICAL GIFT ACT § 4 comment (1968); DEL. CODE ANN. tit. 16, § 2719 (Supp. 1988); IDAHO CODE § 39-3409 (1985). Cf. MD. EST. & TRUSTS CODE ANN. § 4-505 (Supp. 1988) (choice between any person, tissue bank, or institution authorized by law; the Anatomy Board of Maryland; and a specifically named physician, hospital, tissue bank or other medical institution).


87. See, e.g., UNIF. ANATOMICAL GIFT ACT § 6 (1987).
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90. Id.

91. Id.

92. Id.

93. UNIF. ANATOMICAL GIFT ACT § 4 comment (1968).


95. See supra note 94.


97. UNIF. ANATOMICAL GIFT ACT § 2 comment (1987).

98. Id.

99. Id.

100. Id.


103. See generally id. at 199

(The laws of practically all of the states provide that the desire to donate all or part of the body can be indicated on a person's driver license. Obviously, this is invaluable considering the fact that so many Americans are killed in automobile accidents and a police officer can quickly ascertain

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the desires of the victim concerning organ donations.

104. COLO. REV. STAT. § 12-34-105(5)(a) (1985); OHIO REV. CODE ANN. § 2108.10(B) (Baldwin 1987).

105. Dimensions are those of a Texas driver's license.


107. OHIO REV. CODE ANN. § 2108.10(B) (Baldwin 1987).

108. UNIF. ANATOMICAL GIFT ACT § 2 comment (1987) (option to expressly refuse to make any anatomical gift also provided).

109. See, e.g., DEL. CODE ANN. tit. 16, § 2711(a), (b) (Supp. 1988) (written consent of either parent is required unless minor is married); MINN. STAT. ANN. § 525.922(1) (West Supp. 1989) (written consent of both parents is required).


111. Id.

112. Id.


114. See id.

115. See UNIF. ANATOMICAL GIFT ACT § 2(b) (1968) (family members may make gift unless there is "actual notice of contrary indications by the decedent"); UNIF. ANATOMICAL GIFT ACT § 3(a) (1987) (family members may make gift unless "the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift").


117. Id.

118. Id.

119. UNIF. ANATOMICAL GIFT ACT § 2(b) (1968); UNIF. ANATOMICAL GIFT ACT § 3(a) (1987).


121. Id.
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122. UNIF. ANATOMICAL GIFT ACT § 4 comment (1968); DEL. CODE ANN. tit. 16, § 2719 (Supp. 1988); IDAHO CODE § 39-3409 (1985); OHIO REV. CODE ANN. § 2108.10 (Baldwin 1987).

123. See supra note 122.

124. OHIO REV. CODE ANN. § 2108.10(A) (Baldwin 1987).

125. UNIF. ANATOMICAL GIFT ACT § 3 comment (1987).

126. Id.

127. Id.

128. See UNIF. ANATOMICAL GIFT ACT prefatory note (1968).

129. See supra notes 67-68.


131. Id. Cf. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 GEO. WASH. L. REV. 1, 1-2 (1989) ("severe and tragic shortage" of transplant organs due to failure to permit healthy individuals "to contract for the sale of their body tissue for delivery after their death").

132. See supra § B(2).


136. Areen, A Scarcity of Organs, 38 J. LEGAL EDUC. 555, 563 (1988) (agent would make donation once "persuaded that the donor will not benefit from further medical care").

137. UNIF. ANATOMICAL GIFT ACT § 2 comment (1987).

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141. Id. § 766.588.
142. Id. § 766.589.
143. Id. §§ 766.588(9) & 766.588(10).
144. Id.
145. Id.
146. Id. §§ 766.588(3) & 766.589(3).
147. Id. §§ 766.588(9) & 766.588(10).
PART THREE
EFFECT OF STATUTORY ESTATE PLANNING FORMS
ON THE NON-LEGAL COMMUNITY

CHAPTER IX
POTENTIAL RAMIFICATIONS

A. INTRODUCTION

Vigorous debate exists concerning the value of statutory estate planning forms and the effect they will have on the non-legal community.¹ Some commentators believe that statutory forms positively impact the public,² while other writers assert that the forms are a great disservice.³ This chapter presents the arguments that are advanced for and against statutory estate planning forms vis-à-vis the non-legal community. Discussion focuses on the general ramifications of using these forms; it does not evaluate the advisability of providing specific types of estate planning forms by statute nor whether a particular state or Uniform form is adequate to accomplish any particular goal. Part Two of this dissertation directly addresses these issues.
CHAPTER IX

B. OSTENSIBLE BENEFITS

1. To Individual

a. Increased Use of Estate Planning Techniques to Effectuate Demonstrated Intent

The ultimate goal of estate planning is to ascertain and effectuate the intent of each individual regarding property disposition, designation of fiduciaries and agents, medical treatment, and related matters to the greatest extent possible within legal bounds.\(^4\) To secure the benefits of estate planning, individuals must take affirmative steps to prevent generic plans being forced upon them and their families through a variety of legislative mandates. For example, intestate succession laws govern the distribution of property at death, probate or banking codes specify the disposition of funds in multiple-party bank accounts, guardianship laws provide lists of potential guardians in priority order, and statutes governing the medical profession outline the appropriate manner of handling terminally ill individuals who are no longer able to communicate their health care desires. Unconsidered reliance on these "non-planning" options is likely to lead to results that do not accurately reflect intent. Most individuals fail to prepare simple wills,\(^5\) much less comprehensive estate plans, even though state legislatures provide competent adults with ample opportunity to control estate planning matters.
Perhaps the most significant benefit of statutory estate planning forms is their potential for increasing the number of individuals who attempt to customize estate plans to meet their specific needs and circumstances. This section examines the reasons why the enactment of statutory forms may increase the number of individuals who plan their estates.

1. **Lowering of Estate Planning Costs**

Estate planning can be an expensive process, especially if legal counsel is obtained. Fees for a comprehensive estate plan can run into the thousands of dollars and even a simple will can cost one-hundred dollars or more. These expenses place estate planning out of the financial reach of many individuals and may cause those with sufficient resources to be reluctant to incur the expense.

The cost of using statutory estate planning forms is, however, nominal. The forms are designed to be used by non-legally trained individuals so there is often no need to hire an attorney to complete the form. Even if an attorney were employed to review a statutory form and render advice thereon, it is likely the fee would be substantially less than if the attorney were hired to draft an original document.

Estate planning costs are also lowered because the forms themselves may be acquired at little or no cost. A person wishing to use a form may simply hand copy or photocopy it from the statute books for the cost of paper and pen or loose change for the photocopy machine. In addition, governmental
entities, political officials, bar associations, and other organizations frequently distribute statutory forms for free or for only a nominal charge.

Costs may also be reduced when a person with no knowledge of statutory forms hires an attorney for estate planning advice. Under many circumstances, the attorney can use one or more statutory forms in the estate plan thus reducing the time spent on the client's case; less time is needed to draft, prepare, proofread, and review the document. This savings in professional and clerical resources may be passed on to the client in the form of lower fees. There is, unfortunately, the potential for abuse by attorneys who may use statutory forms but bill the client as if the documents had been drafted especially for the client.

\textit{ii. Reduction in Time and Effort Needed to Create and Update an Estate Plan}

Persons preparing their estate plans are usually required to devote a significant amount of time and effort. Several meetings with an attorney may be needed to gather relevant information, review drafts of documents, execute documents, and finalize other aspects of the estate plan. Many individuals may be unwilling or unable to spend the time needed to prepare for their future death or disability. The pressures of work and family are immediate, whereas death and disability are assumed to be far in the future. Accordingly, estates go unplanned.
Statutory estate planning forms allow individuals to quickly and effortlessly plan various aspects of their estates. Statutory forms are readily available; they may be copied from books in public libraries, acquired from various locations in the neighborhood, ordered through the mail, and may even be received unsolicited in the mail. The forms may be completed at a person's convenience in the privacy of his or her home without the necessity of making special arrangements; no appointments, changes to work schedules, or child care is needed. Many forms are relatively simple and may be completed quickly, often in less than thirty minutes.

Because of this overall convenience, statutory forms make it easier for individuals to keep their estate plans current by reflecting changes in their desires caused by altered circumstances such as divorces, marriages, births, deaths of family members or friends who were named as beneficiaries and fiduciaries, and acquisitions or dispositions of property. Many individuals may delay updating attorney-drafted estate plans because of the time and cost involved. However, new statutory forms could be executed promptly with only minimal expenditures.

iii. Greater Awareness of Ability to Plan an Estate and the Importance Thereof

Many individuals are unsophisticated regarding estate planning matters; they are unaware of their rights to control various aspects of their estate and the importance thereof. Even wealthy and politically astute persons may
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neglect to plan their estates; millionaire Howard Hughes died without a will, as did Presidents Lincoln, Jackson, Grant, and Garfield. The enactment of statutory forms, especially those for wills, living wills, and durable powers of attorney for health care, have been accompanied by considerable publicity both in enacting states and in other jurisdictions.

Similarly, some court cases relating to estate planning matters, such as those involving the withholding of life-sustaining medical treatment, receive extensive press coverage. This media attention increases interest in estate planning by creating a greater public awareness of its benefits and the consequences of dying without a plan. As a result, individuals are more likely to obtain estate plans if statutory forms are available.

b. Improved Emotional and Psychological Condition

Many individuals procrastinate estate plan preparation as a conscious or unconscious defense against admitting mortality. As one commentator has stated, "personal death is a thought modern man will do almost anything to avoid." Likewise, people dislike facing the frightening possibility that they may become disabled because of an injury, disease, or accident to the extent that they will no longer be able to make decisions regarding their health care, family, and business. Despite the tendency to ignore these undesirable prospects, facing the inevitability of death and the potential of disability can have many psychological rewards.
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Individuals who plan their estates become "more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop." Additionally, estate planning permits persons to exercise increased self-determination and provides them with a sense of control over their environment and destiny. For example, durable powers of attorney permit business affairs to be controlled by desired agents, self-designations of guardians allow trusted individuals to be nominated, and, at least in Texas, to preclude undesired individuals from being appointed, and living wills permit persons to indicate how critical health care decisions are to be made.

Many persons are intellectually aware that estate planning is necessary but find it emotionally difficult to confront. The existence of statutory forms makes it easier for these individuals to acquire estate plans along with the accompanying assurances. The forms may be easily acquired and rapidly completed unlike attorney-prepared estate plans. This efficiency could lessen what might otherwise be a stressful and prolonged estate planning process, that is, one which may force the person to spend an inordinate amount of time pondering the fragility of life and health. Although this estate plan may not be as thorough as one which has received greater deliberation, it will often be sufficient to satisfy most of the person's desires and give that person many of the benefits of an estate plan.
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2. To Family

Conflict is less likely among the family members of persons who have estate plans. When the time comes for making decisions regarding such things as distribution of property, appointment of fiduciaries, and removal of life-sustaining procedures, many families will want to do what the affected person would have desired. If estate planning has not been done, family members must second guess the wishes of their loved ones, attempting to make the "right" decision but often with little guidance as to what that is. The problems arising from not knowing the person's intent are exacerbated if family members are unable to agree. For example, one child may believe his father wanted life-sustaining equipment removed if he was in a terminal condition and unable to communicate, while another child may remember dad as saying he wanted to be kept alive at all costs. The existence of statutory estate planning forms should increase the use of many estate planning techniques and provide documentation of the person's actual intent for the family's reference. In many cases, this will reduce the emotionally-draining conflicts between family members which may otherwise arise.

3. To Society

a. Education of Public

The public is painfully unaware of the need for estate planning. Many people who do not have wills may realize in general terms the nature and effect of a will but fail to
understand the importance of having one. Perhaps they labor under a misconception of what will happen to their property if they die without a will, believe that because they have small estates no will is needed, or are unaware of the importance of using a will to appoint guardians for their minor children. The public also lacks knowledge of other estate planning devices; many people do not comprehend their ability to create trusts, designate agents in durable powers of attorney, designate their own guardians, control critical medical decisions through living wills or durable powers of attorney for health care, and make anatomical gifts. The enactment of statutory forms and the media publicity that often accompanies their passage serves a vital function in educating society about the necessity for estate planning.

b. Expanded Access to the Legal System

Statutory estate planning forms expand the ability of citizens to take advantage of many aspects of the American legal system that they might otherwise not employ. Estate planning techniques that are accompanied by statutory forms are more likely to be used by individuals because of their low cost, simplicity, accessibility, and publicity. All segments of the population are better able to reap the many benefits that estate planning can yield, not just individuals with sufficient education to appreciate the need for estate planning or persons with the financial resources to pay for an attorney-prepared estate plan. Accordingly, one of the
cornerstones of the American legal system is advanced — equal justice for all.43

c. Decreased Reliance on Commercialized Self-Help Estate Planning Publications

Entrepreneurs, desiring to profit from the public's need for estate planning and recognizing the public's reluctance to incur legal fees to obtain it, have authored a variety of self-help publications targeted at the non-attorney audience. Aggressive marketing strategies are used to sell these products that are designed to increase the likelihood that people from different social and economic levels will be exposed to the alleged virtues of the particular package being offered. Some self-help products are sold in typical shopping mall bookstores next to other popular legal books,44 while others are advertised through slick commercials on late-night television, complete with toll-free telephone numbers for ordering with major credit cards.45 Orders for some estate planning kits are solicited through bulk-mail letters which extol the evils of probate with language such as: "All across the nation, greedy lawyers in league with conniving judges and bureaucrats plunder huge chunks — and sometimes all — of an estate."46 Still other self-help estate planning tools are sold with a high-tech approach; they are marketed as computer software programs that enable a computer literate person to obtain a will by simply answering questions in response to computer-generated questions.47
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These self-help estate planning publications vary in quality and have significant limitations. They are not usually prepared with any particular state's law in mind and may thus unintentionally deceive a user concerning the validity and effect of any document executed using the supplied forms and following the recommended execution procedures. In addition, the motivating factor behind these publications is profit, not a desire to provide individuals with the best possible estate plan. As a result, the forms and accompanying explanations are usually designed to look "official" or "legal" and to sell, not to convey the information truly needed by the consumer. It is anticipated that statutory forms would reduce consumers' reliance on such publications "because the content of the statutory form is regulated and endorsed by state government." Naturally, enterprising writers wishing to retain their market-share may author materials to assist people in completing the statutory forms.

Some of the same criticisms of self-help publications, such as the inability to individualize the document and the potential for improper completion, may also be applicable to statutory forms. However, statutory forms may provide a better method for people to exercise self-help. Statutory forms are drafted and reviewed by leading attorneys and legislators prior to enactment. The forms are carefully designed to comply with state law and often provide instructions for proper completion under existing statutory
mandates. These statutory estate planning forms may serve the public's interest far better than the forms prepared by the profit-oriented business community.

d. Conservation of Resources

There is less need for judicial involvement when estates are planned. For example, if property passes under a will rather than by intestacy, courts need not determine or rule on heirship matters; if a person has executed a self-designation of guardian and a guardian is needed, the court is required to evaluate only the ward's selection rather than search for a proper guardian; if a durable power of attorney exists and the agent is carrying out his or her duties properly, the courts may never get involved; and if a person has a living will, a court order to remove life-sustaining equipment may not be necessary. Statutory forms also reduce the likelihood of self-drafted documents and thus decrease the potential of litigation. Accordingly, society and its judicial system may save time, effort, and expense because statutory estate planning forms encourage citizens to make effective provisions for disability and death.

C. OSTE NSIBLE DISADVANTAGES

1. To Individual

Perhaps the most pervasive fear regarding the enactment of statutory estate planning forms is that their use or misuse will actually result in a frustration of the user's true
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intent. "There is widespread apprehension that the adoption of [statutory forms], which would lend [themselves] to use without legal advice by purchase from a stationer, [are] likely to encourage dangerous misuse." Critics of statutory forms believe that non-attorneys, as a whole, are incapable of using them effectively. One commentator has stated regarding statutory wills, "I think [they are] like telling someone with a toothache to find himself a doorknob and a piece of strong string." This section examines the potential problems with statutory forms and their use which could prevent a person's desires from being carried out as anticipated, as well as increase the litigation that may be needed in the attempt to ascertain those desires.

a. Lack of Individualization

One of the premises underlying the enactment of statutory estate planning forms is that they may be used to carry out the "average" person's intent, that is, someone without unusual circumstances. However, this may not be the case because "[h]ardly anyone's life nowadays is uncomplicated." The statutory forms are generic; they are not designed with any particular user in mind and thus may be difficult to customize to specific circumstances. The degree to which statutory forms permit individualization varies considerably. The testator's ability to use statutory wills to make gifts of particular items or amounts of money serves as a good example. The California statutory will is at one extreme; it
only permits one cash gift to either a person or a charity. At the other extreme, the Maine statutory will provides the testator with eighteen opportunities to make specific gifts: five gifts of personal and household items, five gifts of real property, three cash gifts to named charitable organizations or institutions, and five cash gifts to named individuals. Statutory living will forms are another good example of the range of individualization permitted. Some living will statutes do not allow the inclusion of any specific instructions in the form while others provide for extensive personalization.

Despite the lack of opportunity to customize a statutory form, many individuals may use the form encouraged primarily by its low cost and availability. Obviously, this will result in a frustration of the user's true intent. As one commentator has noted regarding statutory wills, testators "may alter an intended distribution pattern simply to fit it into the form's set pattern." If this speculation proves to be well-founded, it would be ironic that legislation enacted to increase a person's ability to have his or her intent carried out in reality influences a person to alter that intent merely to use a statutory form. The potential effect of this dilemma may be far worse than just an unintended property distribution. If, for example, a living will were involved, the alteration of intent could result in a person's premature death.
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There is an inherent problem with increasing the ability of a statutory form user to individualize the form -- the more choices that are provided, the more complicated the form may become.67 This increased complexity may cause the form to be used less frequently or used improperly. The State Bar of California's Estate Planning, Trust and Probate Law Section has recently addressed this problem concerning California's statutory will form.68 A special committee is rewriting the forms to simplify them as well as to provide testators with more choices.69 One committee member stated that the committee is "basically trying to determine how many choices [they] can give people and not make the form too confusing."70

b. Improper Completion

One of the most common criticisms of statutory forms is that they are subject to improper completion, primarily because they are used by non-legal trained individuals who are unaware of the importance of exact compliance with statutory mandates.71 Portions of the form may be ignored and blanks left empty because a person does not understand what is required and thus erroneously concludes that certain sections are irrelevant. Improper completion may cause a document to be ineffective, or perhaps worse, applied in an unanticipated manner.

Even though the concern about improper completion lacks comprehensive empirical support, reports regarding the California statutory will reflect the seriousness of the
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problem. The Alameda County Court Commissioner indicated that she had many problems with statutory wills and that "[m]ost are not completed correctly." In addition, officials in Los Angeles County report that one-half of the statutory will forms filed are rejected because they were not completed properly. Two errors frequently appeared. First, users attempt to change the statutory language of the form despite clear warnings not to do so. Second, testators make errors regarding necessary formalities such as execution and attestation. The California statutory will forms are being redrafted to solve these and other problems. One member of the California Bar committee responsible for the revision believes that "the warnings can be made clearer by phrasing them as questions and answers."

Disagreement exists on whether the potential for improperly completed statutory forms means that legislatures should not enact such forms. The current debate in California is instructive. One Probate Court Commissioner had gone on record with her belief that the interests of the public would be better served without statutory wills. On the other hand, most California probate lawyers believe that statutory wills are a good tool for consumers provided they are properly selected and completed. In answering criticisms that a durable power of attorney statutory form may be improperly completed, an Illinois writer made the following insightful comment: "Every device that enables people to act for themselves is subject to abuse and misunderstanding. But most
people have a basic store of common sense. They are honest, fair and intelligent enough to know when they need advice.”

Even proponents of statutory forms have expressed great concern over the improper completion issue. One commentator has written:

It may well be unwise to allow people to complete and execute a form of statutory will by themselves, regardless of the number of warnings and disclaimers contained in the instrument. A requirement that the document is effective only if executed under the supervision of an attorney may help insure that the property owner realizes the effect and scope of the instrument.

This suggested solution, however, would increase the cost of completing the forms as well as the time and effort involved.

c. Failure to Comprehend Form and Effect Thereof

Although statutory estate planning forms are designed with the non-legally trained user in mind, it is questionable whether the forms may be sufficiently comprehended by a non-attorney without legal advice. Some statutory forms contain simple language, explanations, warnings, and directions that should enable a person with average intelligence and English proficiency to complete the forms in an acceptable manner while other forms make use of terms or a format that may confuse many people. The California statutory will is now being revised in recognition that the form language must be easily understood. One of the drafters of the original statutory will form believes the forms should be written in eighth-grade English. This proposal is of particular importance because recent statistics indicate that
approximately twenty percent of adult Americans are functionally illiterate.\textsuperscript{87}

Even if the form is brimming with plain language explanations and is expertly arranged on the page, there is no guarantee that the form's import will be appreciated. As one commentator queried regarding statutory wills, "No matter how many disclaimers there are in the instructions or on the form, will the consumer really understand that a will disposes of what is usually only a small portion of the estate of a moderately wealthy person - not including insurance, joint property, or plan benefits?"\textsuperscript{88}

d. Encouragement of Evil Conduct

It has been suggested that statutory estate planning forms "may be easier to forge or may be more susceptible to abuse by 'artful and designing persons.'"\textsuperscript{89} Because these forms are readily available without the intervention of an attorney, individuals inclined to exert undue influence, duress, or fraud to obtain wills, powers of attorney, and other estate planning documents may more easily accomplish their untoward goals. The statutory documents may be executed with great secrecy and privacy when susceptible persons are most likely to succumb to another's wishes. Although non-statutory forms may be used in the same way, the greater availability and legislative sanction of the statutory forms increases the likelihood of this scenario. There is greater protection, however, when documents are attorney-drafted.

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Several private meetings between the client and the attorney usually occur and the client has a greater opportunity to be properly counseled and to consider the consequences of the proposed action. Estate planning attorneys often question clients to be sure that the plans being made are actually what the clients want and are not the result of coercion. Likewise, the attorney-supervised ceremonies accompanying the execution of the documents offer additional protection.

Use of statutory forms as part of the implementation of certain estate planning techniques results in less court involvement and the accompanying supervision. For example, if a person executes a durable power of attorney, the need for a court-appointed guardian is reduced; thus, it is easier for dishonest agents to abuse their authority. It has been noted, however, that such reasons do not provide a sound basis for denying the benefits of the statutory forms.

e. Lack of Comprehensive Estate Plan

The use of a statutory estate planning form may lead some people to believe that they have done everything necessary to plan their estates. For example, a person may execute a statutory will and then fail to take steps to plan for the disposition of non-probate assets or for disability. Both proponents and critics of statutory forms agree that the existence of statutory forms increases the likelihood that legal assistance will not be sought, especially by those of low or moderate income. Thus, these individuals are less
likely to receive competent legal advice regarding the need for comprehensive planning for death, disability, and related matters.\textsuperscript{94}

2. To Family

The families of individuals who use statutory estate planning forms may suffer from the consequences that potentially flow from the forms' improper use. For example, if a testator uses a statutory will even though it may not be individualized to reflect the testator's true intent, family members who are thereby deprived of benefits will be injured. Certain family members may also be injured if the will and its distribution scheme are invalidated because of completion, execution, or attestation problems.\textsuperscript{95} Similarly, if the user of a statutory form fails to comprehend the form and the effect of its execution, the family may need to resolve problems unanticipated by the user.

The failure of statutory forms to provide a comprehensive estate plan may be the family's biggest problem. Referring to statutory wills, one writer noted that "the forms may be wholly inappropriate for some people, and their use could trigger adverse tax consequences or other unintended results."\textsuperscript{96} Sorting through an incomplete or misplanned estate may force the family to incur unnecessary legal expenses and waste valuable time.\textsuperscript{97} Improper use of some forms, especially living wills and durable powers of attorney, could also bring emotional turmoil to a previously stable family.
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3. To Society

a. In General

Society will suffer if statutory estate planning forms are improperly or ineffectively used. Rather than improving the orderly transmission of wealth between generations, the appointment of fiduciaries, and the preparation for disability, statutory forms could disrupt these processes. Controversy concerning the effectiveness of statutory forms is likely to lead to litigation, thus placing a strain on the already burdened court system. Likewise, the monetary, time, and emotional costs of handling estate matters will be a drain on those involved and will prevent these resources from being used more productively.

b. Decrease in Quality of Legal Services to Low and Middle Income Classes

Concerns have been raised that statutory estate planning forms will cause many individuals to receive inadequate legal services. As one commentator noted regarding statutory will forms, they "could certainly be construed as demeaning to suggest that persons with small or moderate estates should do something 'on the cheap.'" Attorney may advise low and middle income clients to use statutory forms not because they are appropriate but to avoid individualized drafting in situations which generate low fees. Conversely, attorneys may refuse to assist clients with statutory forms because they fear that malpractice claims may result if the clients,
believing their situation to be "simple," fail to make a full disclosure of relevant information.\textsuperscript{100}

Another potential problem with statutory forms is that attorneys with little or no estate planning experience may believe that they are "experts" because of the availability of forms with the stamp of governmental approval.\textsuperscript{101} One writer recognized this possibility regarding statutory wills when he wrote that the statutory form "could be merely an attempt to make the incompetent draftsman competent."\textsuperscript{102}

In a similar manner, statutory forms may cause individuals to place greater reliance on non-attorneys for their estate planning advice. Rather than obtaining advice from an attorney, more people may seek the guidance of family members and friends who have already used the statutory forms. Many individuals are likely to believe that someone who has already completed the form will be knowledgeable about its use and effect. Likewise, greater reliance may be placed on the popular press for estate planning advice. Unlike the self-help estate planning forms sold in bookstores or through toll-free telephone numbers, statutory forms have a greater appearance of validity due to their legislative sanction. Accordingly, publications discussing these forms are likely to be given greater credibility by the general public.

\textbf{D. CONCLUSION}

Although reasonable people may certainly disagree about the wisdom of statutory estate planning forms, few would
dispute the potential benefits available to the individual, the family, and society. Many critics believe, however, that statutory forms are unlikely to accomplish their laudable goals and will actually do more harm than good. It remains to be seen whether the complexity of estate planning may be adequately simplified in statutory forms for effective use by non-attorneys without legal assistance.

Only a few reports have surfaced regarding the actual results of non-attorneys using statutory forms. Until further evidence is available, one may only speculate about the true ramifications of statutory estate planning forms on the non-legal community. The empirical study regarding statutory will forms described in the next chapter is this author's attempt to obtain some of this greatly needed evidence.
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2. See, e.g., Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 9 ("I believe that the statutory will . . . will be a great service to the Bar and to the public").

3. See, e.g., Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9 ("I think the statutory will would do a great disservice to the families of persons availing themselves of it.").

4. See generally W. CASEY, NEW ESTATE PLANNING IDEAS 1 (1958) (estate planning "involves the selection, arrangement and disposition of family assets in a way best calculated, not only to save death taxes, but to fit the needs and the aptitudes of family beneficiaries"); E. GERTZ, T. GERTZ & R. GARRO, A GUIDE TO ESTATE PLANNING ix (1983) ("Estate planning is really a lifetime process of arranging assets (property) so that a person may dispose of them during his lifetime and at his death in a manner that best carries out his desires for his family (or other objects of his bounty) consistent with a minimizing of income, gift, and death taxes, and an easing of transfer").

5. See, e.g., Where There's a Will, There's a Way, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985) ("more than two-thirds of all adult Americans die without wills"); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 13 (4th ed. 1987) ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate."); ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING 1 (2d rev. 1983) ("Three out of four Americans die without a will"). Cf. The Law Commission, Distribution on Intestacy 3 (Working Paper No. 108, 1988) ("about half the population [of England and Wales] die intestate"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of studies and surveys demonstrating high percentage of intestate deaths); Chapter I(B)(3)(c).

6. See generally The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 (primary goal of statutory wills is to encourage the use of wills).

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legal assistance to prepare estate plans is costly); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103 (1985) (lawyer as the "hidden heir" in all estates); Comm. on Fiduciary Serv. for Small Estates & Conservatorships, Prob. & Tr. Div., Proposed Uniform Acts for a Statutory Will, Statutory Trust and Statutory Short Form Clauses, 15 REAL PROP. PROB. & TR. J. 837, 837 (1980) ("widespread recognition that the estate planning process has become too . . . costly for many persons"). Contra 1 PAGE ON THE LAW OF WILLS § 1.6, at 25 (W. Bowe & D. Parker ed. 1960) (some people ignorant of fact that will drafting fees are usually nominal).

8. See Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8, 8 ("Even lawyers with the most sophisticated word processing equipment find that the simplest of wills costs hundreds of dollars to prepare in time and disbursements . . ."); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985).

9. See, e.g., Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8, 8 ("the world of law and regulation becomes much more complex each year and the number of people who need legal services but who cannot afford them grows too"); Letter from Perry Bullard to Friend (undated, contained in booklet entitled The Michigan Statutory Will) ("You may have avoided getting a will because you feared the cost of seeing a lawyer . . .").

10. See You Can't Take it With You, So You Should Make a Will, San Antonio Express News, June 4, 1989, at 2-G.

11. Statutory estate planning forms normally contain instructions and plain language provisions so the user may prepare the document without assistance. See, e.g., CAL. PROB. CODE § 6240 (West Supp. 1988) (will form); ILL. ANN. STAT. ch. 110%, para. 803-1 (Smith-Hurd Supp. 1988) (durable power of attorney form); 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04) (living will form). See generally Statement of Tom Loftus, Wisconsin Legislature Assembly Speaker (Jan. 17, 1984) (speaking in reference to Wisconsin statutory will bill, "The bill also expresses a populist belief in the wisdom and intelligence of the common person. People are capable, when their estates are simple, to write their own will without going to an attorney.").

12. Many statutory forms contain language urging the user to consult an attorney. See, e.g., ALASKA STAT. § 13.26.332 (Supp. 1980) (required statement in statutory power of attorney form, "If you have any questions about this document, you should seek competent advice."); CAL. PROB.
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CODE § 6240 (West Supp. 1988) (notice 1 of statutory will form, "It may be in your best interest to consult with a California lawyer because this statutory will has serious legal effects on your family and property."); ILL. ANN. STAT. ch. 110½, para. 804-10 (Smith-Hurd Supp. 1988) (required provision of statutory durable power of attorney for health care form, "If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you."). Even one of the drafters of the California statutory will form believes that average persons should not complete the form because users are unaware of the ramifications. See The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 (quoting Irving Kellogg).

13. See Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 677 (1985) (one of the purposes of the Michigan statutory will was to "assist attorneys in reducing the cost of providing estate planning services to those with small estates and uncomplicated planning objectives"); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 106 (1985) ("You can save time and money by writing your [statutory] will, then having a lawyer check it over to make sure it's legally sound. The cost will often be minimal, and you can get some assurance that your will is valid."); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 ("Even those who check with an attorney to be sure the statutory will makes sense for them or who get help in filling out the printed form will save money."). But see Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 (doubtful whether attorney's fees for reviewing a statutory will would be significantly less than if attorney prepared the will from scratch).


15. Personal experience shows that photocopies cost between 5¢ and 25¢ per page. Statutory forms are seldom more than a few pages in length. Thus, only a few dollars are needed to copy most forms.

16. Colorado law requires that the form for anatomical gifts be placed on the back of all driver's licenses and state issued identification cards. COLO. REV. STAT. § 12-34-105 (1985).

The enabling legislation for the Maine statutory will requires that the statutory form be "provided at all Probate Courts for a cost equivalent to the reasonable cost of printing and storing the forms." ME. REV. STAT. ANN. tit. 18A, § 2-514(b) (Supp. 1987).
The Wisconsin department of health and social services is required to distribute copies of the statutory living will form, in quantity, to local bar associations. WIS. STAT. ANN. § 154.03(2) (West Supp. 1988).

17. Perry Bullard, the Michigan State Representative who sponsored the Michigan Statutory Will Act, has prepared a booklet for his constituents and others which contains the statutory will form along with four pages of information about statutory wills in a question and answer format.

18. The State Bar of California sells statutory will forms for $1.00 each plus a self-addressed stamped envelope. See California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7.

The Vermont Bar Association endorses and distributes a booklet containing living will and durable power of attorney for health care statutory forms. Medical Ethics Committee of the Vermont State Medical Society, Taking Steps to Plan for Critical Health Care Decisions (1987).

19. Living will forms are distributed free of charge by Concern for Dying: The Educational Council for the Living Will, 250 West 57th Street, Room 831, New York, NY 10107 and the Society for the Right to Die, 250 West 57th Street, New York, NY 10107.

Hospitals and medical organizations frequently distribute anatomical gift donor cards following the statutory form at no charge.


25. See, e.g., Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 106 (1985) (discussion of pros and cons of statutory wills); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 82 (discussion of...
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statutory wills as "latest in the crusade to convince more of us to have a will"); You Can't Take it With You, So You Should Make a Will, San Antonio Express-News, June 4, 1989, at 2-G (discussing statutory wills in a state without statutory wills).

26. See, e.g., In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (court permitted withdrawal of extraordinary medical procedures on request of the father of a terminally ill person; triggered extensive interest in living wills); N.Y. Times, Apr. 27, 1989, § A, at 20 ("A man tearfully withdrew his comatose son's life support equipment . . . while holding hospital staff members at bay with a pistol and cradled the boy in his arms until he died.").

27. See, e.g., Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (since passage of statutory will, "bar officials estimate more than half a million have been ordered by attorneys or consumers"); Note, Equal But Incompetent: Procedural Implementation of a Terminally Ill Person's Right to Die, 36 U. FLA. L. REV. 148, 149 n.6 (1984) (Concern for Dying reported distributing more than six million living wills); Letter from Abigail Van Buren to Charles R. Adams, III (July 24, 1884), cited in Adams & Adams, An Overview of Georgia's Living Will Legislation, 36 MERCER L. REV. 45, 46 (1984) ("[e]very time the Living Will is mentioned in my column the response from readers is overwhelming").

28. See generally T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 38, at 160 (2d ed. 1953) (discussing superstitious prejudice which many people have after reaching middle age); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 ("[m]aking [a will] is a sobering job that's easy to put off;" biggest hurdle is "acknowledging your own mortality").

29. Shaffer, The "Estate Planning" Counselor and Values Destroyed by Death, 55 IOWA L. REV. 376, 377 (1969). See also 1 PAGE ON THE LAW OF WILLS § 1.6, at 24 (W. Bowe & D. Parker ed. 1960) (individuals have a "natural preoccupation . . . with the accumulation and present enjoyment of their estate and from the illusion of continued life").


31. See Chapter V.

32. See Chapter VI.

33. TEX. PROB. CODE ANN. § 118A (Vernon 1980).
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34. See Chapter VII.

35. This assumes, of course, that the family members wish to carry out the intent of the affected person. It may be the case that the family is unwilling to abide by the person's estate plan for a variety of reasons ranging from greed to religious beliefs. If the person has documented his or her wishes, those wanting to do otherwise may have more difficulty because of the evidence of intent which the forms provide.

36. See supra § B(1).

37. See supra note 5.


40. See generally Shaffer, Nonestate Planning, 106 TR. & EST. 319 (1967) (discussion of reasons for impecunious person to have estate plan).

41. See supra note 25.

42. See generally Letter from Harold I. Boucher to Gerry W. Beyer (June 14, 1989) (attorneys unable to give layman a law course but can show him appearance of estate planning documents); Zartman, The New Illinois Power of Attorney Act, 76 ILL. B.J. 546, 546 (1988) (statutory durable power of attorney forms "designed to force consideration of a number of basic issues").

43. See The Declaration of Independence para. 1 (U.S. 1776) ("all men are created equal"); Pledge of Allegiance ("with . . . justice for all"). See generally Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 39 (quoting Michael V. Vollmer as indicating that current California
revisions of statutory will form are "for the benefit of the whole state").


45. See, e.g., ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING (2d rev. 1983).

46. Letter LPK-3 from Homestead Publishing Company to Friend (undated), at 1. One of the publications which may be purchased is COUNTY HOMESTEAD SERVICE AGENCY, YOU AND YOUR WILL: A DO-IT-YOURSELF MANUAL (1986).

47. See, e.g., LEGISOFT (program) & NOLO PRESS (manual), WILLWRITER (1985); BLOC PUBLISHING, PERSONAL LAWYER (198_) (also includes forms for powers of attorney, guardian designation for minor child, residential real estate lease, and promissory note). Cf. Attorney's Computer Network, The Texas Wills Library, as advertised in 52 TEX. B.J. 1082 (1989) (computer program designed for attorney use which composes estate planning documents such as wills, declarations to physicians, and powers of attorney based on answers to multiple-choice and fill-in-the-blank questions).


49. Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 677 (1985) (statement made regarding Michigan statutory will).

50. See COUNTY HOMESTEAD SERVICE AGENCY, YOU AND YOUR WILL: A DO-IT-YOURSELF MANUAL 50 (1986) (supplement to text containing one-half page of advice regarding California statutory will followed by the form).

51. See infra § C(1).

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Form Clauses, 15 REAL PROP. PROB. & TR. J. 837, 837 (1980).

53. Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 ("If a lawyer who represents himself is said to have a fool for a client, what of a client who represents himself.").

54. Id.

55. See, e.g., Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 106 (1985) (statutory wills "aimed at small, simple estates"); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 82 (statutory wills "designed primarily for people with relatively small, uncomplicated estates").

56. Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 (discussing statutory will forms).

57. See generally Chapter III(D)(2)(b)(6) & (7).

58. CAL. PROB. CODE § 6240 (West Supp. 1988) (art. 2.2).

59. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987) (art. 2.2).

60. Id. (art. 2.1).

61. Id. (art. 2.3).

62. Id. (art. 2.4(C)).

63. Compare CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1989) (living will required to be in statutory form and statutory form provides no opportunity for specific instructions) with 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04) (form contains seven areas, each consisting of two to four blank lines, for express indications of intent). See generally Chapter VII(B)(3).

64. See Erlanger & Crowley, Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan, WIS. B. BULL., Jan. 1986, at 17, 17 ("Inevitably, some people, out of ignorance or false economy, will try to use one of the [Wisconsin statutory] will forms when the complexity of the situation makes them unsuitable.").

65. See generally Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 ("Because the options [the California statutory wills] offer are extremely limited, the forms may be wholly inappropriate for some people, and their
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use could trigger adverse tax consequences or other unintended results.


67. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (paraphrasing Michael V. Vollmer's statement that providing more options in a statutory will conflicts with the process of simplification). See generally The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 82 ("The simplicity of . . . statutory wills comes at a stiff cost in forfeited flexibility.").

68. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36.

69. Id.

70. Id.

71. See, e.g., Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 678 (1985) ("quite possible that some people will complete the forms improperly"); Rice, Too Little Too Late, CAL. LAW., June 1989, at 36 (large percentage of statutory wills filed in Los Angeles County filled out improperly or not signed).

72. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 ("forms are often improperly filled out, which is causing many of these wills to be thrown out of probate court").

73. Id. (quoting Barbara J. Miller, Alameda County Court Commissioner).

74. Id.

75. Id. Perhaps this is due to the form's extremely limited ability to be customized to specific situations.

76. Id.

77. Id.

78. Id. (citing Michael V. Vollmer, vice-chair of the California State Bar Estate Planning, Trust and Probate Law Section). Cf. Booklet prepared by Perry Bullard which contains Michigan statutory will and four pages of information about statutory wills in a question and answer format.

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79. Id. (citing Barbara J. Miller, Alameda County Court Commissioner, who also indicated that the public might be better off using holographic wills).

80. Id. at 38-39.


83. See Est. Plan., Tr. & Prob. L. Sec. St. B. Cal., Possible Legislation -- Statutory Will 5 (Dec. 16, 1980) ("An attempt has been made to write the statutory will in layman's language in order to encourage its use and to respond to public pressure for 'plain English' legal documents.").

84. See, e.g., Erlanger & Crowley, Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan, WIS. B. BULL., Jan. 1986, at 17, 17 ("serious problems could arise for people who do not understand the implications of the language"); (Girdner, State's Consumers Snapping Up Wills Under New Statute, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (report of unnamed attorney stating that individuals are "mystified" by the language of the California statutory will and would not be competent to complete it).

85. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 39.

86. Id. (quoting Irving Kellogg).

87. See Ad for Coalition for Literacy, A.B.A. J., Sept. 1986, at 85; Ad for Coalition for Literacy, 52 TEX. B.J. 1361 (1989) (27 million Americans are functionally illiterate). In addition, a growing percentage of the United States' immigrant population is unable to read English, especially in border states like California and Texas. See Bradford, Illiteracy: Too Critical to Ignore, 53 TEX. B.J. 261 (1990) (one-third of Texans over 18 are functionally illiterate).

88. Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9.

89. Letter from Francis J. Collin, Jr. to John L. McDonnell, Jr., at 3 (Dec. 9, 1980) (statement made in reference to California's statutory will as one of the reasons why dispositive provisions allowing gifts to non-family members were not included).
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91. Id. (responding to criticism that agents appointed under durable power of attorney forms are not subject to court control, "it is no secret that a dishonest court-appointed guardian can also steal right under the nose of the probate judge").

92. See generally Letter from Daniel Palmer to Abigail Van Buren, reprinted in San Antonio Express-News, June 19, 1989, at 19-D (describing problems that could have been prevented if testators had consulted with attorney rather than writing their own wills).

93. See Lustgarten, *Against Such Wills*, TR. & EST., Jan. 1984, at 9, 9 (statutory wills lead to cursory treatment of disposition which is not true estate planning).

94. See id. (statutory wills as connoting "that lawyers are either unwilling or unable to protect the property interests of persons of moderate means").

95. Under certain circumstances, family members may welcome the opportunity to invalidate a statutory estate planning form. For example, if the testator desired to disinherit certain family members and the statutory will is ineffective, the family members who now take under descent and distribution would be benefited.


97. See STATE BAR OF TEXAS, HOW TO LIVE - AND DIE - WITH TEXAS PROBATE 81 (4th ed. 1983) (homemade wills as "prolific source of litigation with resulting family disputes and greatly increased costs of probate"; quoting Lord Neaves:

Ye lawyers who live upon litigants' fees, And who need a good many to live at your ease, Grave or gay, wise or witty, whate'er you decree, Plain stuff or Queen's Counsel, take counsel of me. When a festive occasion your spirit unbends, You should never forget the Profession's best friends; So we'll send round the wine and bright bumper fill, To the jolly testator who makes his own will.


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may be used because attorney does not "care to take the time to think through a transaction and develop [his or her] own paperwork".


101. See generally 1 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS ix (1988) (lawyer may misplace his trust in a form because it has "the halo of publication"). But see Letter to Michael V. Vollmer from Harold I. Boucher, at 2 (June 9, 1989) (doubtful that California statutory will has greater prestige because passed by legislature).

102. Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9.

103. See, e.g., Rice, Too Little Too Late, CAL. LAW., June 1989, at 36 (describing difficulties with California statutory will form and contemplated steps to rectify them).
CHAPTER X

STATUTORY WILL FORM STUDY

A. INTRODUCTION

As detailed in Chapter IX, different opinions exist concerning the use of statutory estate planning forms and whether their potential benefits to the non-legal community significantly outweigh their potential harm. The arguments advanced on both sides of this issue are based primarily on speculation; there is only limited evidence to support either contention. Before legislatures enact, amend, or repeal statutory estate planning forms, it is important for legislators to have adequate information to substantiate their decisions. The pilot study reported in this chapter provides some of this evidence.

This pilot study maintained a narrow scope because of time and budgetary constraints. Statutory wills were selected as the focus of this study for the following reasons.

• The concept of a will is widely understood, at least in general terms, by the non-legal community. As a result, it was anticipated that it would be easier to locate volunteers because individuals are probably more willing to participate in a study about a topic with which they are already familiar.

• Wills are the cornerstones of estate plans; they provide for property disposition and nomination of guardians for minor children. Although some may argue that wills are
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not the most important estate planning tool, few would deny their critical role or the significant advantages of dying testate.

- Only four states currently have statutory will forms thus making it reasonable to ask participants to review all existing forms.³

- The wisdom of statutory wills is currently being debated in California, the first state to enact a will form,⁴ and statutory wills are currently under consideration in several other jurisdictions.⁵

The primary purposes of this study were to ascertain 1) how individuals react to statutory will forms and 2) the degree to which persons are able to complete fill-in-the-blank will forms to effectuate their actual intent and comply with statutory requirements.

B. METHODOLOGY

1. Groups Studied

Three groups were studied. The participants⁶ were assigned to one of these groups based on their formal educational training. Each group contained seventeen individuals.⁷

Group HS⁸ - Group HS consisted of people who had no more than a high school education. It was assumed that this group would represent individuals who would be most likely to use
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statutory will forms because of their low cost and availability.

Group C⁹ - Group C was composed of individuals who had completed at least four years of college or the equivalent, excluding those with legal training. Group C represented those people who would probably be more inclined to appreciate the value and need for estate planning on their own and would have the financial resources necessary to hire attorneys for estate planning assistance.

Group LS¹⁰ - Group LS consisted of law students who had either completed or were currently enrolled in a law school course on wills.¹¹ After passing the bar examination, these individuals may utilize statutory estate planning forms in their practice or advise others as to their effect, but would be doing so without the depth of experience that practicing attorneys already possess.¹²

2. Solicitation of Participants

Groups HS and C were solicited by classified advertisements in local newspapers,¹³ flyers placed on motor vehicles and public bulletin boards,¹⁴ and through personal contact. The newspaper advertisements received the largest response. As persons expressed their interest, they were provided with a brief explanation of the study. Each volunteer was promised two free passes to a local movie theater as an incentive to participate.¹⁵ If they were still
interested in participating, their educational level was ascertained and they were assigned to the appropriate group.

Group LS was solicited by personal appeal to second and third year students at the St. Mary's University School of Law in San Antonio, Texas. Most of the participants attended a 1989 Summer session course in wills and estates.¹⁶

The individuals who agreed to participate in the study were given the date, time, and location of their session as well as appropriate directions and parking information.

3. Data Gathering Sessions - Number

Originally, three evening sessions were scheduled, one for each group. LS was the first group studied; twenty-one students signed up and seventeen actually attended. The second group studied was HS; twenty-four people volunteered but only nine attended. Nine participants were not enough so several additional sessions were conducted to bring the total number of individuals in the HS group to seventeen. The last group studied was C; thirty individuals indicated they would attend but only seventeen appeared.

4. Data Gathering Sessions - Format

Although the sessions for each group were conducted separately, efforts were taken to make the programs as similar as possible. The participants were welcomed and thanked for their attendance. A brief educational presentation on wills was given that explained the purposes of a will and importance of dying testate. In addition, the Texas laws of intestate
succession were reviewed so participants would realize how their property would be distributed if they were to die intestate.

Attention then focused on statutory will forms. The basic philosophy behind the enactment of statutory wills was explained (e.g., to simplify the will-making process, to encourage people to execute wills, to reduce the cost of will preparation). Participants were told that the study was developed to ascertain their opinions on statutory wills in general as well as to obtain their evaluation of the actual forms. They were told that there were no right or wrong answers to relieve anxiety about being "tested."

Each participant was given a copy of the statutory will forms of California, Maine, Michigan, and Wisconsin. They were instructed to read each of the forms carefully and to select the form that they liked the best. The participants perused the forms for approximately forty-five minutes and a vote was taken to determine which form the group, as a whole, preferred.

The form receiving the greatest number of votes was then completed by each member of the group. Participants were reminded that the will they completed would not be valid for any purpose and would only be used in this study. To document this understanding, participants were required to read, sign, and date a "participation" form which made it clear that the participants would not be bound by anything they wrote on the
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form.\(^2\) In addition, the word "void" was written on the line for the testator's signature at the end of each will.

Participants were not allowed to ask questions or discuss the form with the people conducting the study or the other participants. However, some married individuals did discuss their common assets as they would have were they completing the form at home. Participants were also instructed to complete the forms with great care and to circle any comments or marks made to themselves on the form that they realized would not be part of a "real" will.

Each participant was personally interviewed after completing the form to determine his or her reaction to statutory will forms. Three people conducted the interviews using a defined set of questions with accompanying instructions such as not to suggest or prompt possible answers to the participants. The law student participants were also given questionnaires that solicited their opinions, as future attorneys, of statutory wills. Chapter XII details the results of this questionnaire along with the results of a survey of attorneys' and judges' experiences with and attitudes towards statutory wills.

All participants were encouraged to make additional comments and observations. At the conclusion of the interview, the participants were given movie passes, thanked for their assistance, and excused from the study.
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C. RESULTS - WILL FORMS PREFERRED

The Maine and Michigan forms were clearly preferred to those from California and Wisconsin. Groups HS\textsuperscript{22} and LS\textsuperscript{23} completed the Maine form and Group C\textsuperscript{24} completed the Michigan form. The breakdown of the participants' preferences of statutory will forms is set forth in Table X-1.

<table>
<thead>
<tr>
<th></th>
<th>California</th>
<th>Maine</th>
<th>Michigan</th>
<th>Wisconsin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>3</td>
<td>8</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>Group C</td>
<td>3</td>
<td>5</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Group LS</td>
<td>0</td>
<td>8</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6</td>
<td>21</td>
<td>20</td>
<td>4</td>
</tr>
</tbody>
</table>

TABLE X-1: Statutory Will Forms Preferred

D. RESULTS - PERSONAL INTERVIEWS

This section presents the results of the personal interviews that were conducted with each participant. The heading of each subsection is the question that the participants were asked.

1. "Do you have a will?"

The majority of the participants did not have a will. Only three members of Group HS and just less than half of the Group C and Group LS participants had executed a will. This
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appeared consistent with data from other studies that shows that most Americans do not have wills and that those with less education are less likely to have wills. The results of this question are summarized in Table X-2.

<table>
<thead>
<tr>
<th></th>
<th>Will</th>
<th>No Will</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Group C</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Group LS</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>19</strong></td>
<td><strong>32</strong></td>
</tr>
</tbody>
</table>

TABLE X-2: Participants With Wills

2. "If you have a will, who prepared it for you?"

The majority of participants with wills had obtained them from attorneys. Only four had prepared their own wills and two had assistance from relatives. No one had obtained a will with the help of a friend. The results of this question are presented in Table X-3.
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<table>
<thead>
<tr>
<th></th>
<th>Attorney</th>
<th>Self</th>
<th>Relative</th>
<th>Friend</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Group C</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Group LS</td>
<td>6</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>13</td>
<td>4</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

TABLE X-3: Sources of Participants' Wills

3. "If you have a will which was not prepared by an attorney, what type is it?"

None of the participants with non-attorney prepared wills had used fill-in-the-blank forms such as those contained in popular self-help legal books; their wills were either handwritten or handtyped. One person from Group HS obtained her will because her parents had prepared it and then had taken the will and her to an attorney for the will execution ceremony.

4. "If you do not have a will, why don't you have one?"

The reasons²⁶ cited by participants for not having prepared a will varied within and between the groups. Many people gave more than one reason. The reasons are summarized in Table X-4.

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TABLE X-4: Reasons for Not Having a Will

<table>
<thead>
<tr>
<th>Reason</th>
<th>HS</th>
<th>C</th>
<th>LS</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of property</td>
<td>7</td>
<td>2</td>
<td>6</td>
<td>15</td>
</tr>
<tr>
<td>Never thought about it</td>
<td>7</td>
<td>1</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Procrastination</td>
<td>0</td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Too young; wills are for older individuals</td>
<td>527</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Indifference as to how property distributed upon death</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Time and effort required</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Admission of mortality</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Unaware of importance</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>No children</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Not married</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Lack of knowledge as to how to write a will</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Satisfied with intestate distribution scheme</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Unsure of desires regarding property disposition</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Fear of complexity</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

5. "Did you read the instructions which were on the will form?"

All participants from each of the three groups asserted that they read the instructions and notices that accompanied the statutory will form they completed.
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6. "If you read the instructions, how clear were they?"

a. Maine Statutory Will

Both groups completing the Maine form, Groups HS and LS, believed that the instructions were either "very clear" or "somewhat clear." The results to this question are shown in Table X-5.

<table>
<thead>
<tr>
<th></th>
<th>Very Clear</th>
<th>Somewhat Clear</th>
<th>Neutral</th>
<th>Somewhat Confusing</th>
<th>Very Confusing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>8</td>
<td>7.28</td>
<td>0</td>
<td>1.28</td>
<td>0</td>
</tr>
<tr>
<td>Group LS</td>
<td>8</td>
<td>5</td>
<td>3</td>
<td>0</td>
<td>1.29</td>
</tr>
<tr>
<td>TOTAL</td>
<td>16</td>
<td>12.28</td>
<td>3</td>
<td>1.28</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE X-5: Clarity of Instructions - Maine Form

b. Michigan Statutory Will

Group C was the only group to complete the Michigan form. All participants were impressed with the clarity of the instructions; eight found them to be very clear and seven found them to be somewhat clear.30

7. "Did you refer to the definitions or full text of provisions?"

Fourteen participants in Group C reported that they referred to the definitions or additional clauses found on the
last page of the Michigan will form while only three indicated that they ignored them. This question is not applicable to Groups HS and LS because the Maine form does not contain a separate listing of definitions or full text of provisions.

8. "If you did not read the entire form, what parts did you skip?"

Unlike question five which was designed to determine whether participants read the instructions, this question was asked to find out if any parts of the form itself were skipped. Only a few people from each group admitted that they had not read the entire form. The parts skipped by these individuals were as follows; if a part was ignored by more than one participant, the number of individuals who skipped that part is noted parenthetically:

**Group HS (Maine form)**
- references to "spouse";
- references to "children," including the sections for a guardian or conservator;
- article dealing with disposition of real property;

**Group C (Michigan form)**
- sections with which participant was already familiar;
- witnesses;

**Group LS (Maine form)**
- witnesses (2); and
- sections on real property, charitable contributions, residuary estate, and guardianship.
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9. "If you skipped any part of the form, including the instructions or definitions, why did you decide not to read it?"

The most common reason given for failing to read portions of the form was the belief that those particular sections were unnecessary. All the members of Group HS and Group LS, as well as one person from Group C, believed that the ignored material did not apply to them or their situation and thus did not merit their attention. Two additional reasons were cited by Group C members. One person indicated that he skipped the section on witnesses because it was difficult to understand. Another person touted her prior experience with wills as the justification for ignoring certain provisions.

10. "Did you have questions while completing the will which were not answered anywhere in the form or the instructions/definitions?"

Approximately one-half of the participants believed that the statutory will forms and accompanying instructions were inadequate to answer all of their questions. A summary of the responses to this question is provided in Table X-6.
### TABLE X-6: Participants With Unanswered Questions

Participants were given the opportunity to elaborate on the nature of their questions. The substance of these questions is summarized below; if several participants had the same comment, the number of people so doing is noted parenthetically:

**Group HS (Maine form)**
- failure to understand what "unused space" to draw a line through in the section dealing with undistributed property\(^{32}\) (3);
- function and duties of the personal representative\(^ {33}\) (2);
- degree of specificity required in describing a specific gift of real property;\(^ {34}\)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS (Maine)</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td>Group C (Michigan)</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Group LS (Maine)</td>
<td>10</td>
<td>7</td>
</tr>
<tr>
<td>TOTAL</td>
<td>27</td>
<td>24</td>
</tr>
</tbody>
</table>
CHAPTER X

- interrelationship between provision regarding cash gifts to charities and residuary provisions allowing cash gifts to persons;
  - consequences if the testator fails to nominate a guardian for minor children;
  - function and duties of a conservator;
  - clarification of the terms "spouse" and "children;"
  - appropriate method for leaving property to another relative if testator has no spouse or children;

Group C (Michigan form)

- unclear as to whether the witnesses must read the will;
- uncertain how to use a separate sheet of paper to make specific gifts of personal property and the effect of doing so on personal property passing via the clause as written in the form;
- whether the section on charitable gifts should be left blank if charitable gifts are not being made;
- effect of using more than the allotted space to write the amount of cash gifts in words;
- query whether the testator could stipulate the use of a charitable gift;
- felt the expression "all other assets" was vague and required explanation;
- uncertainty about inheritance tax; how is it computed and paid; and whether specific instructions could be given;
CHAPTER X

- wanted reassurance that a person could exclude family in favor of non-relatives;

**Group LS (Maine form)**

- difficulty understanding function of "undistributed property" clause (4);\(^{43}\)
- confusion regarding the interrelationship between residuary clause and undistributed property clause (4);\(^{44}\)
- failure to comprehend how specific amounts could be bequeathed from the residuary;\(^{45}\)
- uncertain as to whose signature was needed next to the various gifts; testator or beneficiary;\(^{46}\)
- effect of failure to nominate a personal representative;\(^{47}\)
- concerned about differentiating between two beneficiaries with similar names; no space to provide further information such as an address or indication of relationship;\(^{48}\)
- wondered whether unused spaces should be marked out; and
- preference for a provision specifically designed for unmarried individuals without children.

11. "In your own words, explain how you think your property would be distributed upon your death under the will you just completed."

This question was designed to determine what the participants thought they were doing with their property by completing the will and if the form reflected that intent. It would serve no useful purpose to supply the participants'
specific responses. Instead, § E of this chapter compares and contrasts the responses to this question with how the actual will forms were completed.

12. "Before filling out this form will, had you already decided or given thought to how you would like to have your property distributed when you die?"

The majority of the participants in all groups had previously contemplated how their property should be distributed upon their death. Group C was the most thoughtful with over 88% indicating that they had thought about it. Group HS had the lowest response with only 59% indicating that they had pondered the issue. The responses to this question are provided in Table X-7.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>10</td>
<td>7</td>
</tr>
<tr>
<td>Group C</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>Group LS</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>TOTAL</td>
<td>37</td>
<td>14</td>
</tr>
</tbody>
</table>

TABLE X-7: Participants Who Had Previously Considered Property Disposition Upon Death
CHAPTER X

13. "Were you able to provide for the distribution of your property as you wanted by using this form?"

The majority of all participants were able to use the forms to distribute their property in accordance with their desires. Users of the Maine form were considerably more pleased than individuals who completed the Michigan form. The responses to this question are provided in Tables X-8 and X-9.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>14</td>
<td>3</td>
</tr>
<tr>
<td>Group LS</td>
<td>14</td>
<td>3</td>
</tr>
<tr>
<td>TOTAL</td>
<td>28</td>
<td>6</td>
</tr>
</tbody>
</table>

TABLE X-8: Form Permitted Property Distribution as Desired - Maine

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group C</td>
<td>9</td>
<td>8</td>
</tr>
</tbody>
</table>

TABLE X-9: Form Permitted Property Distribution as Desired - Michigan
CHAPTER X

14. "If you could not distribute your property as you wanted, what were you unable to do?"

Although most Group HS participants were satisfied with the property distribution they were able to make via the Maine statutory will, several concerns were mentioned in answering this question. One person did not understand that a personal representative was the equivalent of an executor and expressed concern that the form did not provide for the nomination of an executor. Another participant was uncertain of the appropriate method to distribute property to nieces and nephews. One individual anticipated that problems could arise as she acquired more property.

Of those Group HS members who could not distribute their property satisfactorily by using the statutory will, two wanted spaces to leave property to relatives other than a spouse or children, one wanted to specify to whom the property would pass only if his spouse had predeceased, and one wanted to make other types of contingent bequests.

Three participants from Group LS were unable to use the Maine will to carry out their wishes and were disappointed that the form did not allow them to do the following things:

- make more gifts of personal/household items;
- make conditional gifts;
- establish a trust for children; and
- specify that property should be sold and only cash distributed via the residuary clause.
Almost one-half of the Group C members were unable to use the Michigan form to carry out their intent. The following things were mentioned as being unavailable in the form:

- sufficient opportunity to make cash gifts (two participants noted this shortcoming);
- restriction of the use of a charitable gift;
- ability to make cash gifts in percentage terms;
- power to prefer parents over children;
- authority to explain which estate property is to be sold and how the executor is to be paid;50
- opportunity to establish a trust for children; and
- ability to exclude family in favor of others.

15. "Do you like the idea of a statutory will form?"
Participants overwhelmingly approved of the concept of will forms being provided by statute. The responses are summarized in Table X-10.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>13</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Group C</td>
<td>15</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Group LS</td>
<td>14</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>42</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

**TABLE X-10:** Approval of Statutory Form Concept
16. "What did you like best about this statutory will form?"

Participants were eager to point out the features of the statutory will forms with which they were especially pleased. Below is a listing of these responses; if a particular trait was cited by several individuals, the number of participants who mentioned that feature is supplied parenthetically:

**Group HS (Maine form)**
- uses simple language (6);
- easy to follow (4);
- clear (4);
- ability to leave specific bequests (4);
- concise (2);
- logical progression;
- basic;
- many distribution options provided;
- contains sufficient detail but remains clear;
- treats adopted children as natural children;
- contains residuary clause;
- format/setup;
- appropriate for participant's desires;
- ability to select personal representative;

**Group C (Michigan form)**
- simple (6);
- easy to read and understand (5);
CHAPTER X

- ability to make gifts of personal and household items by a separate list (4);
  - quick (3);
  - clear (3);
  - self-explanatory (2);
  - ability to decide on necessity of bond (2);
  - convenient;
  - format/setup;
  - section on cash gifts to persons or charities;
  - comprehensive;
  - concise;
  - not confusing;
  - residuary clause's disposition if testator unmarried at time of death;
    - ability to make a codicil;
    - nominations of personal representative, guardian, and conservator;

**Group LS (Maine form)**

- simplicity (8);
- separate clauses for different types of property (3);
- ability to make specific bequests (2);
- comprehensiveness (2);
- uniformity of construction of instrument;
- brings things to the testator's attention;
- logical flow of choices;
- understandable;
CHAPTER X

- large print is easy to read;
- straightforward instructions;
- clear textual explanations;
- provides good opportunity for the less educated to make a will;
- warning to consult with an attorney if any questions arise; and
- recommendation to make a new will if children are born thereafter.

17. "What did you like least about this statutory will form?"

Approximately twenty-five percent of all participants indicated total satisfaction with the will form they completed; six from Group HS, four from Group C, and three from Group LS. The remaining participants identified various features which they disliked about the forms. A summary of these features is provided below; if the same dislike was mentioned by several individuals, the number of participants who replied likewise is supplied parenthetically:

**Group HS (Maine form):**
- lack of definitions (3);\(^{51}\)
- more space for specific gifts/property descriptions (3);
- form geared to "typical" family (spouse and children) rather than single person with no children (3);\(^{52}\)
- undistributed property provision unclear;
CHAPTER X

- necessity of picking residuary clause option;
- failure of witness provision to explain requirements for a proper witness;
- inability to change or amend form language;
- property distribution clauses too restrictive;
- impersonal nature of form;
- insulted intelligence (too condescending; too easy);

**Group C (Michigan form)**
- ambiguous or unclear language (4);^53
- inadequate space for specific gifts (3);
- insufficient choices for disposition of residuary estate;
- lack of flexibility;
- limitation in number of cash gifts allowed;
- unable to stipulate actual desires;
- unable to leave unequal shares to children;
- doubt as to comprehensiveness of form;
- failure to provide instructions about codicils;
- negative wording in form;

**Group LS (Maine form)**
- lack of definitions (4);
- insufficient space to provide detailed property descriptions (2);
- ambiguous language (2);
- difficulty in reconciling undistributed property clause with residuary clause;
CHAPTER X

- language too technical;
- failure to stress importance of witnesses;
- provisions made for only two witnesses;
- not geared toward single and childless individuals;
- form inadequate for complex estates;
- legal implications of signing will not sufficiently explained;
- lack of information about ability to establish a trust; and
- impersonal nature of form.

18. "What suggestions would you make to improve the statutory form and its instructions/definitions?"

Participants were anxious to provide recommendations on ways to improve the forms. Their advice is summarized below; if several participants made the same suggestion, the number is shown parenthetically:

**Group HS (Maine form)**
- add definitions (5);
- increase amount of space allotted for property descriptions (3);
- change references to spouse to include other living relatives (3);
- explain how detailed the property descriptions need to be regarding the specific gifts (2);
- gear form toward single and childless individuals (2);
- write in simpler, plain English, terms (2);
CHAPTER X

- require complete address of charities;
- provide better explanation of clause 2.5 dealing with undistributed property;
- explain factors to consider when selecting a conservator;
- explain what happens in various contingencies such as where property goes if disclaimed, who serves if all named guardians decline, etc.;
- remove requirement that each bequest be separately signed;

**Group C (Michigan form)**

- more options for property distribution (4);
- more space for specific and monetary gifts (3);
- improve clarity of language in witness statement (2);
- improve clarity of language of residuary clause;
- include space for noting whether a separate list giving personal and household items has already been made;
- provide better explanation of how to make gifts of personal and household items via a separate list;
- inclusion of a sample list or statement form to make gifts of personal and household items;
- use bold print or capitalization to emphasize important material;
- include property distribution provisions for parents and other relatives;
CHAPTER X

• incorporate definitions where needed rather than at the end;
  • provide option of distributing property by percentages to named individuals;
  • include space to designate alternate beneficiaries;
  • explain use of codicil;
  • provide better explanation of bond;
  • allow bond to be waived for each fiduciary individually rather than all together;
  • include spaces to name additional alternate personal representatives;

Group LS (Maine form)
• add definitions (7);
• use simpler terminology (5);
• provide more room to write property descriptions (5);
• include provisions on bond (2);
• resolve seeming conflict between undistributed property clause and residuary clause (2);
• make bequests more flexible;
• require more information to identify fiduciaries;
• explain how specific property descriptions need to be;
• explain intestate distribution;
• allow for contingent gifts;
• expand instruction which explains the property not governed by the will;
• print the form on 8½" x 11" paper; and
CHAPTER X

- stronger warning for user to see attorney for problems and assistance.

19. "Would you use a statutory will form (to make your will or to revise your present will) if one were available in Texas?"

A substantial majority of all participants in Groups HS and C indicated that they would use a statutory will form if one were available in Texas. However, less than one-half of the members of Group LS expressed the same willingness to use a statutory will. Table X-11 details the reactions to this question.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>14</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Group C</td>
<td>11</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Group LS</td>
<td>755</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>32</td>
<td>15</td>
<td>4</td>
</tr>
</tbody>
</table>

TABLE X-11: Willingness to Use Statutory Will Form

20. "If you don't currently have a will, would the existence of a statutory will form encourage you to make a will?"

The existence of a statutory will form would serve as the impetus for most of the participants to obtain a will. The replies to this question are reflected in Table X-12.
TABLE X-12: Statutory Forms as Impetus to Obtain Will

21. "If you were going to complete a statutory will form, how likely would you be to consult an attorney?"

The responses of Group HS were evenly spread across the range from "very likely" to "very unlikely." On the other hand, Groups C and LS were more polarized with most participants strongly favoring or disfavoring the seeking of legal advice when using a statutory will. The results of this question are summarized in Table X-13.

TABLE X-13: Likelihood of Seeking Legal Advice When Using Statutory Will Forms
22. "If Texas had a statutory will form, would you recommend it to your family and friends?"

The overwhelming majority of participants indicated that they would be willing to recommend a statutory will form to their family and friends. Several others were uncertain indicating that they "thought" the form would meet the needs of their family and friends. The results of this question are set forth in Table X-14.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>13</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Group C</td>
<td>13</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Group LS</td>
<td>9</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>TOTAL</td>
<td>35</td>
<td>10</td>
<td>6</td>
</tr>
</tbody>
</table>

TABLE X-14: Recommendation of Statutory Will Form to Family/Friends

E. RESULTS - ANALYSIS OF COMPLETED FORMS

This section analyzes the participants' completion of the statutory will forms from two perspectives. First, the forms are examined to ascertain whether the distribution scheme provided or selected in the form actually matched the person's understanding of how his or her property would be distributed upon death. Second, the forms are reviewed to determine
CHAPTER X

whether the completed forms satisfied the formal requirements for valid statutory wills.

1. Comprehension of Property Distribution Plan

Participants were asked to explain how they believed their property would be distributed upon death under the wills they had just completed. These responses were then compared to the distribution scheme actually established in the wills to determine how accurately the participants understood what they had done.

Group HS had tremendous difficulty with the Maine statutory will form; the forms of only seven participants clearly matched how they thought their property would be distributed. Some of the discrepancies were relatively minor, such as including gifts of personal property under the section for real property or placing cash gifts to family members in the section for cash gifts to charities. On the other hand, some errors were serious such as a total disagreement regarding the distribution of the residuary.

Group C fared much better with the Michigan statutory will form. Over fifty-eight percent of the completed will forms matched the participants' understanding thereof. In addition, three other participants indicated they knew what they had done in the form but could not use the form to correctly express their intent. This limitation of the form forced two individuals to attempt makeshift alterations without fully realizing the effect of those changes. The
remaining discrepancies were easy to ascertain. Two participants did not understand what they had done in the will, one person's explanation was radically different from what the form reflected, and one person's real property distribution was different.

Considering their familiarity with wills, it was not surprising that Group LS members had the greatest success rate with fourteen members (82%) being able to accurately explain how the Maine statutory will would distribute their property. The remaining participants thought that their residuary estate would pass differently from what was actually indicated in the form.

2. Formal Validity of Forms

Each participant's statutory will was carefully analyzed to determine whether it was properly completed according to its instructions so it would be effective under the appropriate state law. It is significant to note that this study did not encompass the actual will execution ceremony and the accompanying attestation. Preliminary information from at least one state indicates that the testator's failure to sign the will and have it properly witnessed produces many invalid statutory wills.59 This section is thus limited to an examination of the substance of the will form.

Completion errors are divided into four major categories. "Harmless errors" refer to mistakes that would have no effect on the will's validity. "Potential problems" are those errors
CHAPTER X

that are likely to raise a question of validity but which would probably be overlooked by a court. "Partial invalidity" refers to errors that would invalidate a provision of the will but not the entire will. "Total invalidity" means that the error was fatal to the validity of the entire will.

Reference was made to each form's enabling legislation when classifying the completion errors. Maine has several interpretation and construction rules that anticipate some users improperly completing the forms. These rules are as follows:

Failure to complete or mark through any section or part of a section in the statutory will shall not invalidate the entire will. Failure to sign any section or part of a section in the statutory will requiring a signature shall only invalidate the part not signed, except as specifically provided in paragraph 2.4.60

[Paragraph 2.4] If I fail to sign the appropriate distribution(s) or if I sign in more than one clause or if I fail to place my initials in the appropriate box, this paragraph 2.4 will be invalid and I realize that the remainder of my property will be distributed as if I did not make a will.61

On the other hand, the Michigan statutory will statute does not contain any special interpretation or construction rules.

Less than thirty percent of the participants were able to complete the statutory will forms without error. None of the mistakes made by the participants, however, were fatal to the validity of the entire will. Although most of the errors were harmless in nature, almost twenty-five percent of the wills were partially invalid and another twenty percent raised potential problems.
CHAPTER X

A considerable difference in the severity of errors was noticed between the Maine and Michigan forms. Over thirty-five percent of the Maine forms contained provisions which would clearly be deemed invalid while none of the Michigan forms contained obviously invalid provisions.

Table X-15 summarizes the completion errors made by the participants. Several people made multiple errors so the rows in the table may add up to more than the number of participants in each group.

<table>
<thead>
<tr>
<th></th>
<th>No Errors</th>
<th>Harmless Errors</th>
<th>Potential Problems</th>
<th>Partial Invalidity</th>
<th>Total Invalidity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group HS</td>
<td>362</td>
<td>1563</td>
<td>564</td>
<td>565</td>
<td>0</td>
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<tr>
<td>(Maine)</td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>Group C</td>
<td>6</td>
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<td>267</td>
<td>0</td>
<td>0</td>
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<tr>
<td>(Mich.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group LS</td>
<td>6</td>
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<td>369</td>
<td>770</td>
<td>0</td>
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<td>(Maine)</td>
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<tr>
<td>TOTAL</td>
<td>15</td>
<td>38</td>
<td>10</td>
<td>12</td>
<td>0</td>
</tr>
</tbody>
</table>

TABLE X-15: Completion Errors in Statutory Will Forms

F. RESULTS - TIME REQUIRED TO COMPLETE FORMS

Participants were observed to determine the amount of time required to complete the statutory will forms. The data regarding the first several participants to finish in each group is highly accurate because these people were
individually observed. For example, in Groups HS and C the first individuals finished in five minutes and in Group LS in seven minutes. Reliance was placed on estimates provided by the participants to obtain other completion times. Many participants were unable to accurately report their completion times as demonstrated by some individuals who indicated that they finished before specifically observed individuals. Table X-16 reflects a combination of observed times and participant estimates with allowances made for known inaccuracies.

<table>
<thead>
<tr>
<th></th>
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<th>5-8</th>
<th>8-10</th>
<th>10-13</th>
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<tr>
<td>Group HS(^1)</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Group C</td>
<td>1</td>
<td>5</td>
<td>5</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Group LS(^2)</td>
<td>0</td>
<td>4</td>
<td>6</td>
<td>1</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>4</td>
<td>11</td>
<td>13</td>
<td>7</td>
<td>5</td>
<td>9</td>
</tr>
</tbody>
</table>

**TABLE X-16: Time Required to Complete Statutory Will Forms (in minutes)**

Although it is interesting to note these times, meaningful conclusions are not possible regarding the length of time needed to complete statutory will forms; participants had already spent approximately forty-five minutes examining four statutory forms. Prior familiarity with the forms probably shortened the time necessary to complete them.
CHAPTER X

G. FINDINGS

This section summarizes the primary findings of this study based on the data reported in Sections C & D. No attempt is made to draw all of the conclusions that are possible from the collected data. Instead, this section focuses on those issues which directly address the impact of statutory will forms on the non-legal community.

1. Widespread Approval of Statutory Will Forms

All of the groups studied were highly supportive of statutory wills. Over 80% of the participants approved of statutory wills while less than 6% disliked the concept. The vast majority of participants in Groups HS and C indicated that if a statutory will were available in Texas they would consider using the statutory form in preparing their estate plans as well as recommend it to their families and friends. These groups also believed that the existence of a statutory will would encourage them to make wills.

These results are consistent with reports from states presently utilizing statutory will forms which reflect a high degree of public interest in this type of will. For example, officials from the California Bar Association estimate that more than one-half million statutory will forms have been ordered by consumers or attorneys. Likewise, the head of the probate section of the San Diego County Bar Association indicated that a high level of interest in the forms was
CHAPTER X

exhibited during public talks. Experiences are similar in the other states with statutory wills.

2. Preference for Maine and Michigan Statutory Will Forms

Participants from all groups uniformly preferred the Maine and Michigan statutory will forms to those from California and Wisconsin. No criteria were given to the participants to aid them in making their decision; they were simply asked to review the four forms and select the one which they "liked" the best. Unfortunately, only limited data was gathered that sheds light on the reasons behind these preferences. Accordingly, it is uncertain whether participants based their decisions on the appearance or format of a will or because of its substantive contents.

3. Failure of Statutory Forms to Contain Sufficient Opportunities for Individualization

Although a majority of the participants were able to use the statutory forms to distribute their property in accordance with their desires, many individuals found that the statutory form stifled their ability to create the distribution plans they desired. This problem was less evident with the Maine form with which 82% of the participants were satisfied, as compared to only 53% for the Michigan form.

In general, the participants dissatisfied with the statutory forms wanted to customize their wills beyond the form's parameters. For example, individuals wanted to make more gifts of specific property, create trusts, place
restrictions on the gifts, and alter the distribution of the residuary estate.83

4. High Percentage of Statutory Will Forms Inaccurately Completed84

a. Maine Form

All members of Groups HS and LS alleged that they read all of the instructions that accompanied the statutory will form85 and over 80% concluded that the instructions were either "very clear" or "somewhat clear."86 Almost one-half of these participants, however, had questions while completing the form which were not answered by the forms or the accompanying instructions.87

Close examination of the forms revealed that significant problems arose from two perspectives. First, participants did not understand the distribution schemes they created in the forms. In Group HS, only 35% of the participants understood how their property would be distributed under the will forms they completed.88 Although 82% of Group LS comprehended what they provided in the form, such a result was anticipated because its members had at least one year of legal training and were familiar with the operation of wills.

Second, the forms were improperly completed. Although none of the Maine forms completed by Groups HS and LS would have been totally invalid, many contained errors that would result in partial invalidity; 30% of those completed by Group HS and 40% of those completed by Group LS.89 It is interesting
to note that the group with no more than a high school education did a better job of following the instructions on the form than persons with law school training.

b. Michigan Form

All members of Group C asserted that they read the instructions accompanying the Michigan form. In addition, they believed the instructions were "very clear" or "somewhat clear." Although many members of this group thought that the Michigan form did not provide sufficient opportunity for individualization, 58% were able to correctly explain how their property would pass under the will. In addition, none of the Michigan forms were totally or partially invalid and only two had errors that even raised a potential problem.

5. Detailed Options and Detailed Instructions May Increase Opportunity for Errors

It appears that there is a greater likelihood of completion errors when more options are provided. Although the ability to individualize a form allows a person's property to be distributed according to his or her intent, it may also increase the chance that at least a portion of the document will be deemed invalid. Detailed instructions may also lead to mistakes, such as Maine's requirement of placing initials in a box and signing after a certain option.
6. Approximately Fifty Percent Likely to Consult Attorney

Approximately 50% of all participants indicated that they would consult an attorney if they were going to complete a statutory will\textsuperscript{93} while the other half indicated that they would probably not seek legal advice. Although some of the completion errors previously discussed may have been recognized and corrected by actual users of the forms, many mistakes would escape detection because the form will would not be reviewed by an attorney.

H. RECOMMENDATIONS FOR FUTURE EMPIRICAL STUDIES

1. Study of Existing Statutory Will Forms

Additional studies are necessary to acquire more reliable data concerning the public's reaction to statutory will forms and the average individual's ability to complete them properly. Much was learned in conducting this pilot study that would be helpful in constructing a comprehensive study. Major recommendations are discussed below.

a. Groups Studied

The groups in the pilot study that were relevant to ascertain community reaction to statutory wills were those composed of individuals with a high school education or less and those with at least four years of college. This classification format should be expanded to encompass individuals at all points on the educational scale rather than
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groups at the ends of the scale. Each participant should indicate the highest grade level completed; this information would then be considered in interpreting the data.

b. Selection of Participants

The participants in this study were not randomly selected. Instead, they were volunteers who knew that the study involved statutory wills and that statutory wills were used in some states to reduce the cost of estate planning. This may have led to a participant bias in favor of statutory wills. The study may also have been biased in favor of individuals who were interested in estate planning. Accordingly, any future studies should be conducted with randomly selected individuals who at the time of selection are unaware of the nature of the study.

Other participant characteristics may impact the findings of statutory will studies and need to be factored into the interpretation of results. Examples include the following:

- Age - Some forms appear to be geared toward middle-aged individuals rather than young adults or senior citizens.
- Family situation - Many forms are designed for use by married individuals with children.
- English proficiency - Statutory will forms are written in English and require a solid familiarity with English to be correctly understood.
c. Information Given to Participants Prior to Completion of Statutory Wills

Participants in this study were provided with information that the average non-attorney is not likely to have. For example, they were told the purposes and importance of having a will as well as how their property would be distributed if they died intestate. Participants were also told about the basic philosophy behind statutory wills. This information made the participants less representative of the community. Accordingly, in future studies the participants should not be given this type of additional information prior to completing the form.

d. Knowledge That Form Would Have No Legal Effect

The study failed to reflect the real-life user of statutory will forms in another way. Participants knew that they were in a study and that the documents they completed would have no legal effect. Accordingly, some individuals chose to skip portions of the form they did not understand or completed them the best they could knowing that they would suffer no legal detriment for doing something wrong. Perhaps the participants should believe they are completing a "real" will at the time they are actually filling in the form; after finishing, they would be told otherwise. Thus, during the act of completing the form, participants would have a frame of mind closer to that of an actual user. It seems unethical, however, to have people ponder death, complete a will, and then tell them it was merely a facade for a study. It may
also be difficult to convince people to do something "legal" without some type of assurance.

e. Selection of Form to Complete

Each participant was given the opportunity to review four statutory wills and then select the one he or she preferred. This part of the study has merit because it sheds light on the type of form a non-attorney prefers. Unfortunately, the participants were not given any criteria by which to make their decision and they were not asked the reasons for their decisions. It is therefore unknown whether preferences were based on style, format, substantive contents, or some other ground. In subsequent studies, it may be wise to provide participants with criteria and question them about their selection.

Another problem emerged because participants were allowed to examine four statutory wills. The participants appeared to read the forms with great interest, often comparing one with another. Thus, when each participant completed a sample form, he or she was using the knowledge gained from reading the instructions and definitions on the other forms. Accordingly, the participants had a higher degree of knowledge than the normal user who would examine only the form about to be completed. It is thus advisable to have participants review and complete only one form and use different groups for each state.
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f. Method to Study Attestation

The participant's ability to have the statutory will properly attested was not within the scope of this study. Evidence exists that improper attestation causes many statutory wills to fail. Therefore, a means to ascertain whether participants could take the steps necessary to have their wills properly witnessed needs to be developed. This would be difficult to do because the mere fact of mentioning that steps must be taken to witness the will decreases the realism of the study; when statutory wills are actually completed, no one is around to remind users that attestation is needed.

2. Study to Develop Model Statutory Will Form

The valuable data collected in this pilot study indicates that a comprehensive study is desperately needed to ascertain the wisdom of legislatures enacting statutory will forms. However, more is required than simply a better study of the existing statutory will forms. Although it is important to acquire better data about the ability of people to use the statutory forms of California, Maine, Michigan, and Wisconsin, such a study by itself is insufficient to reach the ultimate goal of constructing a statutory will form that has a chance of being effectively used by the non-legal community.

A productive approach would be to conduct a study which focuses on creating a statutory will form with understandable instructions as well as sufficient opportunity for
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individualization. The study would be conducted in a similar manner to the pilot study, with the improvements noted above, but with one major difference. The form used would be a model form. As each group completed the form, changes would be made based on the data obtained and the revised form retested until a superior form was developed.

It is anticipated that this study would lead to one of two diametrically opposed conclusions. It could result in a well-organized, simply worded, flexible, and legally effective will form which could be used by a wide segment of the population. On the other hand, the study could demonstrate that non-attorneys are incapable of either understanding or following directions well enough to justify governmental sanction of a statutory will form.

3. Study Other Types of Statutory Forms

Studies are also needed that focus on other types of statutorily supplied estate planning forms such as durable powers of attorney, guardian self-selection documents, and living wills. It is important to ascertain whether non-attorneys are able to use these forms to effectuate actual intent. The studies encompassing these forms may be conducted in basically the same way as this pilot study by incorporating the recommendations discussed above.
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I. CONCLUSION

Statutory will forms are generally well-received by the public and have the potential of assisting the non-legal community in acquiring basic estate plans. However, the current statutory forms may not be doing a good job of effectuating the policies behind statutory wills because some forms impose undue restrictions on how estates are distributed. If sufficient opportunity to individualize is provided, however, the likelihood of completion errors appears to increase. Accordingly, if the benefits of statutory will forms are to be pursued, greater care needs to be taken in drafting the forms. Rather than attorneys and legislators spending time and money merely debating the wisdom of various will clauses and how they may or may not be desirable or functional, detailed testing of the public is also needed. Carefully conducted studies would ascertain the type of options which should be provided, the type of format to use, and the appropriate wording of instructions. As a result, a form could be developed which can be properly completed by non-attorneys to reflect intent and to comply with state requirements for a valid will.
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1. The study reported in this chapter was funded by a grant from the American College of Probate Counsel Foundation. The author greatly appreciates the ACPC's generosity. Three individuals also deserve special mention for their support of this study: Mr. Harold I. Boucher, for his undaunting support of statutory will research and of the ACPC grant application; Dr. Wayne Ferguson, Pryor Professor of Free Enterprise, St. Mary's University School of Business Administration, for his insights into the methodology of empirical studies; and Ms. Ellen Kissling, 1990 J.D. Candidate, St. Mary's University, for her highly competent, enthusiastic, and invaluable assistance. The author would also like to acknowledge the efforts of Mr. Bruce Dean, 1989 J.D., St. Mary's University, and Ms. Bobbie Belzung, 1990 J.D. Candidate, St. Mary's University, in helping to interview participants.

2. See, e.g., Rice, Too Little Too Late, CAL. LAW., June 1989, at 36 (describing apparent difficulties with California statutory will forms, such as failure of testator to complete, execute, and have them witnessed properly, along with contemplated steps to rectify them).


4. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36.

5. There appears to be interest in New Jersey, New York, and Texas. See, e.g., American College of Probate Counsel, Board of Regents Report 2 (Oct. 1988) (New York and Texas); Letter from C. Terry Johnson to Robert M. Brucken (Dec. 28, 1983); You Can't Take it With You, So You Should Make a Will, San Antonio Express-News, June 4, 1989, at 2-G; Letter from Kent H. McMahan to Gerry W. Beyer (Nov. 17, 1988) (Texas probate judges appear to be opposed to statutory wills); The Limits to a Do-It-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 (some efforts in New Jersey to enact statutory will form).

6. Individual participants may be referred to as "he" or "she." Such references are only for convenience and do not reflect the actual gender of that particular participant.

7. There is nothing magical about seventeen. The goal was to have between fifteen and twenty persons per group. By coincidence, the first two groups that were studied had

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seventeen members and the decision was then made to have seventeen in the remaining group for consistency.

8. "HS" is an acronym for "high school."

9. "C" is an abbreviation for "college."

10. "LS" is an acronym for "law students."

11. Although many of the law students knew the author, none of them had attended his wills course. This reduced the chance that the author may have communicated a bias to students which later played a part in the students' responses.

12. Some of the data obtained from this group is reported in Chapter XII(D).

13. The advertisements were substantially as follows:

   LEARN ABOUT WILLS - Professor at St. Mary's Law School needs participants for study on wills. Takes 2 hours, receive 2 Santikos movie passes. Must be over 18. Call . . . .

   See, e.g., San Antonio Express-News, June 8, 1989, at 8-C; Recorder, June 8, 1989, at NWC-10 (San Antonio, Texas).

14. Two flyers were used which differed in format and organization but contained essentially identical information. The text of the flyers were substantially as follows:

   -WILLS- DO THEY HAVE TO BE EXPENSIVE?

   NO. A new type of will has been designed that anyone can use. It's easy, inexpensive and you don't need to hire an attorney. This new type of will is not used in Texas; it is used in other states.

   Professor Gerry W. Beyer of St. Mary's Law School is conducting a study on this new will. Help us learn more about it, and help yourself learn more about wills.

   We need only 2 hours of your time and all participants will receive 2 Santikos movie passes.
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If interested in taking part in this study, please call .... (Must be over 18 years of age.)

15. If the passes were used at peak times, the value of the incentive was $11.00.

16. The author would like to express his appreciation to his colleague, Professor Aloysius A. Leopold, who allowed requests for participants to be made during his wills and estates course.

17. CAL. PROB. CODE § 6240 (West Supp. 1988). The California statutory will with trust was not used because a separate trust form is not available in Maine and Michigan.


20. WIS. STAT. ANN. § 853.55 (West Supp. 1988). The Wisconsin statutory will with trust was not used because a separate trust form is not available in Maine and Michigan.

21. The text of the participation form was as follows:

I understand that the will I fill out IS NOT VALID FOR ANY PURPOSE. The sample will is only for the purposes of the study being conducted by Professor Gerry W. Beyer of the St. Mary's University School of Law. I will not be legally held to anything I write in this document.

I also understand that the discussions which take place as part of this study may be taped for note-taking purposes. Any statement that may be quoted in any report of this study will be credited to "a participant" and not to me by name.

22. The participants of the initial HS session voted as follows: California 2; Maine 5; Michigan 2; and Wisconsin 0. Thus, the Maine will was completed. It was also decided that to remain consistent, all subsequent HS participants would complete the Maine form regardless of their vote. Nonetheless, their preference was still sought.

23. In Group LS, the first ballot produced a tie between the Maine and Michigan form. The sole person who voted for a form from the other two states was given the opportunity
to break the tie. This person selected the Maine form and thus Group LS completed the Maine form.

24. The closeness of the vote between the Maine and Michigan form was also demonstrated by one participant who indicated that although she initially selected the Michigan form, if given the opportunity to re-vote, she would have chosen the Maine form.

25. See, e.g., Where There's a Will, There's a Way, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985) ("more than two-thirds of all adult Americans die without wills"); E. COLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDEENTS' ESTATES AND TRUSTS 13 (4th ed. 1987) ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate."); ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING 1 (2d rev. 1983) ("Three out of four Americans die without a will."). Cf. The Law Commission, Distribution on Intestacy 3 (Working Paper No. 108, 1988) ("about half the population [of England and Wales] die intestate"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of studies and surveys demonstrating high percentage of intestate deaths); Chapter I(B)(3)(c).

26. In the atmosphere of the study, perhaps "excuses" would better describe the responses to this question.

27. This response was typical among those in the 18 to 20 year old range.

28. One participant found the instructions to be both somewhat clear and somewhat confusing.

29. One law student anticipated that a non-attorney would find the instructions to be very confusing but found the instructions to be very clear from a legal viewpoint.

30. The remaining two participants made specific comments. One person disliked the admonition against adding or crossing out words (notice 3) and another needed to read the definitions at the end of the form before the instructions became clear.

31. Three people from Group LS indicated that they would have skipped the definitions if some had been included in the Maine form.

32. See ME. REV. STAT. ANN. tit 18A, § 2-514 (Supp. 1987) (clause 2.5). This clause is a "super-residuary" provision providing for disposition of the residuary estate if the testator fails to select one of the three
residuary distribution options provided on the form. The super-residuary clause must be separately signed to be valid.

33. *Id.* (clause 3.3).
34. *Id.* (clause 2.1).
35. *Id.* (clause 3.1).
37. *Id.* (clause 2.2).
38. *Id.* (clause 2.1).
39. *Id.*
40. *Id.*
41. *Id.* (clause 2.3).
42. *Id.* (notice 5; clause 2.2).
43. See ME. REV. STAT. ANN. tit. 18A, § 2-514 (Supp. 1987) (clause 2.5).
44. *Id.* (clauses 2.4 & 2.5).
45. *Id.* (clause 2.4C).
46. *Id.* (various clauses).
47. *Id.* (clause 3.3).
48. *Id.* (various clauses).
49. This figure includes two individuals who thought it would be possible to use the form with only a slight modification of their intent or if their questions about the effect of the form were answered in a certain manner.
50. This participant wanted to name a "conservator" for estate property as a separate entity from the personal representative.
51. One participant was unclear what the term "amount" meant in clause 2.4(C); did it mean amount of money or amount of any type of property and could percentage figures rather than dollar amounts be used.
52. This comment was made by two persons who were eighteen years old and one person who was over sixty-five.

53. Participants specifically mentioned the witness statement and clauses 2.2 and 2.3 dealing with property disposition.

54. One participant specifically wanted a definition of "amount" in clause 2.4C.

55. One participant indicated that he would use the will at this stage in his life but not later. Another person stated that the form would be used assuming a trust option were provided.

56. The response to this question by Group C is anomalous; eleven people responded although only nine participants admitted not having a will in response to question one.

57. The response to this question by Group LS is anomalous; thirteen individuals responded although only nine people admitted not having a will in response to question one.

58. One person qualified her answer by stating that the form would only be an encouragement if it contained a trust option.

59. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36.

60. ME. REV. STAT. ANN. tit. 18A, § 2-514(b) (Supp. 1987).

61. Id. § 2-514(a) (clause 2.4).

62. One Group HS member also completed the California form. This form was accurately completed.

63. Fourteen people did not mark through the sections or parts of sections which were not completed as requested by notice # 4; one person failed to name a personal representative.

64. Five participants disposed of personal property under the real property section.

65. Four persons did not initial the box in front of the residuary estate distribution option which was selected; one person did not sign next to the specific property dispositions.

66. Six participants crossed-out or marked "n/a" on sections not used despite warning that "[i]t is strongly recommended that you do not add or cross out any words on this form except for filling in the blanks because all or
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part of this will may not be valid if you do so." MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (notice # 3). Two people failed to place their name on the top of the will. One person did not select one of the bond provisions.

67. One individual signed both options for the residuary clause. Under the terms of the will, this would mean that the property is automatically distributed under the second choice, i.e., by intestacy. Another person made more cash gifts than permitted by the form by inserting the names of additional beneficiaries.

68. Twelve people did not mark through the sections or parts of sections which were not completed as requested by notice # 4; one individual did not name a personal representative; one person did not write his name at the top of the will.

69. One person signed the undistributed property clause without indicating where the undistributed property was to pass; one person disposed of personal property under the real property section; one person marked two residuary clause options but signed only one.

70. Seven participants did not initial the box in front of the residuary estate distribution option which was selected.

71. The completion time for one participant is unknown.

72. The completion time for one participant is unknown.

73. See supra Table X-10.

74. See supra Table X-11.

75. See supra Table X-14.

76. See supra Table X-12.

77. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36; see also California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7 (within the first year after passage of California statutory will, Bar sold 175,000 copies of the form).


79. The Center for Public Representation has published a non-technical guide to the Wisconsin statutory wills. M. KLUG & H. ERLANGER,'THE BASIC WILLS HANDBOOK: A GUIDE TO
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THE WISCONSIN BASIC WILLS (1985). The Michigan statutory will is distributed by local politicians and there is evidence that the forms have been popular. Letter from Fredric A. Sytsma to Gerry W. Beyer (Oct. 24, 1988).

80. 41% preferred the Maine form; 39% Michigan; 12% California; and 8% Wisconsin. See supra Table X-1.

81. See supra Table X-8.

82. See supra Table X-9.

83. See supra § D(14), (17), & (18).

84. See supra Table X-15.

85. See supra § D(5).

86. See supra Table X-6.

87. See supra Table X-7.

88. See supra § E(1).

89. See supra Table X-15.

90. See supra § D(5).

91. See supra § D(6)(b).

92. See supra Table X-15.

93. See supra Table X-13.

94. It was realized that this question should have been asked early in the study. To maintain consistency, however, this question was not added in subsequent interviews.

95. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36.
PART FOUR

EFFECT OF STATUTORY ESTATE PLANNING FORMS
ON THE LEGAL PROFESSION

CHAPTER XI

POTENTIAL RAMIFICATIONS

A. INTRODUCTION

The legal profession is undecided about the wisdom of enacting statutory estate planning forms and the effects they will have on the legal community.¹ Many commentators believe that statutory forms provide "a great service to the Bar"² while other writers assert that any benefits the forms may possess are outweighed by their disadvantages. This chapter presents the arguments which have been advanced for and against statutory estate planning forms vis-à-vis the legal community. The discussion focuses on the general ramifications of using these forms; it does not evaluate the advisability of providing specific types of estate planning forms by statute nor whether a particular state or Uniform form accomplishes the desired goals. These issues are covered in Part Two of this dissertation.
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B. OSTENSIBLE BENEFITS

1. Enhanced Image of Legal Profession

The enactment of statutory estate planning forms may improve the dishonorable reputation that the public has imputed to attorneys and the legal profession. The Bar's support of statutory forms "should help some members of the general public to understand the true service ethic of the legal profession." As stated in the New York Bar Association's memorandum endorsing statutory will legislation:

During the past several years complaints about both the quality of, and high cost of, lawyers' services have been heard with increasing frequency. While some, if not most, of these criticisms may be inaccurate or exaggerated, and some of the proposed solutions offered by the critics naive or even utopian, there is undeniably an element of accuracy to the expressions of discontent. Lawyers' services are beyond the means of many Americans; and when the services that are rendered are inadequate, the profession as a whole should be concerned. Lawyers must begin to deal, in a constructive way, with the legitimate aspects of the criticisms that have been leveled against the profession.

California's experience with statutory will forms provides a good example of Bar involvement with these forms. The enabling legislation was initiated and developed entirely by the California Bar. One of the drafters of the legislation stated that the Bar hoped to achieve a change in "the image of lawyers trying to mystify the public, particularly those who are not sophisticated . . . [The Bar] wanted to show that lawyers were taking the initiative in helping the middle-income consumer." The statutory will
project was praised as an example of "the bar pursuing something that is not in their narrowly defined economic self-interest." After passage of the enabling legislation, the California Bar continued its support by printing the statutory forms and marketing them to the public at a nominal cost.

The California Bar has maintained its leadership role in statutory will legislation by proposing revisions to the forms based on experience. Evidence exists that the statutory will forms are often improperly completed resulting in their being denied probate. To remedy this problem, a special committee of the Bar's Estate Planning, Trust and Probate Law Section is rewriting the forms. This committee's goals include simplifying the form to reduce the chance of error and increasing the choices for estate distribution that may be selected by a person using the form. These actions further demonstrate to the public that the Bar is concerned and responsive to society's needs.

The wording of statutory forms may also enhance the legal profession's image. One of the causes of the public's distrust of attorneys is their use of language that is difficult for many people to understand -- the so-called "legalese disease." Statutory forms typically use plain language and are designed to be understood by the average person. Accordingly, statutory estate planning forms may be an effective part of the Bar's public relations effort.
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2. Improved Quality of Services

Statutory estate planning forms may permit attorneys to improve the quality of legal services by minimizing the risk of significant errors in drafting or analysis.\textsuperscript{15} For example, a statutory form containing all of the necessary elements for the document’s validity would make it easier to ensure that a technicality is not inadvertently overlooked. A statutory form may also draw the attorney’s attention to an issue that may otherwise have been neglected.\textsuperscript{16}

An attorney needs less time to complete a statutory form than to draft an original document for the client.\textsuperscript{17} Likewise, less time may be needed to advise the client if the client has already reviewed a statutory form and its accompanying instructions. Accordingly, the attorney will be able to charge less for his services\textsuperscript{18} or will have more time to devote to other aspects of the client’s case. In either instance, the statutory forms may assist the attorney in providing less expensive and more efficient legal services.\textsuperscript{19}

3. Decreased Probability of Malpractice

As discussed above, statutory forms make it easier for an attorney to be sure that the required formalities are satisfied and relevant issues considered.\textsuperscript{20} Thus, the likelihood of drafting and execution errors is reduced as is the concomitant risk of malpractice.\textsuperscript{21}
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4. Abatement of Court Congestion

Statutory estate planning forms may also relieve the congestion often found in probate courts. Because the forms are inexpensive and easily obtained, individuals wanting to prepare their own legal documents will be less likely to do original drafting; instead, they will use the statutory forms. As a result, the number of disputes over the construction and interpretation of holographic instruments should be reduced.22 The necessity for court proceedings may also be reduced or completely avoided because the existence of the forms may encourage people to plan for various aspects of their estate that otherwise would go unplanned.23 For example, if a valid statutory will exists, there is no need for intestacy proceedings and the determination of the proper administrator,24 and if a person has executed a valid durable power of attorney, guardianship proceedings may be avoided.25

5. Increased Estate Planning Business

The non-lawyer community is generally unaware of the need for estate planning.26 This unawareness is decreased, however, after a state enacts statutory forms. The media publicity that accompanies their passage educates the public about the importance of estate planning.27 Because statutory forms bring estate planning issues to the attention of a greater number of individuals, more people may decide to consult with attorneys, especially concerning forms that recommend that the users obtain legal advice.28 The study reported in Chapter X
revealed that approximately 50% of the non-legally trained participants were "very likely" or "somewhat likely" to seek legal advice when using statutory will forms.  

The potential increase in the practitioner's estate planning business may be derived from several sources. First, some individuals will merely want advice regarding the statutory forms. Not only is this clientele triggered by the publicity surrounding statutory forms, it may also consist of individuals who, in the absence of a statutory form, may have been unable to find an attorney to accept employment because of the attorney's inability to charge a fee that would seem fair to the client without losing money. Enterprising attorneys could advertise a "statutory forms review" service and charge a nominal fee to critique the completed forms. This service would provide additional business for the attorney and give peace of mind to the forms' users who would be assured that the forms will operate as anticipated. 

Second, statutory forms may increase estate planning business by providing some individuals, who need and can afford the type of comprehensive estate plan not possible with statutory forms, with the "push" needed to bring them into the attorney's office.
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C. OSTENSIBLE DISADVANTAGES

1. Loss of Estate Planning Business

Perhaps the foremost, albeit often unexpressed, reason attorneys are opposed to statutory estate planning forms is the forms' potential for reducing the number of people employing attorneys to draft estate planning documents. For example, it has been asserted that up-state New York lawyers, fearing loss of business, were "largely responsible" for the failure of a New York bill establishing statutory wills. Many statutory forms are designed for use by non-attorneys and usually contain instructions and warnings so there is often no need for an attorney to assist in completing the form. Even if an individual hires an attorney to review a statutory form, the fee is likely to be substantially less than if the attorney drafted an original document. Some attorneys may allow self-serving financial interests to color their evaluation of statutory forms and may forget that the Bar's "primary responsibility is to provide legal services to the public, not to produce revenue for attorneys."

It has also been suggested that this financial concern may affect the way in which statutory forms are drafted. If public pressure prompts the Bar to concede that statutory forms are needed, the forms may be subtly drafted to increase attorney business in several ways. First, the forms may be designed to encourage the user to hire an attorney either because the forms are too complicated for the average person
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to understand or because the form's applicability is limited by restrictions on individualization. Second, the form could be purposely written with various traps for the unwary leading to problems that would require an attorney to correct. Intentional drafting of this sort is highly unlikely, however, because the forms are usually critically reviewed by a wide variety of individuals and groups. One outspoken advocate of statutory wills admits, however, that the "real objective is to get people to walk into a lawyer's office." However, this proponent's stated motive is to obtain quality legal services for users of the form, not to increase business for attorneys.

This fear of lost business is very likely unfounded, however, because the statutory forms are often addressed to a segment of the population that does not typically consult attorneys. On the other hand, the statutory forms may actually lead to an increase in business as discussed earlier in this chapter.

2. Violation of Obligation to Public

A significant portion of the legal profession's opposition to statutory forms is not spurred by selfish and profit oriented motives such as the loss of estate planning business. Instead, the belief exists that supplying statutory estate planning forms is a violation of the legal profession's duty to protect the public and to provide high quality legal services. Critics cite to the potential problems that
individuals may encounter when using statutory forms, such as the lack of opportunity for customization, susceptibility to improper completion, failure to comprehend the form and the effect thereof, the potential for the forms to encourage evil conduct by unscrupulous individuals, and the likelihood that individuals, especially those of low or moderate means, will fail to obtain a comprehensive estate plan. One proponent of statutory wills even recognized that the availability of a statutory form may prevent some people from consulting an attorney to obtain the advice needed to effectuate their actual intent. Opponents believe that these difficulties negate all of the potential benefits of statutory forms because the users of the forms are led to believe that the legal problems regarding their estates have been properly handled when, in reality, they have not. They believe that it is "inappropriate for the Bar to support legislation which arguably encourages people to handle for themselves an important matter meriting the assistance of a lawyer." Proponents of statutory estate planning forms believe that, on balance, the benefits to society and to individuals which flow from the use of these forms outweighs their potential danger. Likewise, statutory form advocates claim that "most people have a basic store of common sense [and] are honest, fair and intelligent enough to know when they need [legal] advice." Nonetheless, some statutory forms are designed for attorneys and thus are difficult to complete without legal assistance. This is frequently done to help
CHAPTER XI

ensure that the forms are used properly, not to give the legal profession more business. One of the drafter's of the California statutory will likens the form to a bottle of aspirin - "[y]ou put warnings on the label, with caps that aren't opened easily."58 Another proponent of statutory will forms suggests that a solution to this problem would be to require the form to be "executed under the supervision of an attorney [to] help insure that the property owner realizes the effect and scope of the instrument."59

3. Increase in Unnecessary Probate Litigation

When non-attorneys complete legal documents without a skilled attorney's assistance, an increased opportunity exists for errors and other problems. As one critic of statutory will forms proclaimed, "You should not put a legal document in the hands of a layman."60 Even proponents of statutory forms realize that "[e]very device that enables people to act for themselves is subject to abuse and misunderstanding."61 Controversy concerning improperly completed forms may thus lead to litigation and place a burden on already overloaded court dockets.62 The time and effort expended by lawyers, judges, and their assistants in resolving these problems could be better spent on other matters.

4. Encouragement of Self-Professed "Experts"

Some attorneys have expressed the fear that statutory forms make it too easy for attorneys with inadequate experience or training to hold themselves out as qualified
estate planners. As one commentator stated regarding statutory wills, "[t]he form could be merely an attempt to make the incompetent draftsman competent." In a similar vein, others have commented that the purpose of statutory will forms "is to allow lawyers without expertise in probate to draft wills and avoid the threat of malpractice or the danger of losing a client referred to another firm that does probate work."

Even those in favor of statutory forms admit that the forms enable attorneys who are not experts in the field to recommend, select, and use the forms for their clients. If the enactment of statutory forms actually leads attorneys to hold themselves out falsely as experts, both the individual who employed such an attorney as well as the reputation of the legal profession would suffer. However, this concern may be unwarranted because estate planning books containing a wide array of forms are readily available for attorneys to purchase from legal publishers or to borrow from law libraries and inexperienced attorneys should have the ability to become competent through adequate preparation.

5. Damage to Image of Legal Profession

Instead of viewing the enactment of statutory estate planning forms as an action which enhances the image of the legal profession, some commentators believe that the public's opinion of attorneys will be tarnished by the existence of the forms. In a discussion of the advisability of statutory will
forms, one writer maintains that the existence of statutory forms "connotes that lawyers are either unwilling or unable to protect the property interests of persons of moderate means." The same commentator further opines that use of a statutory will is the functional equivalent of "telling someone with a toothache to find himself a doorknob and a piece of strong string." This fear of damage to the legal profession's image may be overly dramatic as reflected by the study reported in Chapter X that found that over 70% of the participants without legal training indicated a willingness to use a statutory will. In addition, 96% of the non-legally trained participants who did not already have a will asserted that the existence of a statutory form would serve as an impetus to obtain a will, either statutory or attorney-drafted.

The legal profession's image could be affected in another way. If statutory estate planning forms are well-drafted and usable by the "average" person, some of the mystery surrounding the legal profession will be removed. The "aura" surrounding wills, trusts, and other documents may be dimmed if the public realizes that they are capable of using the forms to achieve their desired goals. In addition, this increased self-reliance and independence of action may hurt the egos of some attorneys who thrive on thoughts of their unique and special skills.
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D. CONCLUSION

Although the effect of statutory estate planning forms on the legal community is unclear, these forms have the potential to positively impact the profession. The alleged failings of statutory forms are either guided by self-interest or a belief that non-lawyers are, in general, unable to use them properly and will not seek legal assistance when it is needed. If a segment of the Bar decides to oppose statutory forms, the basis of the opposition should be solely on the impact of the forms on the non-legal community.\textsuperscript{72}

Only limited information is available upon which to determine the actual effect of statutory estate planning forms on the legal community. As detailed in the next chapter, a survey of attorneys and judges who practice in the states with statutory will forms was conducted to provide insight into this important area.
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1. See, e.g., Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9 (indicating "turmoil" regarding statutory will forms).

2. Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8 (statement made regarding statutory will under assumption that "its execution is carefully supervised").

3. See generally Jost, What Image Do We Deserve?, A.B.A. J., Nov. 1988, at 47, 47 ("the image of lawyers today ranges somewhere between 'poor' and 'not much worse than before'").

4. Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 678 (1985) (statement made with regard to the State Bar of Michigan's support of the Michigan statutory will).


6. See California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 17 ("The project was taken on by the bar's Estate Planning, Trust and Probate Law Section at the urging of Harold I. Boucher, a retired partner in the San Francisco firm of Pillsbury, Madison & Sutro.").

7. Id. (quoting Irving Kellogg).

8. California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 17 (quoting Professor Edward C. Halbach, Jr., who also stated that he had told his law students that "before they get cynical and think that lawyers won't act in a way that is counter to their economic interests," they should examine the history of the California statutory will).

9. See Will Forms Available, CAL. LAW., Mar. 1983, at 58, 58 (forms cost $1.00 each plus a self-addressed stamped legal-size envelope); see also California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7, 7; Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (California Bar sold more than 25,000 forms in first three months of 1989).

10. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (Alameda County Court Commissioner Barbara J. Miller quoted as stating that "[m]ost [statutory will forms] are not completed correctly"; Los Angeles County officials report that approximately 50% of statutory will

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forms denied probate due to lack of signatures or improper completion).

11. See id.

12. See id.

13. See id. at 39 (quoting Michael V. Vollmer, "[The Bar is] trying to do something that benefits everybody and reduces legal fees; . . . something for the benefit of the whole state.").

14. California Lawyers Struggle For Plain English, TRIAL, Feb. 1990, at 100, 100 (quoting State Bar of California Director of Communications Todd Martin as stating that "obscure language is one cause of public mistrust of lawyers").


16. See The Ass'n of the Bar of the City of New York, Legislative Memorandum in Support of . . . Creation of a Statutory Form of Will (Mar. 2, 1979), at 1 (listing of issues which proposed New York statutory will would bring to the attorney's attention); Zartman, The New Illinois Power of Attorney Act, 76 ILL. B.J. 546, 553 (1988) (statutory durable power of attorney forms will "help lawyers because they will be able to provide their clients with a reliable power of attorney that will do the job for which it is intended"). See generally Quinn, The Hazards of Making Do With the Wrong Form, U.C.C. L. LETTER, May 1989, at 1 (indicating that well drafted preprinted forms "address a range of other potential problems that might otherwise be missed").

17. See generally Chapter IX(B)(1)(a)(2).

18. See Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 677 (1985) (savings in drafting time resulting from using statutory will forms allows services to be rendered to persons of modest means who otherwise could not afford an attorney).


20. See supra § B(2).

statutory will could also serve to reduce the probability of malpractice claims arising from the drafting of wills.

22. See SENATE COMMITTEE ON JUDICIARY, REPORT ON AB 2452, at 4 (Cal. 1981-82 Reg. Sess.).

23. See id. See generally Chapter IX(B).


25. See generally Chapter V(E)(2).

26. See, e.g., ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING 1 (2d rev. 1983) ("Three out of four Americans die without a will."); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 13 (4th ed. 1987) ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate."); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985) ("more than two-thirds of all adult Americans die without wills"); Where There's a Will, There's a Way, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills). Cf. The Law Commission, Distribution on Intestacy 3 (Working Paper No. 108, 1988) ("about half the population [of England and Wales] die intestate"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of studies and surveys demonstrating high percentage of intestate deaths); Chapters I(B)(3)(c) & IX(B)(3)(a).

27. See, e.g., Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (since passage of statutory will, "bar officials estimate more than half a million have been ordered by attorneys or consumers"); Note, Equal But Incompetent: Procedural Implementation of a Terminally Ill Person's Right to Die, 36 U. FLA. L. REV. 148, 149 n.6 (1984) (Concern for Dying reported distributing more than six million living wills); Letter from Abigail Van Buren to Charles R. Adams, III (July 24, 1884), cited in Adams & Adams, An Overview of Georgia's Living Will Legislation, 36 MERCER L. REV. 45, 46 (1984) ("[e]very time the Living Will is mentioned in my column the response from readers is overwhelming").

28. See California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7, 7 (statutory wills may increase business as they make "people more aware of their testamentary needs and encourage[s] them to contact a lawyer"); Note, The Statutory Will: A Simple Alternative to Intestacy, 35 CASE W. RES. L. REV. 307, 328-29 (1984) (statutory wills would "enhance the lawyer's role").
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see Girdner, State's Consumers Snapping Up Wills Under New Statute, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (California statutory will did not create significant new business for probate lawyers within first month after its enactment).

29. See Chapter X(D)(21).

30. See Girdner, State's Consumers Snapping Up Wills Under New Statute, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (supporters of California statutory will legislation indicated that "it will encourage people to consult a lawyer in the creation of a simple will"); Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 678 (1985) ("Because of the detailed warnings on the [statutory will] forms regarding their use without the assistance of an attorney, it is expected that attorneys will be contacted by many who intend to use one."). But see Girdner, State's Consumers Snapping Up Wills Under New Statute, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (reporting that approximately one month after the enactment of the California statutory will that "in interviews with probate lawyers throughout California, the lawyers reported not a single instance in which a client came in with the form and asked for advice").

31. See Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8 (in absence of statutory will, cost of preparing will for small estates places attorney in position of losing money or failing to accept employment); Letter from Francis J. Collin, Jr. to John L. McDonnell, Jr., at 5 (Dec. 9, 1980) (expressing belief that it is customary for attorneys to reduce their bills for drafting wills below their normal billing rates because it is difficult to justify full rates for a two or three page will).

32. See Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 106 (1985) (recommendation to complete statutory will form and then have a lawyer examine it to be sure it is legally sound).

33. See generally Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 678 (1985) (after consulting with attorney regarding statutory will form, attorney may advise that form is inappropriate and proceed to draft proper will); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 (statutory will forms may "start[] the ball rolling" for people to consult attorney and discover that an individualized will is needed); Hearing of Assembly Bill 893 - Creation of Statutory Will (statement of Tom Loftus) (indicating that
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one of the goals of the bill was to "prompt those who have more complicated estates to see an attorney".

34. See California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 18; California Statutory Will -- The People Will: Setting the Record Straight, at 1 (attorneys may "perceive their turf to be endangered" by statutory form wills).


36. Statutory estate planning forms normally contain instructions and plain language provisions so the user may prepare the document without legal assistance. See, e.g., CAL. PROB. CODE § 6240 (West Supp. 1988) (will form); ILL. ANN. STAT. ch. 110½, para. 803-1 (Smith-Hurd Supp. 1988) (durable power of attorney form); 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04) (living will form). See generally Statement of Tom Loftus, Wisconsin Legislature Assembly Speaker (Jan. 17, 1984) (speaking in reference to Wisconsin statutory will bill, "The bill also expresses a populist belief in the wisdom and intelligence of the common person. People are capable, when their estates are simple, to write their own will without going to an attorney."). But see Kellogg, Adapting Your Practice to the New Statutory Wills, CAL. LAW., Feb. 1983, at 14, 14 (California statutory will not designed for use without lawyer's assistance); Shaw, Benefits to Both Lawyers & Clients Could Result From Statutory Wills, N.Y.L.J., Jan. 24, 1980, at 39, col. 1 ("use of [proposed New York statutory will] by laypersons without legal help should be discouraged").


Many statutory forms contain language which suggests or even urges the user to consult an attorney. See, e.g., ALASKA STAT. § 13.26.332 (Supp. 1980) (required statement in statutory power of attorney form, "If you have any questions about this document, you should seek competent advice."); CAL. PROB. CODE § 6240 (West Supp. 1988) (notice 1 of statutory will form, "It may be in your best interest to consult with a California lawyer because this statutory will has serious legal effects on your family and property."); ILL. ANN. STAT. ch. 110½, para. 804-10 (Smith-Hurd Supp. 1988) (required provision of statutory durable power of attorney for health care form, "If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you."). Even
one of the drafters of the California statutory will form believes that average persons should not complete the form because they are unaware of the ramifications. See The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 (quoting Irving Kellogg).

38. See Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 677 (1985) (one of the purposes of the Michigan statutory will was to "assist attorneys in reducing the cost of providing estate planning services to those with small estates and uncomplicated planning objectives"); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 106 (1985) ("You can save time and money by writing your [statutory] will, then having a lawyer check it over to make sure it's legally sound. The cost will often be minimal, and you can get some assurance that your will is valid."); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 84 ("Even those who check with an attorney to be sure the statutory will makes sense for them or who get help in filling out the printed form will save money."). But see Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 (doubtful whether attorney's fees for reviewing a statutory will would be significantly less than if attorney prepared the will from scratch).


40. See The Ass'n of the Bar of the City of N.Y., Legislative Memorandum in Support of . . . Creation of a Statutory Form of Will (Mar. 2, 1979), at 5 (proposed statutory will form "should be sufficiently complex to discourage its use without legal assistance").

41. See generally Chapter IX(C)(1)(a).

42. See California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 17 (quoting Professor Edward C. Halbach, Jr.).

43. Id.

45. See California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 18 (quoting Francis J. Collin, Jr., co-drafter of the California statutory will).

46. See supra § B(3).

47. See Letter from Professor Edward C. Halbach, Jr. to Elihu M. Harris, at 2 (March 10, 1982) ("opposition to [statutory will forms] can stem for economic self interest, but, . . . it also comes from legitimate and reasonable concern about the "safety" of the public"). See generally California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 18 (reporting opposition to statutory wills because they "could be dangerous if used by the general public without legal advice").

48. See generally Chapter IX(C)(1)(a).

49. See generally Chapter IX(C)(1)(b).

50. See generally Chapter IX(C)(1)(c).

51. See generally Chapter IX(C)(1)(d).

52. See generally Chapter IX(C)(1)(e) & (C)(3)(b).


54. See Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9 (discussion of the many issues a user of a statutory will form would not address).


56. See California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 18 (quoting Francis J. Collin, Jr., co-drafter of the California statutory will); Erlanger & Crowley, Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan, WIS. B. BULL., Jan. 1986, at 17, 17 ("the benefit to society in having a statutory will available outweighs the risk of misuse"); Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 678 (1985) ("the drafters and proponents of the [Michigan statutory will] believe that the advantages of statutory wills outweigh their disadvantages"); Zartman, The New Illinois Power of Attorney Act, 76 ILL. B.J. 546, 553 (1988) (although subject to abuse, statutory durable power of attorney forms are beneficial to society).
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58. California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 18 (quoting Francis J. Collin, Jr.).


62. See You Can't Take it With You, So You Should Make a Will, San Antonio Express News, June 4, 1989, at 2-G (fear that improperly completed statutory wills would lead to litigation aimed at ascertaining testator's intent as reason some states have not authorized statutory wills); Draft of memorandum from L. Young to Elihu Harris, at 3 (Mar. 24, 1982) (explaining that critics of statutory wills fear that "court congestion could result from litigation based on misuse").


65. See The Ass'n of the Bar of the City of N.Y., Legislative Memorandum in Support of . . . Creation of a Statutory Form of Will (Mar. 2, 1979), at 1 (proposed New York statutory will form would "[e]nable lawyers who are not experts in the drafting of Wills to select, from the statute, appropriate Wills for certain of their clients").

66. See supra § B(1).

67. Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9 (author also indicates that statutory wills could "be construed as demeaning to suggest that persons with small or moderate estates should do something 'on the cheap'").

68. Id.

69. See Chapter X(D)(19).
70. See Chapter X(D)(20).

71. See California Lawyers Struggle For Plain English, TRIAL, Feb. 1990, at 100, 100 (quoting California State Bar Director of Communications Todd Martin as stating that lawyers "use a lot of phrases and terms most people have no need to know . . . Law is a complex field, and lawyers like to show off").

72. See Chapter IX(C) for a discussion of the ostensible disadvantages of statutory estate planning forms to the individual, his family, and society, e.g., lack of individualization, improper completion, failure to comprehend forms and effect thereof, encouragement of evil conduct, and lack of a comprehensive estate plan.

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CHAPTER XII

STATUTORY WILL FORM SURVEYS

A. INTRODUCTION

Considerable divergence of opinion exists concerning the wisdom of enacting statutory estate planning forms and their impact on both the non-legal community and the legal profession. The arguments presented on both sides of these issues have been based primarily on speculation although there are numerous reports of lay individuals improperly completing statutory will forms. Before state legislatures enact, amend, or repeal statutory estate planning forms, it is imperative for legislators to possess sufficient information to make informed decisions.

In an attempt to obtain some of this essential evidence, studies were conducted that focused on statutory fill-in-the-blank will forms. Chapter X detailed the results of a pilot study designed to determine the reaction of individuals to statutory will forms and the degree to which users are able to complete the forms to accurately reflect their testamentary intent while simultaneously complying with statutory requirements.

To compliment this study, several surveys were conducted to ascertain the opinions of the legal profession. Three segments of the legal community were asked to describe their reactions to and experiences with statutory will forms: estate
planning attorneys, probate judges, and law students. This chapter details and analyzes the results of these surveys.

B. ESTATE PLANNING ATTORNEYS

1. Methodology

To determine the reaction of estate planning attorneys to statutory will forms, questionnaires were mailed to members of the American College of Probate Counsel who practice in California, Maine, Michigan, and Wisconsin. A cover letter explained the nature of the survey and how the results would be used. A self-addressed stamped envelope was enclosed to simplify the return of the completed questionnaire.

Overall, the response rate was approximately 52%. It is interesting to note that the more surveys sent to a state, the lower the response rate. For example, the greatest number of surveys were sent to California but the response rate was only 47%. On the other hand, only twenty-four surveys were mailed to Maine but the response rate was 67%. Table XII-1 summarizes the participation rate of the survey.
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<table>
<thead>
<tr>
<th></th>
<th>Surveys Sent</th>
<th>Surveys Returned</th>
<th>Reply Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>198</td>
<td>93</td>
<td>47%</td>
</tr>
<tr>
<td>Maine</td>
<td>24</td>
<td>16</td>
<td>67%</td>
</tr>
<tr>
<td>Michigan</td>
<td>53</td>
<td>32</td>
<td>60%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>72</td>
<td>40</td>
<td>56%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>347</td>
<td>181</td>
<td>52%</td>
</tr>
</tbody>
</table>

### TABLE XII-1: Survey Participation Rate of Estate Planning Attorneys

### 2. Recommendation of Statutory Will Form

The attorneys were asked if they had ever advised one of their clients to complete a statutory will form. Approximately 75% of the respondents had never recommended the form. The lowest percentage was 6% from Maine while the highest was California's 39%. The recommendation rates are summarized in Table XII-2.
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<table>
<thead>
<tr>
<th></th>
<th>Recommend</th>
<th>Not Recommend</th>
<th>Percentage Recommend</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>36</td>
<td>57</td>
<td>39%</td>
</tr>
<tr>
<td>Maine</td>
<td>1</td>
<td>15</td>
<td>6%</td>
</tr>
<tr>
<td>Michigan</td>
<td>4</td>
<td>28</td>
<td>13%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>5</td>
<td>35</td>
<td>13%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>46</td>
<td>135</td>
<td>25%</td>
</tr>
</tbody>
</table>

TABLE XII-2: Recommendation of Statutory Forms by Estate Planning Attorneys

The respondents who had recommended a statutory will form were then asked to indicate the number of times they had done so. The answers reflect a uniformly low rate of recommendation suggesting that most respondents do not routinely suggest the form. Table XII-3 shows the high, low, and average rate of recommendation among respondents who have advised their clients to use statutory will forms.

<table>
<thead>
<tr>
<th></th>
<th>High</th>
<th>Low</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>20</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Maine</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Michigan</td>
<td>10</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>5</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

TABLE XII-3: Frequency of Statutory Form Recommendations by Estate Planning Attorneys
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Respondents were also asked to explain why they do or do not recommend their state's statutory will form. The most common reasons for recommending the form were the forms' low cost, the client's need for only a simple will, and the small size of the client's estate. The most frequently cited explanation for not recommending a statutory will form was that the form was inadequate for their clients' needs. Other common reasons included a belief that the form was too complicated or confusing, a preference for self-prepared forms, and the conviction that an attorney should be consulted to assure that a comprehensive approach to estate planning is taken. A review of the reasons for the attorneys' actions concerning statutory will forms is provided in Tables XII-4 and XII-5.

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economical</td>
<td>19</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>23</td>
</tr>
<tr>
<td>Client needed only simple estate plan</td>
<td>12</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>16</td>
</tr>
<tr>
<td>Small estate</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Lack of time to prepare custom will¹⁰</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Easy for client to complete without assistance</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>1¹¹</td>
<td>1²</td>
<td>0</td>
<td>1³</td>
<td>3</td>
</tr>
</tbody>
</table>

TABLE XII-4: Reasons Statutory Will Forms Recommended by Estate Planning Attorneys
CHAPTER XII

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form inadequate for client’s needs¹⁴</td>
<td>34</td>
<td>6</td>
<td>11</td>
<td>13</td>
<td>64</td>
</tr>
<tr>
<td>Form too complicated or confusing</td>
<td>9</td>
<td>3</td>
<td>2</td>
<td>7</td>
<td>21</td>
</tr>
<tr>
<td>Preference for own forms</td>
<td>9</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>18</td>
</tr>
<tr>
<td>Need for attorney consultation to obtain comprehensive estate plan</td>
<td>7</td>
<td>2</td>
<td>1</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>No occasion; client has not asked</td>
<td>0</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Fear of completion errors</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Too difficult/costly to determine if form is adequate</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Fear of liability if form recommended but not supervised</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Desire to receive fee</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Form too impersonal</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Unaware of form</td>
<td>0</td>
<td>1⁵</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Unprofessional to recommend form</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-5: Reasons Statutory Will Forms Not Recommended by Estate Planning Attorneys

3. Advice to Clients Using Statutory Will Forms

Only 16% of all respondents indicated that they had ever given advice to a client who was in the process of completing a statutory will form. See Table XII-6. Of those attorneys...
who had advised clients, the number of instances was relatively small. See Table XII-7. When advice was sought, it encompassed a broad array of concerns ranging from general questions about whether the client had a correct understanding of the disposition plan selected in the form to technical questions regarding lapse and abatement. See Table XII-8.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>17</td>
<td>76</td>
<td>18%</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>16</td>
<td>0%</td>
</tr>
<tr>
<td>Michigan</td>
<td>5</td>
<td>27</td>
<td>16%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>7</td>
<td>33</td>
<td>18%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>29</td>
<td>152</td>
<td>16%</td>
</tr>
</tbody>
</table>

TABLE XII-6: Clients Seeking Advice from Estate Planning Attorneys on Completing Statutory Will Forms

<table>
<thead>
<tr>
<th></th>
<th>High</th>
<th>Low</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>10</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Michigan</td>
<td>35</td>
<td>1</td>
<td>4(^{17})</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>6</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

TABLE XII-7: Frequency of Client Requests for Advice on Completing Statutory Will Forms from Estate Planning Attorneys
CHAPTER XII

4. Use of Statutory Will Forms

The responding attorneys rarely prepared statutory will forms for their clients. Overall, less than 11% indicated that they had included a statutory form in a client's estate plan. See Table XII-9. Although most respondents who had used the forms had done so sparingly, a few attorneys had used the forms at least ten times. See Table XII-10. The reasons cited for selecting a statutory form centered on the form's appropriateness for the client's situation as well as its low cost. See Table XII-11. Two reasons emerged as the most

<table>
<thead>
<tr>
<th></th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client's correct understanding of form</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Ability to alter form</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Method of completion</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Effect of will on spouse</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Definitions</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Method of execution</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Sufficiency of form as total estate plan</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Lapse</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Abatement</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Validity of completed form</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-8: Inquiries to Estate Planning Attorneys by Persons Completing Statutory Will Forms
common grounds for not using a statutory will form; the forms were inadequate for the needs of the respondents' clients and the respondents preferred their own forms. See Table XII-12.

<table>
<thead>
<tr>
<th>State</th>
<th>Use Form</th>
<th>Not Use Form</th>
<th>Percentage Use Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>15</td>
<td>77</td>
<td>16%</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>16</td>
<td>0%</td>
</tr>
<tr>
<td>Michigan</td>
<td>2</td>
<td>30</td>
<td>6%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>2</td>
<td>38</td>
<td>5%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>19</td>
<td>161</td>
<td>11%</td>
</tr>
</tbody>
</table>

TABLE XII-9: Use of Statutory Will Forms by Estate Planning Attorneys

<table>
<thead>
<tr>
<th>State</th>
<th>High</th>
<th>Low</th>
<th>Average¹⁸</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>20</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Michigan</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>2</td>
<td>1</td>
<td>1½</td>
</tr>
</tbody>
</table>

TABLE XII-10: Frequency of Use of Statutory Will Forms by Form Users

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CHAPTER XII

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fit client's needs</td>
<td>7</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Inexpensive</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Simple</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Speed</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Small estate</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

TABLE XII-11: Reasons Statutory Will Forms Prepared by Estate Planning Attorneys

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form inadequate for client's needs</td>
<td>33</td>
<td>8</td>
<td>8</td>
<td>14</td>
<td>63</td>
</tr>
<tr>
<td>Preference for own forms</td>
<td>16</td>
<td>5</td>
<td>4</td>
<td>10</td>
<td>35</td>
</tr>
<tr>
<td>No occasion to use</td>
<td>1</td>
<td>1</td>
<td>6</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Form too complicated or confusing</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>To impress client with need for custom estate plan</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Unprofessional to use statutory form</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Client expressed preference for statutory form</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-12: Reasons Statutory Will Forms Not Prepared by Estate Planning Attorneys

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CHAPTER XII

5. Opinion of Statutory Will Form Concept

Respondents were asked if they generally approved of the concept of statutory fill-in-the-blank will forms (as compared to the actual statutory form of their particular state). Overall, 44% agreed that statutory will forms should exist. The forms were best received in California with an approval rate of 56%; they were least appreciated in Maine where the approval rate was only 27%. See Table XII-13. The reasons frequently cited in favor of statutory wills were that they are useful for small estates, are inexpensive, and operate better than holographic wills. Perceived difficulties with the statutory will concept included the inability to individualize a form to a specific fact pattern, the likelihood of completion errors, and the belief that they prevent individuals from seeking the legal advice needed to obtain comprehensive estate plans. The reasons for approval or disapproval of the concept of statutory will forms are summarized in Tables XII-14 and XII-15, respectively.
TABLE XII-13: Approval of Statutory Will Form Concept by Estate Planning Attorneys

<table>
<thead>
<tr>
<th>State</th>
<th>Approve</th>
<th>Disapprove</th>
<th>Percentage Approve</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>47</td>
<td>37</td>
<td>56%</td>
</tr>
<tr>
<td>Maine</td>
<td>4</td>
<td>11</td>
<td>27%</td>
</tr>
<tr>
<td>Michigan</td>
<td>13</td>
<td>17</td>
<td>43%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>11</td>
<td>29</td>
<td>28%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>75</td>
<td>94</td>
<td>44%</td>
</tr>
</tbody>
</table>

TABLE XII-14: Statutory Will Form Concept Approval Reasons Cited by Estate Planning Attorneys

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Useful for simple estates</td>
<td>12</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td>Inexpensive</td>
<td>10</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>15</td>
</tr>
<tr>
<td>Better than holographic will</td>
<td>8</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>Better than intestacy</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Encourages estate planning</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Assists individuals who dislike attorneys</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Speed</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Provides alternative</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Better than commercial forms</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Good public relations for Bar</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Better than will written by non-probate attorney</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
CHAPTER XII

Inadequate; lack of individualization  
Prevents person from seeking legal advice needed for comprehensive estate plan  
Improper completion likely  
Confusing; difficult to understand  
Non-lawyers lack sufficient understanding of estate planning to use forms  
Results in litigation  
Legislative approval implies adequacy  
Mere political tool to obtain popular vote  
Reflects poorly on legal profession  
Encourages unauthorized practice of law  
Encourages fraud

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadequate; lack of individualization</td>
<td>13</td>
<td>2</td>
<td>4</td>
<td>6</td>
<td>25</td>
</tr>
<tr>
<td>Prevents person from seeking legal advice needed for comprehensive estate plan</td>
<td>9</td>
<td>2</td>
<td>2</td>
<td>8</td>
<td>21</td>
</tr>
<tr>
<td>Improper completion likely</td>
<td>9</td>
<td>2</td>
<td>7</td>
<td>2</td>
<td>20</td>
</tr>
<tr>
<td>Confusing; difficult to understand</td>
<td>8</td>
<td>4</td>
<td>1</td>
<td>5</td>
<td>18</td>
</tr>
<tr>
<td>Non-lawyers lack sufficient understanding of estate planning to use forms</td>
<td>4</td>
<td>0</td>
<td>4</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td>Results in litigation</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Legislative approval implies adequacy</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Mere political tool to obtain popular vote</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Reflects poorly on legal profession</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Encourages unauthorized practice of law</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Encourages fraud</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-15: Statutory Will Form Concept Disapproval Reasons Cited by Estate Planning Attorneys

6. Opinion of Home State's Statutory Will Form

Respondents were asked if they approved of the specific statutory will form enacted by their home states. The California and Michigan forms received the highest rating with each garnering an approval rate of over 50%. Maine's form
faired the worst by obtaining the support of only 21%. See Table XII-16. Two reasons were frequently cited for liking a particular state's form; it was carefully constructed and it would satisfy the needs of many individuals, especially those with small or simple estates. See Table XII-17. The respondents disliking their state's form indicated that the form was complicated, confusing, difficult to understand, failed to provide adequate opportunity for individualization, presented a high risk of improper completion, and was likely to lead users to conclude that the form was a complete estate plan. See Table XII-18.

<table>
<thead>
<tr>
<th></th>
<th>Approve</th>
<th>Disapprove</th>
<th>Percentage Approve</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>40</td>
<td>39</td>
<td>51%</td>
</tr>
<tr>
<td>Maine</td>
<td>3</td>
<td>11</td>
<td>21%</td>
</tr>
<tr>
<td>Michigan</td>
<td>13</td>
<td>11</td>
<td>54%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>14</td>
<td>22</td>
<td>39%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>70</td>
<td>83</td>
<td>46%</td>
</tr>
</tbody>
</table>

TABLE XII-16: Approval of State Statutory Will Forms by Estate Planning Attorneys
CHAPTER XII

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carefully drafted to satisfy needs of many</td>
<td>9</td>
<td>4</td>
<td>5</td>
<td>1</td>
<td>19</td>
</tr>
<tr>
<td>Useful for small estates</td>
<td>6</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Economical</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Better than intestacy</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Helps those who distrust attorneys</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Better than holographic will</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Clarity</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Short time to complete</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-17: Reasons for Approval of State Statutory Will Form Cited by Estate Planning Attorneys
CHAPTER XII

Complicated; confusing; difficult to understand 15 4 2 7 28
Inflexible; lack of ability to individualize 11 2 4 5 22
Risk of improper completion 11 4 4 1 20
Implication that form will is sufficient estate plan 6 2 3 3 14
Only skilled attorneys should prepare wills 1 0 1 2 4
Difficult/risky for attorneys to use 1 1 0 0 2
Preference for own forms 2 0 0 0 2
Leads to litigation 1 0 0 0 1
Form encourages use of attorney 1 0 0 0 1
Public unable to handle choices 0 0 1 0 1

TABLE XII-18: Reasons for Disapproval of State Statutory Will Form Cited by Estate Planning Attorneys

7. Effect of Statutory Will Form on Will Drafting Business

Only 2% of the responding attorneys believed that their will-drafting business has been affected by the enactment of statutory will forms. See Table XII-19. Several respondents noticed general changes such as a greater awareness among their clients of the necessity of preparing a will. Other attorneys noted, however, that lay individuals are generally
unaware of the statutory will forms and that "popular" forms, such as those advertised on late night television, have a greater impact.

<table>
<thead>
<tr>
<th></th>
<th>Effected</th>
<th>Not Effected</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1</td>
<td>92</td>
<td>0</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>16</td>
<td>0</td>
</tr>
<tr>
<td>Michigan</td>
<td>3</td>
<td>28</td>
<td>1</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>0</td>
<td>38</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>4</td>
<td>174</td>
<td>3</td>
</tr>
</tbody>
</table>

TABLE XII-19: Effect of Statutory Will Forms on Will Drafting Business

8. Litigation Involving Statutory Wills

Only two respondents indicated that they had been involved in litigation concerning the validity of a statutory will. See Table XII-20. A California attorney had worked on a case where the attestation of the statutory will was in issue because of the number of witnesses and because witnesses were also beneficiaries. Several other respondents had heard of cases where the improperly completed forms had led to litigation. One Michigan respondent was currently working on an estate involving a statutory will form that he doubted accurately reflected the testator's true intent. Several
respondents who reported no involvement with litigation anticipated litigating the forms in the near future.

<table>
<thead>
<tr>
<th></th>
<th>Litigation</th>
<th>No Litigation</th>
<th>Percentage Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1</td>
<td>92</td>
<td>1.1%</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>16</td>
<td>0%</td>
</tr>
<tr>
<td>Michigan</td>
<td>0</td>
<td>31</td>
<td>0%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1</td>
<td>39</td>
<td>2.5%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2</td>
<td>178</td>
<td>1.1%</td>
</tr>
</tbody>
</table>

TABLE XII-20: Estate Planning Attorneys Involved in Statutory Will Litigation

9. Additional Comments

At the end of the questionnaire, respondents were given the opportunity to provide comments about statutory will forms in general or about their state's particular form. For the most part, respondents made thoughtful observations and suggestions reiterating previously stated opinions of statutory wills. The tenor of the comments varied from the adamant to the cautious, both in opposition to and in approval of the statutory forms. The dominant theme appeared to be a reluctance to embrace the forms, at least in their current condition. Many believed that statutory will forms are easily misused, not fully understood by non-attorney users, and leave
people with the mistaken belief that nothing further need be done to plan their estates. Some attorneys believed that statutory will legislation is enacted to garner support of the public despite the "meaningless benefit" of the forms. Two respondents from Wisconsin had especially colorful replies: "[statutory will legislation is] like passing a law that says you can take out your child's appendix, just because the law says you can do it doesn't mean you ought to" and "[the forms] perform the same function as a butcher knife in do-it-yourself hernia repair." Other respondents, however, praised statutory will legislation and made constructive comments on ways to improve current forms.

C. PROBATE JUDGES

1. Methodology

Probate judges in the four states that have enacted statutory will forms were surveyed to determine their experiences with the forms. It was originally planned to send questionnaires only to a target group of probate judges in California, Maine, Michigan, and Wisconsin, i.e., those who were members of the National College of Probate Judges. A detailed letter was sent to the College explaining the survey and its purpose. The letter concluded with a request for the names and addresses of their probate judge members from the four states. No response was received so the College was telephoned. A College representative stated the letter had
not been received and requested that a copy of the letter be sent to her as well as to the College's president, Judge George J. Demis of New Philadelphia, Ohio. The representative stated that the judges' names and addresses would be supplied as soon as the request was approved by the president and the board of directors. Several weeks later, the College decided not to release the names and addresses of its members for fear that the information would be put to a nefarious use or that its members would not like to be subjected to a survey. Accordingly, alternative methods of locating probate judges were used.

Telephone calls were made to the supreme courts of the four states. The court administrators cooperated and supplied the names and addresses of their probate judges or indicated how the information could be obtained. A detailed list of probate judges was received from Maine and Michigan. It was not possible to get a complete list from California and Wisconsin because probate matters in those states may be handled by judges on a rotation or assignment basis. As a result, surveys were mailed to all circuit judges in Wisconsin who were eligible to serve on a probate rotation. For California, the surveys were sent to the presiding judge of each county with a request that surveys be distributed to the judges or commissioners who handle probate matters.

Using this method to locate probate judges resulted in the survey being mailed to a broad spectrum of judges who were likely to have experience with statutory will forms. The
reluctance of the National College of Probate Judges to supply names and addresses actually led to a survey of a wider base of judges than originally planned. Accordingly, the survey findings may better reflect the opinions of probate judges because mailings were unbiased and not distributed to any particular group of probate judges.

A cover letter explaining the nature of the survey and how the results would be used accompanied each questionnaire. A self-addressed stamped envelope was also enclosed to facilitate return of the survey. Overall, the response rate was approximately 30%. Due to the various methods used to ascertain the identity of probate judges, however, several surveys were returned unanswered by judges who did not handle probate cases. In addition, administrative probate personnel in some jurisdictions completed one survey on behalf of several judges. Table XII-21 summarizes the participation rate of the survey.

<table>
<thead>
<tr>
<th>Surveys Sent</th>
<th>Replies Received</th>
<th>Completed Surveys</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>152</td>
<td>25</td>
</tr>
<tr>
<td>Maine</td>
<td>16</td>
<td>8</td>
</tr>
<tr>
<td>Michigan</td>
<td>106</td>
<td>48</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>207</td>
<td>62</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>481</strong></td>
<td><strong>143</strong></td>
</tr>
</tbody>
</table>

TABLE XII-21: Survey Participation by Probate Judges
CHAPTER XII

2. Statutory Wills Offered into Probate

The judges were asked to indicate the number of statutory wills that had been offered into probate in their courts. Most judges reported that they rarely, if ever, encounter statutory wills. However, several respondents had observed a relatively large number of statutory wills with the highest number, fifty, coming from a Wisconsin judge. See Table XII-22.

<table>
<thead>
<tr>
<th></th>
<th>High</th>
<th>Low</th>
<th>Average</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>27</td>
<td>0</td>
<td>5</td>
<td>66</td>
</tr>
<tr>
<td>Maine</td>
<td>20</td>
<td>0</td>
<td>6</td>
<td>44</td>
</tr>
<tr>
<td>Michigan</td>
<td>20</td>
<td>0</td>
<td>2</td>
<td>85</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>50</td>
<td>0</td>
<td>3</td>
<td>121</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>66</strong></td>
<td><strong>44</strong></td>
<td><strong>85</strong></td>
<td><strong>121</strong></td>
</tr>
</tbody>
</table>

TABLE XII-22: Statutory Wills Offered into Probate

3. Admission of Statutory Wills Into Probate

The judges were asked to indicate the number or percentage of statutory form wills to which they had granted or denied probate. Overall, in excess of 80% of the statutory wills offered for probate were admitted. Statutory wills fared best in California where 97% were admitted and worst in Maine where only 53% were admitted. See Table XII-23. The
main reasons statutory wills were denied probate included improper execution, ineffective dispositions of property, and attestation errors. See Table XII-24.

<table>
<thead>
<tr>
<th></th>
<th>Admitted</th>
<th>Denied</th>
<th>Percentage Admitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>61</td>
<td>2</td>
<td>97%</td>
</tr>
<tr>
<td>Maine</td>
<td>23</td>
<td>20</td>
<td>53%</td>
</tr>
<tr>
<td>Michigan</td>
<td>74</td>
<td>11</td>
<td>87%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>96</td>
<td>22</td>
<td>81%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>254</strong></td>
<td><strong>55</strong></td>
<td><strong>82%</strong></td>
</tr>
</tbody>
</table>

TABLE XII-23: Probate of Statutory Wills

<table>
<thead>
<tr>
<th></th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Execution errors</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Improper dispositive provisions</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Attestation errors</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Unauthorized changes to form</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-24: Reasons Statutory Will Forms Denied Probate
CHAPTER XII

4. Will Contests Involving Statutory Wills

Nine judges reported hearing will contest cases involving statutory will forms and only two judges had heard more than one contest. See Table XII-25. The most common grounds for these contest actions included improper execution and faulty attestation. See Table XII-26.

<table>
<thead>
<tr>
<th></th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Execution issues</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Attestation issues</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Construction/interpretation</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Undue influence</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Fraud</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Handwritten changes to form</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Testator's failure to follow instructions on form</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-25: Will Contests Involving Statutory Wills

TABLE XII-26: Grounds for Will Contests Involving Statutory Wills

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CHAPTER XII

5. Opinion of Statutory Will Form Concept

Judges were asked if, in principal, they approved of the concept of a legislatively supplied fill-in-the-blank will form. Overall, the judges' opinions were evenly divided between those who approved and those who disapproved. The judges from California had the highest approval rate and those from Maine the lowest. See Table XII-27. The most frequently cited reasons for approving the forms were usefulness in small estates and their low cost. Reluctance in using statutory will forms resulted from concerns that the users would not seek legal advice to obtain a comprehensive estate plan and a fear that improper completion is likely. The reasons the responding judges approved or disapproved of the concept of statutory will forms are summarized in Tables XII-28 and XII-29, respectively.

<table>
<thead>
<tr>
<th></th>
<th>Approve</th>
<th>Disapprove</th>
<th>Percentage Approve</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>12</td>
<td>7</td>
<td>71%</td>
</tr>
<tr>
<td>Maine</td>
<td>3</td>
<td>5</td>
<td>38%</td>
</tr>
<tr>
<td>Michigan</td>
<td>19</td>
<td>23</td>
<td>45%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>21</td>
<td>20</td>
<td>51%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>55</strong></td>
<td><strong>55</strong></td>
<td><strong>50%</strong></td>
</tr>
</tbody>
</table>

TABLE XII-27: Approval of Statutory Will Form Concept by Probate Judges
### CHAPTER XII

Useful for simple estate 2 1 2 5 10
Inexpensive 2 0 4 2 8
Better than holographic will 2 1 0 2 5
Convenient/simple 1 0 2 13 4
Eliminate mystique/intimidation of estate planning 0 0 1 1 2
Good public service 0 0 0 2 2
Better than commercial forms 0 0 0 1 1
Assists individuals who dislike attorneys 0 0 1 0 1

<table>
<thead>
<tr>
<th>Approval Reasons Cited by Probate Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA</td>
</tr>
<tr>
<td>----</td>
</tr>
<tr>
<td>Useful for simple estate</td>
</tr>
<tr>
<td>Inexpensive</td>
</tr>
<tr>
<td>Better than holographic will</td>
</tr>
<tr>
<td>Convenient/simple</td>
</tr>
<tr>
<td>Eliminate mystique/intimidation of estate planning</td>
</tr>
<tr>
<td>Good public service</td>
</tr>
<tr>
<td>Better than commercial forms</td>
</tr>
<tr>
<td>Assists individuals who dislike attorneys</td>
</tr>
</tbody>
</table>

**TABLE XII-28: Statutory Will Form Concept**
**Approval Reasons Cited by Probate Judges**
Prevents person from seeking legal advice needed for comprehensive estate plan
Improper completion likely
Inadequate; lack of individualization
Confusing; difficult to understand
Non-lawyers lack sufficient understanding of estate planning to use forms
Testator alters form
Completed form not reviewed for validity by attorney
Lack of tax planning
Not enough users to justify cost
Encourages fraud

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prevents person from seeking legal advice needed for comprehensive</td>
<td>2</td>
<td>3</td>
<td>12</td>
<td>3</td>
<td>20</td>
</tr>
<tr>
<td>estate plan</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Improper completion likely</td>
<td>3</td>
<td>1</td>
<td>3</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Inadequate; lack of individualization</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Confusing; difficult to understand</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Non-lawyers lack sufficient understanding of estate planning to use</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>forms</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Testator alters form</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Completed form not reviewed for validity by attorney</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Lack of tax planning</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Not enough users to justify cost</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Encourages fraud</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

**TABLE XII-29: Statutory Will Form Concept**
Disapproval Reasons Cited by Probate Judges

6. Opinion of Home State's Statutory Will Form

The judges were asked if they approved of their home state's statutory will form. In general, about half of the respondents were satisfied with their state's form although the Maine judges were noticeably less pleased than their counterparts in the other states. See Table XII-30. Frequent reasons stated for liking a form included its low cost and usefulness as an effective self-help legal technique,
especially for simple estates. See Table XII-31. The respondents critical of the form commonly cited the following as the major difficulties: too complex and confusing, prevents individuals from seeking legal advice to obtain a comprehensive estate plan, and likelihood of improper completion. See Table XII-32.

<table>
<thead>
<tr>
<th></th>
<th>Approve</th>
<th>Disapprove</th>
<th>Percentage Approve</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>9</td>
<td>9</td>
<td>50%</td>
</tr>
<tr>
<td>Maine</td>
<td>2</td>
<td>6</td>
<td>25%</td>
</tr>
<tr>
<td>Michigan</td>
<td>22</td>
<td>18</td>
<td>55%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>19</td>
<td>20</td>
<td>49%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>52</td>
<td>53</td>
<td>50%</td>
</tr>
</tbody>
</table>

**TABLE XII-30: Approval of State Statutory Will Forms by Probate Judges**

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective self-help tool</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Inexpensive</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Useful for simple estate</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Better than commercial form</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Better than holographic will</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Better than intestacy</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

**TABLE XII-31: Reasons for Approval of State Statutory Will Form Cited by Probate Judges**
CHAPTER XII

<table>
<thead>
<tr>
<th>Reason</th>
<th>CA</th>
<th>ME</th>
<th>MI</th>
<th>WI</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complex/unclear/confusing</td>
<td>4</td>
<td>1</td>
<td>7</td>
<td>6</td>
<td>18</td>
</tr>
<tr>
<td>Prevents person from seeking legal advice needed for comprehensive estate plan</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>Improper completion likely</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>Lack of individualization</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Non-lawyers lack sufficient understanding of estate planning to use forms</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Testator alters form</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Potential for abuse</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Too many options</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Completed form not reviewed for validity by attorney</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>More definitions of legal terms needed</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

TABLE XII-32: Reasons for Disapproving State Statutory Will Form Cited by Probate Judges

7. Additional Comments

The probate judges were asked for additional comments or recommendations regarding statutory will forms in general or specifically about their state's form. Responses revealed a wide divergence of opinion. Some judges were proud to be on the bench in a state that was progressive in its enactment of statutory wills while others urged the immediate repeal of all statutory will legislation. Many judges recognized the
potential benefits of statutory forms but believed that in reality those benefits are illusory or outweighed by the disadvantages. For example, the initial low cost of the form may be counterbalanced by the high cost of remedying the problems resulting from the testator not preparing a complete estate plan or not properly completing the statutory form. Several judges also remarked that their experiences with statutory forms were too limited to give informed opinions. Some of these judges hypothesized that their lack of experience was due to the form being used by many young people who have not yet died. Some judges made very insightful recommendations on how to improve their state's form while others asserted that their state's form was excellent but that the concept of self-help will preparation is flawed regardless of the quality of a statutory form.

D. LAW STUDENTS

1. Methodology

Seventeen law students who had either completed or were currently enrolled in a law school course on wills participated in the statutory will form completion study detailed in Chapter X. During the course of this study, the law students became familiar with the statutory will forms; they received a brief explanation of the philosophy behind the enactment of statutory wills (i.e., to simplify the will-making process, to encourage people to execute wills, to
reduce the cost of will preparation), reviewed the statutory will forms of California, Maine, Michigan, and Wisconsin, and then completed the Maine form. This experience gave these law students a greater exposure to statutory wills than most, if not all, other law students thus making their opinions more likely to be based on deliberation rather than on initial impression. After these students completed the study, they answered a questionnaire that solicited their opinions of statutory wills.36

2. Opinion of Statutory Will Forms

Over 80% of the law students approved of the concept of a statutory will form.37 The reasons cited for approval are listed below; if a particular reason was mentioned by several students, the number giving that response is supplied parenthetically:38

- Encourages people without wills to prepare them (6);
- Efficient estate planning method for uncomplicated estates (3);
- Reduces time and money required to make a will (3);
- Simple to use (3);
- Easily obtained by general public (2);
- Lessens the number of people who die intestate (2);
- Reduces stress associated with making a will; and
- Reduces probate litigation.

The reasons for disliking the idea of statutory will forms are listed below; if a particular reason was mentioned
CHAPTER XII

by several students, the number giving that response is supplied parenthetically:39

• Instructions insufficiently clear for average person to understand (3);
• Discourages individuals who need an attorney's assistance to prepare proper estate plans from seeking such help;
• Too impersonal;
• Too difficult for average person ("more trouble than it's worth"); and
• Use may lead to probate litigation.

3. Recommendation of Statutory Forms

The law students were asked whether they would recommend a statutory will form to their future clients and if so, under what circumstances.40 Approximately 88% of the students believed that in the proper situation, they would recommend a statutory will form.41 Only two students replied that they would not recommend the statutory form under any circumstances. Below is a list of the situations in which the students expressed a willingness to recommend a statutory will form; if the same situation was mentioned more than once, the number of students so responding is given parenthetically:

• Clients with small and simple estates (14);
• Clients with simple family situations (i.e., only spouse and children) (5);
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- Clients who are unwilling to spend the money needed for an individualized will/estate plan (2);
- Clients who expressed a desire for a simple will; and
- Clients who do not need a custom-drafted will.

The students were also asked to assume that a potential client requested their advice regarding statutory will forms. Below is a summary of the advice that the students would give; if the same recommendation would be given by several people, the number of students replying similarly is indicated parenthetically:

- Client should use the form only if simple estate and family situation (8);
- Client must follow instructions carefully; be sure to contact attorney if any questions (3);
- Client should not use statutory form; a custom-drafted will is always better (3);
- An attorney should review the form after completion (3);
- Before deciding to use the form, be certain to review estate to determine if form is adequate for the present time as well as for the future (2);
- Good idea to use form because it is easy; and
- Exercise care in using form if intent susceptible of misconstruction.
4. Impact of Statutory Will Forms on the Legal Profession

The law students were asked if the existence of statutory will forms would have a significant impact on the number of attorney-drafted wills. Thirty-five percent believed that statutory wills would reduce the number of attorney-drafted wills. One student qualified her reply by stating that the impact would be greatest if the forms were heavily advertised or if attorneys conducted workshops to assist people in completing the forms.

On the other hand, 65% of the students replied that they believed statutory will forms would have a small impact, if any, on the number of attorney-drafted wills. Many felt that the form would be used only by those individuals who would not otherwise make a will due to their lack of property, education, or money.42 Several other students indicated that people would still consult an attorney because of the complicated nature of the statutory forms or because people with large estates would realize that a comprehensive estate plan is needed.43 Only one student believed that attorneys would actively advise against the use of the forms in all cases.

5. General Comments About Statutory Will Forms

The law students were asked to provide additional comments regarding statutory will forms. Below is a list of the students' comments; if the same remark was made by more
than one person, the number of students making that particular statement is noted parenthetically:

- Important to keep the form language simple (4);
- Forms should contain explanations of the effect (legal consequences) of the provisions within the form itself (4);
- Definitions should be contained within the form (4);
- Form should contain ample space to write, especially for property descriptions (3);
- Instructions must be easy to read and understand (2);
- Form should contain references to appropriate statutory provisions;
- Information regarding the disposition of non-probate assets such as insurance, pensions, and trusts should be contained in the form;
- Form should explain requirement of disinterested witnesses;
- Effect of divorce should be mentioned in the form;
- Effect of birth or adoption of a child after will execution should be explained;
- Form should warn that step-children may not fall within gifts to "children";
- Form should explain how to make subsequent changes by codicil or new will;
- Contingent gifts should be authorized in the form; and
- Form should contain a greater number of property distribution options.
E. FINDINGS

1. Limited Acceptance of Statutory Will Forms by Estate Planning Attorneys and Probate Judges

Statutory will forms have not gained widespread approval from estate planning specialists. Overall, only 25% of the attorney respondents had ever recommended a statutory will and over 55% were opposed to statutory wills in general. About 50% of the probate judges were of like mind being opposed to the statutory will concept. Although many reasons were given for this opposition, there was considerable agreement that the current forms were inadequate for individual needs, were too complicated or confusing, did not contain adequate opportunity for individualization, prevented individuals from acquiring comprehensive estate plans, and were likely to be improperly completed.

2. Limited Impact of Statutory Will Forms on the Legal Profession

Statutory will forms appear to have had little impact on the legal profession. Only 2% of the attorney respondents believed that the enactment of statutory will legislation has had any effect on their will-drafting business. In addition, only two practitioners indicated first-hand involvement with litigation concerning the validity of a statutory will. Most judges had not been in a position to rule on the validity of a statutory will. Of the relatively few statutory wills offered into probate, approximately 82% had been admitted. As feared by attorneys and judges alike, the
most common reasons for denying probate included execution errors, improperly completed dispositive provisions, and attestation defects.  

3. Statutory Will Forms Need Improvement

Many estate planning attorney and probate judge respondents, even those who support statutory will forms, appear to agree that the forms need improvement. Some respondents believe that considerable improvement is needed before the forms are even marginally acceptable while others think that the forms are good but could be better. Frequent recommendations were to improve the language of the forms so they are more easily understood, to reduce the complexities of execution, and to expand the group of people who would find the form useful by providing the user with greater opportunity to individualize. On the other hand, many respondents indicated that all statutory will legislation should be repealed because the demonstrated and anticipated problems with the forms outweigh their benefits.

4. Statutory Will Forms Received Favorably by Law Students

Over 80% of the law students surveyed approved of the concept of a statutory will form. The students believe that the forms would encourage people to make wills and provide many individuals with a fast, efficient, inexpensive, and simple method of planning their estates. Likewise, approximately 88% believed that under the proper
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circumstances, they would recommend a statutory will form.\textsuperscript{55} The students were aware of the forms' potential problems that were described by the attorney and probate judge respondents but believed that the benefits of the forms outweighed the potential difficulties.\textsuperscript{56} Only 35\% of the law students thought that the existence of statutory will forms would have a significant impact on the number of attorney-drafted wills; most felt the forms are more likely to be used by individuals who would not consult an attorney.\textsuperscript{57}


In 1988, the Michigan Probate Council mailed a questionnaire to all Michigan probate judges and to all members of the Probate Council.\textsuperscript{58} Seventy-two responses were received.\textsuperscript{59} The following conclusions were drawn from the collected data:

- Almost one-half of the respondents had no or insufficient experience with the statutory will form to express an opinion on whether the forms were a benefit or detriment to the public.\textsuperscript{60}

- Of the respondents who had either experiences with or opinions about the statutory will form, the unfavorable opinions outweighed the favorable by a margin of approximately two to one.\textsuperscript{61}

- Of the thirteen responses which were generally or mildly favorable to statutory will forms, most were based on only limited experience.\textsuperscript{62}
The more experience the judges had with statutory will forms, the more inclined they were to be unfavorable towards them with some judges recommending that the enabling legislation be abolished.\(^{63}\)

F. RECOMMENDATIONS FOR FUTURE SURVEYS

1. Expand Base of Attorneys Surveyed

The statutory will form attorney surveys used in this study were mailed only to members of the American College of Probate Counsel (ACPC). This group of attorneys was selected because it was assumed that they would be knowledgeable about statutory will forms and would have already considered the advantages and disadvantages of such an estate planning technique. This assumption appears to have been accurate because a large percentage of replies evidenced careful deliberation about the issue. However, a clearer picture of the value and effectiveness of statutory will forms might be developed if an expanded base of attorneys were surveyed.

a. Include Non-estate Planning Specialists

Statutory will forms are primarily designed for use by attorneys who are not estate planning specialists as well as for the general public.\(^{64}\) It is possible that attorneys who are more likely to deal with small and uncomplicated estates would have different opinions concerning the value of statutory will forms than many ACPC members who are more
likely to have wealthier clients requiring extensive estate planning.

b. Include More Attorneys from Maine

Because of Maine's small population and concomitant small number of ACPC members, only twenty-four surveys were sent to Maine attorneys. Although the reply rate was an admirable 67%, in absolute numbers only sixteen replies were studied. This number may be too small to accurately reflect the opinions and experiences of Maine estate planning attorneys. Any future survey involving Maine must attempt to include a greater number of participants.

c. Avoid Age and Gender Bias

The respondents were predominantly older male attorneys. Most of the respondents had been practicing law for over twenty-five years; only seven had practiced for twelve or less years and thirty-four had practiced for forty-two years or more. Although the gender of the respondents is unknown, only twelve questionnaires were sent to attorneys with traditional female names. This skewed age and gender distribution could have been a significant factor in the results obtained.

2. Provide Lists of Reasons

Difficulties in compiling data were encountered when respondents were given the opportunity to use their own words in answering questions. It was often hard to categorize the participant's responses. Ambiguous language was frequently
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used which made it difficult to ascertain the respondent's true intent. The tenor of many comments was perplexing because it was not possible to ask the respondent to elaborate on a response. A better technique may be to provide an extensive list of relevant answers and permit the respondent to select those with which he or she agrees. Of course, the survey should still provide the opportunity for the respondent to include individualized comments.

3. Provide Clarification for Similar Questions or Avoid Questions With Insignificant Differences

The survey asked several similar questions. For example, attorneys were asked the reasons why they had or had not recommended a statutory form as well as the reasons why they have used or not used a statutory form. Although the relevant language was printed in bold type in the questionnaire, many respondents seemed to have trouble differentiating between the questions. Perhaps the questions need to be phrased with clearer language and explanations so the respondent is aware of the exact question being asked. Alternatively, there may be no valid reason for trying to compartmentalize the respondent's opinion on statutory forms based on these types of distinctions. A simpler, more direct survey may achieve more accurate and useful results.

4. Include Other Estate Planning Forms in Survey

Future surveys of attorneys and judges should include other types of statutorily enacted estate planning forms such
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as durable powers of attorney, guardian self-selection documents, and living wills. Several attorney respondents who do not favor statutory will forms indicated that they find other types of statutory forms to be very useful.

G. CONCLUSION

The legal community is skeptical about the utility and effectiveness of statutory wills. Although many attorneys and judges recognize the potential benefits available to the public through the use of statutory wills, many believe that statutory forms are unable to achieve their lofty goals. Some respondents assert that the design of the forms is at fault and that with further study and redesign, statutory wills could operate as intended. Others, however, believe estate planning requires the expertise of a professional and that placing estate planning matters in the hands of non-legally trained individuals is an open invitation to disaster.

A great deal of the opposition to the forms, however, is based on limited evidence or speculation. The forms have not been in existence long enough for comprehensive data to have been compiled. Despite this lack of evidence, it is clear that statutory wills do lead to frustration of intent and additional cost in a significant number of cases.

The next part of this dissertation discusses the author's predictions for the future of statutory estate planning forms and recommendations on how that future should be shaped.
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1. The study reported in this chapter was funded by a grant from the American College of Probate Counsel Foundation. The author greatly appreciates the ACPC's generosity. The author also acknowledges the exceptional and invaluable assistance of Ms. Ellen Kissling, 1990 J.D. Candidate, St. Mary's University.

2. See Chapter IX.

3. See Chapter XI.

4. See Rice, *Too Little Too Late*, CAL. LAW., June 1989, at 36, 36 (Alameda County Court Commissioner Barbara J. Miller quoted as stating that "[m]ost [statutory will forms] are not completed correctly"; Los Angeles County officials report that approximately 50% of statutory will forms are denied probate due to lack of signatures or improper completion).

5. See Chapter X(A) (reasons for statutory wills providing the focal point of studies).

6. The 1988 ACPC Membership Directory was used to ascertain ACPC members and addresses.

7. The cover letter read substantially as follows:

   Dear Estate Planning Practitioner:

   Vigorous debate currently exists concerning the effectiveness of statutorily enacted fill-in-the-blank will forms. I respectfully request your participation in a study which I am conducting to help determine the wisdom of these forms.

   I am a professor of law at the St. Mary's University School of Law in San Antonio, Texas and I am currently pursuing a J.S.D. degree from the University of Illinois. My dissertation topic is Statutorily Enacted Estate Planning Forms: Development, Explanation, Analysis, Studies, Commentary and Recommendations. This statutory will form study is an important part of my research. The results will not only be reported and analyzed in my dissertation but will also be submitted to the legislatures of those states currently considering the enactment or amendment of a statutory will form.
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You practice in one of the only four states (California, Maine, Michigan & Wisconsin) that currently has a statutory will form. I value your reactions, observations, experiences, and recommendations concerning the current use and future of these forms.

Enclosed is a very brief questionnaire. Please take a few moments to fill it out and return it within the next three weeks in the enclosed self-addressed stamped envelope. Your assistance in this study is greatly appreciated.

Please let me know if you would be interested in receiving a copy of the results and I will be happy to provide you with the information upon the completion of the study.

Thank you for taking the time to complete the questionnaire.

8. The average was computed from the respondents who answered in numbers. Several replies consisted of descriptive words such as "many," "very few," and "several." If a response was a range, e.g., 1-2, 1-5, the average of the given range was used in calculating the average given in this column.

9. Only one respondent from Maine indicated that the statutory form had been recommended.

10. This category includes responses indicating that statutory wills were used as an interim device pending preparation of individualized documents.

11. Conflict of interest for a California attorney to draft client's will.

12. One Maine respondent wrote, "I believe I once suggested that a prospective client use the statutory form when there seemed great resistance to having us draft something other than the persons dictated provisions."

13. Wisconsin client had prior experience with a statutory will of another state.

14. Typical reasons given for the inadequacy of the form were the inability to individualize and the form's lack of tax planning considerations for large estates.
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15. One Maine respondent wrote, "It never occurred to me. Now that I have read the form for the first time, it will not occur to me in the future."

16. The average was computed from the respondents who answered in numbers. Several replies consisted of descriptive words such as "many." If a response was a range, e.g., 2-3, 3 or 4, the average of the given range was used in calculating the average shown in this column.

17. This average does not include one respondent who indicated that 25 to 35 clients had requested information on the statutory will forms.

18. The average was computed from the respondents who answered in numbers. Several replies consisted of descriptive words such as "several." If a response was a range, e.g., 2-3, the average of the given range was used in calculating the average listed in this column.

19. Respondents who gave ambiguous responses or who did not reply to the question are not included in this table.

20. Respondents who gave ambiguous responses or who did not reply are not included in this table.

21. One Michigan respondent replied, "I consider the statutory will a hoax. It is designed to win voter favor for politicians who jumped on the statutory will bandwagon . . . Better form wills have been available since I began practice for as little as $1.00."

22. Assurances to the contrary from the author, a non-judge member of the organization, were ineffective.

23. Two administrators supplied information without inquiring why the information was needed.

24. The assistance of Mr. Ben McClentin of the State Judicial Counsel was greatly appreciated. He provided a list of presiding judges along with the number of judges in each county. His recommendation that surveys be supplied for distribution to ten percent of the judges was followed as well as his suggestion that surveys be sent to superior court commissioners who also handle probate matters.

25. The cover letter was substantially the same as the one used for attorneys. See supra note 7.

26. This was particularly common in Maine and Wisconsin where a Register in Probate handles most uncontested probate matters. See Letter from Judge David L. Brooks to Gerry W. Beyer, at 1 (Oct. 3, 1989) ("A primary function of the Register of Probate in Maine is to receive, review and
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approve applications for informal probate of wills. Judges of Probate review wills only on a more formal basis, usually when there is a question regarding validity or some other form of contest about the will.

27. Some surveys may reflect the responses of several judges because the probate administrators of several jurisdictions completed one survey for all the judges in that jurisdiction.

28. The average was computed from the respondents who answered in numbers. Several replies consisted of descriptive words such as "only a few," "very few," "uncertain," and "no idea." If a response was a range, the average of the given range was used in calculating the average shown in this column.

29. To compile this table, some liberty had to be taken with the judges' responses because the figures given for statutory wills admitted and denied did not always match the total number of statutory wills they indicated had been offered in their court.

30. The judges' responses indicated that 55 statutory wills were denied probate. Only 14 reasons for denial were given, however, due to the same reason applying to multiple wills and the judges' failure to indicate how many times a particular defect caused the denial of probate.

31. The total number of contest grounds do not directly match the number of contests reported in Table XII-25 because several contests were on multiple grounds and some respondents did not indicate how many times a particular contest ground was raised.

32. Replies of respondents who indicated they were uncertain about their opinion regarding statutory wills or who replied ambiguously are not included in this table.

33. One Wisconsin judge admitted using statutory will form for both him and his wife.

34. Replies of respondents who indicated they were unsure of their opinion of their state's statutory will form are not included in this table.

35. These law students were in their second or third year at the St. Mary's University School of Law in San Antonio, Texas.

36. Although many of the law students knew the author, none of them had attended his wills course. In addition, the author was not present at the time the questionnaires...
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were completed. This helped reduce the chance that the author may have communicated a bias to the students which later played a part in their responses.

37. Fourteen indicated approval while only 3 expressed disapproval.

38. The total number of responses exceeds 14 because many students gave multiple reasons.

39. The total number of responses exceeds 3 because some students gave multiple reasons.

40. The students answered this question in general; they were not referring to any particular state's form.

41. Fifteen of 17 students indicated they would recommend the form.

42. Six students so indicated.

43. Three students believed most people would still need an attorney's assistance and one opined that people with large estates would know that legal advice was important.

44. See supra Table XII-2.

45. See supra Table XII-13.

46. See supra Table XII-27.

47. See supra Tables XII-16 & XII-29.

48. See supra Table XII-19.

49. See supra Table XII-20.

50. See supra § C(2).

51. See supra Table XII-23.

52. See supra Table XII-24.

53. See supra Tables XII-5 & XII-12.

54. See supra § D(2).

55. See supra § D(3).

56. Id.

57. See supra § D(4).
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59. Id.

60. Id. at 6.

61. Id.

62. Id.

63. Id.

64. See Chapter XI(B)(2).

65. The breakdown of female names was as follows: California 9; Maine 1 (name was ambiguous); Michigan 2; and Wisconsin 0.
PART FIVE
CONCLUSIONS

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PREDICTIONS FOR THE FUTURE

A. INTRODUCTION

Statutory estate planning forms have assumed a significant role in the estate planning arena. The types of forms vary greatly; for example, some are procedural in nature such as self-proving will affidavits, some control the distribution of property upon death, and others control life and death decisions regarding health care. The use of statutory forms has progressed from a rare event to a common occurrence; several states have numerous statutory forms while other states have only a few.

As familiarity with statutory estate planning forms grows within the lay community and the legal profession, it becomes increasingly important to detect the existing trends regarding the use of these forms. Knowing the direction this estate planning technique is heading may make it possible for legislatures and bar associations to take appropriate steps to increase the probability that statutory forms will impact positively on both the legal and non-legal communities. This
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chapter discusses the author's predictions for the future of statutory estate planning forms.

B. INCREASE IN THE NUMBER OF STATUTORY FORMS ENACTED

Legislation enacted during the 1990's will probably show an increased frequency in the codification of statutory estate planning forms. This section reviews some of the reasons for this anticipated increase.

1. Public Demand for Self-Help Legal Techniques

The public has recently demonstrated an increased awareness of and interest in the legal system. Bookstores frequently have large sections devoted to legal books covering a wide variety of topics that are written specifically for the non-attorney audience. Television programs such as "The People's Court," "Superior Court," and "L.A. Law" consistently score high ratings. Even the old mainstay "Perry Mason" has enjoyed a resurgence of popularity as reflected by both reruns and newly produced shows.

Accompanying this increased interest in the law is a corresponding rise in the demand for self-help legal techniques. Estate planning is one of the most popular areas of the law in which self-help techniques have developed probably because of the widespread need for estate planning; each individual should have a will and make provisions for incompetency and death. A wide range of marketing strategies
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are used to insure that self-help estate planning products are available to individuals from different social and economic classes. Some of these products are sold in typical shopping mall bookstores alongside other popular legal books, others are advertised in commercials on late-night television, complete with toll-free telephone numbers for placing orders using major credit cards, and still others are solicited through bulk-mail advertisements. Another avenue taken by some enterprising purveyors of self-help legal material is the marketing of estate planning kits as computer programs that enable a person to create a will or other estate planning document by simply responding to questions generated by the program.

The apparent success of these self-help publications is a strong indication of the public's desire for self-help estate planning techniques. This demand will probably result in the enactment of statutory forms. Statutory forms may meet the self-help desires of the public more effectively than commercially prepared publications because statutory forms are available free of charge or at a nominal cost and are widely distributed. In addition, statutory forms are more likely to be carefully designed to comply with state law and provide instructions for proper use and completion.

2. Legal Profession's Support of Statutory Forms

The public's increased interest in and scrutiny of the legal profession has done little to improve the reputation of
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the legal profession which regrettably has been far from exemplary. The Bar's support of statutory estate planning forms is one technique that has been used to improve the dishonorable reputation imputed by the public to attorneys and the legal profession. By advocating statutory forms, bar associations stand to gain respectability in the public's eye because such forms are not perceived to be in the best interest of attorneys who will arguably lose business as a result of their existence. Accordingly, the Bar is likely to echo the public's demand for self-help estate planning techniques by supporting statutory forms.

The public's belief that statutory forms are not in the Bar's best interest may be erroneous. For example, only two percent of the estate planning attorney respondents in the survey discussed in Chapter XII believed that the enactment of statutory will legislation had any effect on their will drafting business. Therefore, the Bar's support of statutory estate planning forms becomes more palatable because the forms may be supported without a realistic fear of negatively impacting on fee-generating business. This situation could change, however, if the forms are redrafted to be usable by a larger segment of the population.

3. Political Expedience

Because both the public and the Bar continue to press for the adoption of statutory estate planning forms, it is likely that a growing number of bills containing such forms will be
introduced into state legislatures. Regardless of the personal opinions of the legislators concerning statutory forms, it will be increasingly difficult from a political standpoint to actively oppose such measures. Opposition may cause a legislator to be labeled "anti-consumer" or "pro-attorney" by the media or consumer activist groups. As a result, more statutory forms will be enacted. Unfortunately, valid criticisms may be stifled for the sake of popularity. This could result in the codification of ill-conceived or ill-drafted forms that may place the public at the mercy of future legislative sessions to correct the problems.

C. INCREASED USE OF STATUTORY FORMS BY THE NON-LEGAL COMMUNITY

The enactment of statutory estate planning forms typically receives extensive media publicity in the state enacting the form and in other states, as well as in publications with a national distribution to non-attorney audiences. This publicity educates society about the necessity for estate planning and expands access to estate planning techniques. As a result, there is a significant increase in the number of people aware of the numerous benefits that estate planning can yield.

Many of these individuals, with their newly-found realization of the necessity of estate planning, will elect to use statutory forms. The California experience with statutory will forms provides evidence of this increased use. In the
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first year after the 1983 enactment of the will form, the State Bar of California sold 175,000 forms. This initial interest has withstood the passage of time; California Bar officials estimate that over 500,000 forms have been ordered with more than 25,000 being sold during the first three months of 1989. Living will forms and durable power of attorney for health care forms are also popular as evidenced by various reports of their wide distribution.

There is no assurance that the forms are actually completed merely because they are purchased or otherwise obtained. Nonetheless, it is likely that this broad dissemination of the forms, coupled with their low cost and ease of completion, will lead to an actual increase in usage.

D. WIDESPREAD IMPROPER USE OF STATUTORY FORMS ACCOMPANIED BY UNFAVORABLE RESULTS

One of the most significant criticisms of statutory estate planning forms is that completion by non-attorneys without legal advice provides an open invitation for improper use that will subsequently result in the invalidation of documents, increased litigation, and frustration of intent. As one critic of statutory wills proclaimed, "You should not put a legal document in the hands of a layman." Even proponents of statutory forms recognize that "[e]very device that enables people to act for themselves is subject to abuse and misunderstanding." This fear of improper use is well-founded.
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The statutory will form study discussed in Chapter X revealed significant completion problems from two perspectives. First, the participants did not realize the effect of what they had done by completing the form. Over fifty-eight percent of the high school group members did not appreciate how their property would be distributed under the statutory will they had just completed. The percentage of participants misunderstanding what they had done was lower for the college group which completed the Michigan form. Nonetheless, a significant portion of this group would have authorized distributions that were not in accordance with their verbally expressed intent. Second, a considerable number of the forms completed by study participants contained errors. A total of fifty-one statutory wills were completed with less than thirty percent containing no errors. The remaining wills had mistakes ranging from those that were legally harmless to those that would produce a partially invalid will. The participant's ability to have the statutory will form properly attested was outside the scope of this study. Accordingly, it is likely that some, or perhaps many, of the participants would not have taken the steps necessary to have the will properly attested.

Results of the surveys reported in Chapter XII further confirm the extent of the completion problem. Fear of improper completion was one of the most frequent reasons estate planning practitioners cited for disapproving of the statutory will concept generally and their own state's form in
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particular. The probate judges indicated that execution, attestation, and other completion errors were the most common reasons for their denial of probate to statutory wills. The data acquired in these surveys is consistent with other reports stating that a significant number of statutory will forms are not correctly completed.

The number of improperly completed statutory estate planning forms is likely to escalate as the use of the forms grows because of the media attention given to existing forms and the passage of new ones. This improper use will lead to unintended results such as the unanticipated distribution of estates and property or health care decisions being made by individuals whom the incompetent person did not select. Improper completion may also produce increased costs to the users, their families, and their estates when the legal system is needed to resolve the problems either caused by or left unresolved because of inappropriately used or completed forms.

E. CHANGES IN COMPOSITION OF STATUTORY FORMS

Statutory estate planning forms are in their early developmental stages. As more forms are enacted and the frequency of their use increases, valuable insights are gained into the possible methods of improving the effectiveness of the forms. These discoveries will be used when drafting new forms and incorporated into existing forms through statutory amendments. This section reviews the changes in the
composition of statutory estate planning forms that are likely to occur in the future.

1. Increased Opportunity for Individualization

Statutory estate planning forms are generic; they are designed for widespread use by the "average" person. Because the forms are drafted without any specific user in mind, they are often difficult to customize to the circumstances of a particular individual. This lack of opportunity to individualize statutory forms is one of the most frequently cited criticisms of the forms. This deficiency appears to be universally recognized not only by the legal community but by the non-attorney community as well.

New or amended forms will provide the user with increased opportunities to customize the form. The California experience with statutory will forms evidences the movement to supply more alternatives. The State Bar of California's Estate Planning, Trust and Probate Law Section is currently reviewing the statutory form to increase the number of options so the form will be usable by a greater segment of the population.

Unfortunately, increasing the opportunity for individualization potentially has an undesirable side effect; the more choices that are provided, the more complicated the form becomes. This added complexity makes the form confusing and increases the probability that the form will be misunderstood or improperly completed. Consequently,
legislatures will need to balance the advantages of permitting more customization against the accompanying problems. As discussed in the next section, many of these difficulties may be rectified through other improvements in the form.

2. Improved Instructions and Warnings

Statutory estate planning forms differ widely with respect to the number and type of instructions and warnings supplied to assist the user in correctly completing the form. Some forms, such as the California statutory will form and the Texas durable power of attorney for health care form contain extensive instructions and warnings. On the other hand, other forms such as the Texas self-designation of guardian form and the Illinois living will form have no instructions or warnings.

New and amended forms are likely to contain more carefully drafted instructions and warnings. The inclusion of comprehensive information on the form itself is, however, no guarantee that the user will actually read and understand what is written. It may be human nature that the longer the list of warnings and instructions, the less likely an individual is to read them because of the fear of confusion and a desire to fill in the form quickly without "wasting" time reading what is perceived to be unnecessary material. As a result, innovative techniques will be needed to convey important information to the user.
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Three techniques to provide improved transmission of information between the legislature and the form's users may gain in popularity. First, emphasis will be placed on drafting the forms in plain language so they may be read and understood by the average individual. The language used in the explanations, directions, and actual form should enable a person with average intelligence and reading skills to complete the form in an acceptable manner.

Second, a change is likely to occur in the way preliminary information, instructions, and warnings are presented. A question and answer format may displace a mere listing of the items at the beginning of the form. This format is easier to read because the questions can be phrased to pique the reader's interest and the answers can supply the necessary information in a concise and organized manner. The question and answer format has already been used in brochures distributed by Michigan congressmen to publicize the statutory will forms and is being considered in discussion drafts of revisions to the California statutory will.

Third, important instructions and warnings will be supplied at the exact location on the form where such information is needed. For example, in a statutory will form, instructions that a signature is needed in a box will be printed directly next to that box. Providing instructions on how to fill in certain blanks or stating important warnings in close proximity to the location on the form where such information is needed will make the forms more understandable.
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Although the forms will be somewhat longer, non-attorneys will be able to understand them better and complete them more effectively.

3. Streamlined Execution Procedures

One of the major reasons that statutory forms fail to take effect as the user intended is lack of proper execution. For example, a testator's improper will execution often prompts California probate judges to refuse admission of a statutory will to probate. Likewise, the survey of probate judges in California, Maine, Michigan, and Wisconsin revealed that the most common reason for statutory will forms to be denied probate was completion errors.

To reduce the frustration of intent caused by execution errors, it is likely that streamlined execution procedures will be adopted that remove or eliminate many of the traditional formalities such as witnessing and notarization. Although this procedure may be more difficult with statutory wills where formalities are steeped in tradition, implementation will be easier with other types of estate planning documents, such as durable powers of attorney. Alternatively, courts may be granted the discretionary power to excuse formalities under certain circumstances when a statutory form is used.
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F. MOVEMENT TOWARD STATE BAR FORMS

As an alternative to statutorily enacted estate planning forms, at least one prominent proponent of statutory forms advocates the use of forms prepared by state bar associations.54 This technique, already popular in other areas such as real estate,55 has several advantages over legislatively enacted forms. It is often difficult to enact statutory forms because of the cumbersome legislative procedures and approvals required.56 Likewise, once a form is codified, it is burdensome to update it to reflect changes in the law or practice.57 A state bar committee established for the purpose of preparing and revising forms, however, would be able to take swift action to react to such changes.58 A greater number of alternatives could also be provided in bar forms because they could be designed for a wide variety of circumstances. Simpler forms may also result because some provisions that are important but frequently unneeded would not have to be included in all forms as is the case when a single form is designed for widespread use.59

This technique may also improve the public image of attorneys and the legal profession. Claims are often made that the Bar's support of statutory forms "should help some members of the general public to understand the true service ethic of the legal profession."60 These claims would be just as valid if the Bar drafted and promulgated its own estate planning forms. Bar associations could sell these forms and
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raise the money necessary to finance efforts to draft new forms and revise old ones.61

It appears likely that the efforts of state bars in preparing estate planning forms will increase, especially because of their intimate involvement in drafting the statutory forms. The success of these efforts, however, remains to be seen. If this concept is accepted by the legal community, it may be a method of obtaining many of the benefits of statutory forms without some of the problems. The benefits of legislatively sanctioned forms must not be forgotten, such as uniform rules governing the forms' execution and effect with the accompanying increased security and predictability. As a result, bar associations may cautiously and slowly break ground in this relatively new area.

G. CONCLUSION

There will be a noticeable increase in the number of statutory estate planning forms enacted in the next ten years. Because of the public's demand for self-help legal techniques, state legislatures, often urged by state and local bar associations, are likely to codify a greater number of forms. However, the increase in the availability and subsequent use of the forms will show that the current forms are difficult to use and do not fit the circumstances of many individuals.

The future of statutory estate planning forms hinges on the reaction of the government and the Bar to the shortcomings
of the current forms. Will legislatures take steps to improve the forms such as by providing increased opportunities for individualization and supplying improved instructions and warnings, or will the forms remain inadequate due to a failure to modernize? If development of the forms is halted, will it be because of the legal profession's fear of losing business or will it be because the concept of a "safe" form usable by the general public is unrealistic? If the goal of a "safe" form is unattainable, it is likely that bar associations may be able to prepare standard forms to aid the practitioner as well as the non-attorney.
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1. See Chapter VIII(A).

2. See Chapter III.

3. See Chapter VII.


5. For July 1989, the Nielsen Designated Marketing Area (DMA) ratings for the San Antonio area consisting of 24 counties and 1,600,000 homes were as follows:

<table>
<thead>
<tr>
<th>Program</th>
<th>NBC Share (carrier)</th>
<th>ABC Share</th>
<th>CBS Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>People's Court</td>
<td>33</td>
<td>21</td>
<td>29</td>
</tr>
<tr>
<td>Superior Court</td>
<td>32</td>
<td>13</td>
<td>31</td>
</tr>
<tr>
<td>L.A. Law</td>
<td>33</td>
<td>13</td>
<td>8</td>
</tr>
</tbody>
</table>

Telephone interview with Michelle Giguere, Sales Assistant KMOL (Oct. 12, 1989) (NBC affiliate; also noting that "Divorce Court" was dropped due to poor ratings); Telephone interview with Steve Wegner, Production Manager KSAT (Oct. 12, 1989) (ABC affiliate); Telephone interview with Kathy Standage, Account Representative KENS (Oct. 12, 1989) (CBS affiliate).


7. See, e.g., ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING (2d rev. 1983).


9. See, e.g., LEGISOFT (program) & NOLO PRESS (manual), WILLWRITER (1985); SELF-HELP LEGAL SERVICES, DISKWILL (198_). Cf. Attorney's Computer Network, The Texas Wills Library, as advertised in 52 TEX. B.J. 1082 (1989) (computer program designed for attorney use which composes estate planning documents such as wills, declarations to physicians, and powers of attorney based
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on answers to multiple-choice and fill-in-the-blank questions).

10. The forms may be handcopied or photocopied from statute books at public libraries. See generally You Can't Take it With You, So You Should Make a Will, San Antonio Express-News, June 4, 1989, at 2-G. Perry Bullard, the Michigan State Representative who sponsored the Michigan Statutory Will Act, has prepared a booklet for his constituents containing the statutory will form along with four pages of information in a question and answer format. The State Bar of California sells statutory will forms for $1.00 each plus a self-addressed stamped envelope. See California Bar Sells 175,000 Will Forms, B. LEADER, Jan.-Feb. 1984, at 7. The Vermont Bar Association endorses and distributes a booklet containing living will and durable power of attorney for health care statutory forms. Medical Ethics Committee of the Vermont State Medical Society, Taking Steps to Plan for Critical Health Care Decisions (1987). Colorado law requires that the form for anatomical gifts be placed on the back of all driver's licenses and state issued identification cards. COLO. REV. STAT. § 12-34-105 (1985). The Wisconsin Department of Health and Social Services is required to distribute copies of the statutory living will form, in quantity, to local bar associations. WIS. STAT. ANN. § 154.03(2) (West Supp. 1988). Living will forms are distributed free of charge by Concern for Dying: The Educational Council for the Living Will, 250 West 57th Street, Room 831, New York, NY 10107 and by the Society for the Right to Die, 250 West 57th Street, New York, NY 10107.

11. See generally Jost, What Image Do We Deserve?, A.B.A. J., Nov. 1988, at 47, 47 ("the image of lawyers today ranges somewhere between "poor" and "not much worse than before").

12. Bar associations have actively supported statutory forms. See, e.g., The Ass'n of the Bar of the City of N.Y., Legislative Memorandum in Support of . . . Creation of a Statutory Form of Will (Mar. 2, 1979) (documenting support of the Association of the Bar of the City of New York for statutory will legislation); Granelli, Do-It-Yourself Wills Ready in Calif., Nat'l L.J., Nov. 1, 1982, at 7, col. 3 (discussing California Bar's support of statutory will legislation); Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 677 (1985) (discussing support of the Probate and Trust Law Section of the Michigan Bar for statutory will legislation).

13. See California First With Statutory Wills, CAL. LAW., Feb. 1983, at 17, 17 (quoting Professor Edward C. Halbach, Jr. as stating that California's statutory will
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project was an example of "the bar pursuing something that is not in their narrowly defined economic self-interest").

14. See Chapter XII(E)(2). Survey respondents were experienced estate planning specialists and thus it is possible that the forms have had a greater effect on the businesses of non-estate planning specialists.


17. See, e.g., Isn't it Time You Wrote a Will, 50 CONSUMER REP. 103, 106 (1985) (discussion of pros and cons of statutory wills); The Limits to a Do-it-Yourself Will, CHANGING TIMES, Nov. 1984, at 82, 82 (discussion of statutory wills as "latest in the crusade to convince more of us to have a will").


20. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36.

21. See, e.g., Blodgett, New "Living Wills," A.B.A. J. Sept. 1986, at 24, 24 (quoting George Annas of the Boston University School of Medicine as stating that "millions of people have signed some kind of living will"); Note, Equal But Incompetent: Procedural Implementation of a Terminally Ill Person's Right to Die, 36 U. FLA. L. REV. 148, 149 n.6 (1984) (Concern for Dying reported distributing more than six million living wills); Comment, The Living Will—Death With Dignity or Mechanical Vitality, 10 CUMB. L. REV. 163, 166 n.12 (1979) (Euthanasia Education Council reported distributing 2½ million copies of their living will form); Letter from Harley J. Spitler to Gerry W. Beyer (Feb. 13, 1989) ("people are using the Statutory form . . . . It has very wide and most favorable acceptance.").

22. See Chapter IX(B)(1)(a)(1).
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23. See Chapter IX(B)(1)(a)(2).


26. See Chapter X(E)(1).

27. Id.

28. See Chapter X(E)(2) & (F)(4).

29. Id.

30. Id.

31. See Chapter X(H)(1)(f).

32. Cf. Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (Alameda County Court Commissioner Barbara J. Miller quoted as stating that "[m]ost [statutory will forms] are not completed correctly"; Los Angeles County officials report that approximately 50% of statutory will forms were denied probate due to lack of signatures or improper completion).

33. See Tables XII-15 & XII-18.

34. See Table XII-24.

35. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (Alameda and Los Angeles county offices indicated that most statutory will forms are improperly completed).

36. See Chapter IX(C)(1)(a).

37. The survey of estate planning practitioners discussed in Chapter XII revealed a considerable dissatisfaction with statutory will forms because they were not suited to their clients' needs, often because of insufficient ability to individualize. See Chapter XII(E)(3) & Tables XII-5, -12, -29 & -32.

38. Results of the statutory will form completion study detailed in Chapter X indicate that many participants found that the statutory form stifled their ability to create the distribution plan they desired. See Chapter X(G)(3).

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39. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 ("the committee is trying to give consumers more choices in planning their estates"); Letter from Michael V. Vollmer to Gerry W. Beyer, at 1 (Sept. 7, 1989) (forms are being redrafted in part because "existing forms do not provide enough choices for people (that is why they are not used more frequently)").

40. See generally Chapter IX(C)(1)(a).

41. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (quoting Michael Vollmer, Vice Chair of the Estate Planning Sub-Committee of the California States Bar's Estate Planning Trust and Probate Law Section, "As we add more and more complexity to it, then the form becomes more difficult to fill out.").

42. CAL. PROB. CODE § 6240 (West Supp. 1988).


45. ILL. ANN. STAT. ch. 110 1/2, para. 703(e) (Smith-Hurd Supp. 1989).

46. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (one of the goals of the Bar committee redrafting the California statutory will form is to make the warnings more understandable).

47. See, e.g., Est. Plan., Tr. & Prob. L. Sec. St. B. Cal., Possible Legislation -- Statutory Will 5 (Dec. 16, 1980) ("An attempt has been made to write the [California] statutory will in layman's language in order to encourage its use and to respond to public pressure for 'plain English' legal documents.").

48. See Bullard, The Michigan Statutory Will 3-4, 13-14 (April 1988) (twenty-seven questions are in bold face type with answers following; the questions are short and lead the reader to the important issues; typeface, spacing, and other aspects of set-up also add to readability).

49. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 (phrasing warnings as questions and answers may make them clearer); Letter from Michael V. Vollmer to Gerry W. Beyer, at attachment 73-74 (Sept. 7, 1989) (discussion draft of proposed questions and answers).

50. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36; see also Letter from Michael V. Vollmer to Gerry
W. Beyer, at 1 (Sept. 7, 1989) ("the attestation clause in the existing [will] forms frequently means that the wills are not admitted to probate in California").

51. See Chapter XII(C)(3) & Table XII-24.

52. See Gulliver & Tillson, Classification of Gratuitous Transfers, 51 YALE L.J. 1 (1941) (discussing history and functions of will formalities).

53. See Langbein, Substantial Compliance With the Wills Act, 88 HARV. L. REV. 489 (1975) ("insistent formalism of the law of wills is mistaken and needless").


56. See Letter from Harold I. Boucher to Gerry W. Beyer (Sept. 29, 1989) ("I still favor Bar Association created forms because of the difficulty of shepherding a "Statutory" law through a legislature.").


58. Id. (in discussing state bar forms for revocable inter vivos trusts, "desirable amendments could readily be made and there would be no need to beg the Legislature for relief").

59. Id. ("bothersome provisions" could be avoided).

60. Lawrence, III & Sytsma, Michigan Statutory Wills, 64 MICH. B.J. 677, 678 (1985) (statement made with regard to the State Bar of Michigan's support of the Michigan statutory will). See, e.g., The Ass'n of the Bar of the City of N.Y., Legislative Memorandum in Support of . . . Creation of a Statutory Form of Will (Mar. 2, 1979), at 5; California First with Statutory Wills, CAL. LAW., Feb. 1983, at 17, 17 (quoted Irving Kellogg as stating that
the Bar "wanted to show that lawyers were taking the initiative in helping the middle-income consumer").

61. See generally Memorandum from Harold I. Boucher to Colin W. Wied, at 2 (Sept. 23, 1989) (suggesting that the Bar market the forms and that experience with the sale of statutory forms indicates that the profit from such sales would be enormous).
CHAPTER XIV

RECOMMENDATIONS

A. INTRODUCTION

It is a well-documented fact that a sizeable majority of Americans fail to execute a simple will much less prepare a comprehensive estate plan for possible lifetime incompetency and death.¹ Many reasons have been cited to explain why individuals neglect to exercise their important rights to control the management and distribution of their property at death as well as to direct how their personal needs will be handled during lifetime if they are temporarily or permanently unable to do so themselves. Explanations for this phenomena include:

- lack of appreciation for the critical importance of estate planning;²
- indifference or apathy;³
- belief that state law adequately handles estate matters;
- assumption that family members will provide personal and estate protection;
- cost, especially if legal advice is obtained;⁴
- time and effort required;⁵
- complexity;⁶
- lack of property;⁷ and
- difficulty of admitting one's own mortality.⁸
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The general population's failure to prepare estate plans and the subsequent consequences have been broadly recognized. Many steps have been taken by different groups that theoretically will lead to an increase in the number of individuals who prepare plans to effectuate their actual desires rather than subjecting themselves to a statutorily-supplied presumed intent by default. The private sector has taken the lead by publishing many self-help legal books targeted towards individuals without estate plans. These products have been aggressively marketed by bookstores, by the media, and by the mails.

The legal community has also endeavored to increase the public's awareness of the benefits of estate planning and to make estate planning techniques available to a wider range of people. For example, bar associations prepare books and distribute pamphlets describing estate planning and the advantages that can be gained by proper preparation for death and incompetency. In addition, the Bar provides attorneys who discuss estate planning at group meetings of non-lawyers and in the media.

Many state legislatures have also taken steps to expand the availability of estate planning techniques to the general public. This dissertation has concentrated on one of the common methodologies adopted by these legislatures, that is, statutorily enacted estate planning forms. The history and development of these forms have been discussed and the various types of estate planning forms have been examined in
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detail. 16 A comprehensive analysis of the impact of statutory forms on both the non-legal and legal communities was presented along with data from a study and several surveys that focused on statutory will forms. 17 In the first part of the Conclusion, 18 the author speculated on the future of statutory estate planning forms. In this chapter, the author offers recommendations concerning the advisability of enacting statutory forms and suggests methods for improving the viability of the technique.

B. PREMISE ONE: THE GOALS OF STATUTORY FORMS ARE MERITORIOUS

The purpose of estate planning is to ascertain and effectuate the intent of each individual, to the extent possible within legal bounds, with respect to property disposition, designation of fiduciaries and agents, medical treatment, and related matters. 19 As noted above, most individuals fail to take the affirmative steps necessary to plan their estates and to obtain the many benefits that flow from a well-planned estate. Statutory estate planning forms are designed to increase the use of estate planning techniques and thus increase the number of individuals who make an effort to customize estate plans to meet their specific needs and circumstances. 20 When individuals fail to plan their estates, the law provides generic plans through a variety of legislative mandates such as intestate succession laws. 21
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There is no assurance that reliance on "non-planning" options will lead to results that accurately reflect intent.

Statutory estate planning forms offer considerable benefits to both the non-legal and legal communities. Statutory forms lower estate planning costs and reduce the time and effort needed to create and update estate plans. The publicity surrounding the forms leads to more individuals being aware of their ability to plan estates and the importance thereof. As a result, there is improvement in the emotional/psychological condition of individuals who have planned their estates and reduction in family conflict upon death or incompetency. The forms expand the public's access to the legal system and decrease reliance on commercialized self-help estate planning publications. Statutory forms also enhance the image of the legal profession, improve the quality of legal services, decrease the probability of attorney malpractice, and abate court congestion.

The ostensible benefits of statutory estate planning forms are so numerous that it seems unlikely that the policies underlying their enactment could be seriously questioned. Accordingly, the remainder of this chapter's discussion is based on the premise that the policy goals of statutory forms are meritorious and commendable.
C. PREmise Two: Many Criticisms of Statutory Forms Are Valid

Despite the favorable policies supporting the enactment and use of statutory estate planning forms, many arguments raised against the enactment, use, and content of these forms are valid and are supported by empirical evidence. For example, statutory forms are typically generic in nature and are not designed with any particular user in mind. As a result, they are difficult to customize to accommodate the circumstances of a particular situation. This format limits the range of individuals who may be able to use the forms and may even cause individuals to modify their estate planning objectives to fit within the purview of the forms.\textsuperscript{33} This shortcoming was evident from the will completion study that indicated that although there was widespread approval of the concept of statutory will forms,\textsuperscript{34} many prospective testators noted that the form stifled their ability to create the distribution plan they desired.\textsuperscript{35} Likewise, numerous attorneys responding to the statutory will survey voiced dissatisfaction with the forms because of their rigidity.\textsuperscript{36}

Another reasonable concern is whether an untrained person can properly complete a statutory form. A growing body of evidence demonstrates that this concern is justified. Reports from California concerning its statutory will form indicate that completion errors are common.\textsuperscript{37} The will completion study confirmed that a high percentage of the statutory will forms will be inaccurately completed.\textsuperscript{38} The survey of probate judges
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revealed that completion errors were one of the most common reasons statutory wills are denied probate.\(^3\)\(^9\)

A further example of the well-founded objections to statutory forms is their failure to provide the user with a comprehensive estate plan.\(^4\)\(^0\) A person completing one type of form, such as a will covering only probate assets, may not appreciate the necessity of planning for the disposition of non-probate assets or for lifetime disability.\(^4\)\(^1\) Estate planning specialists cited this difficulty as one of the main reasons for their disapproval of statutory will forms.\(^4\)\(^2\)

Although very important benefits can be gained by enacting statutory estate planning forms, it must be recognized that current efforts are fraught with significant difficulties. Accordingly, this chapter will also proceed on the premise that there are valid criticisms of current statutory forms.

D. STEP ONE: DEVELOP IMPROVED FORMS

Assuming that statutorily enacted estate planning forms are meritorious but subject to valid criticisms, the logical first step is to develop better forms. Legislatures must accept the criticisms of the current forms and take steps to ameliorate those problems when drafting new forms and the accompanying enabling legislation. This section suggests some ways current statutory forms may be improved.
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1. Provide Greater Opportunity for Individualization

Perhaps the strongest criticism of statutory forms is the inability to adapt the form to the circumstances of a particular user. The failure of statutory forms to provide the opportunity for individualization is recognized by both the legal and non-legal communities. Accordingly, the forms need to be drawn so users will not have to forego their freedom to formulate plans specific to their needs merely because they wish to use statutory forms.

2. Expand Use of Plain Language

Great care must be taken to draft the forms in language that can be read and understood by the average individual. Although current statutory estate planning forms are, for the most part, designed for use by the non-lawyer public and thus are drafted in plain language, there are still serious concerns about the terminology that is used. For example, the survey of estate planning specialists revealed the primary reason for dissatisfaction with their particular state's statutory will form was that it was complicated, confusing, and difficult to understand. Plain language will permit users to better comprehend the purpose and effect of the form, and increase the form's usefulness as a viable method of carrying out actual intent.
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3. Provide More Detailed Instructions, Warnings, and Explanations

The forms also need to provide the user with a solid base of information upon which to make informed decisions about the appropriateness of the form according to the person's situation, if outside assistance should be sought, and the proper methods of completion and execution. Likewise, the forms need to explain the reasons for selecting the form and the ramifications thereof, as well as alternative techniques should the form be inappropriate.

4. Present Instructions, Warnings, and Explanations Effectively

More carefully drafted instructions, warnings, and explanations in plain language will often not be enough; merely because extensive information is contained in the form is no assurance that the user will read and understand it. Thus, it is crucial that the format and content of this important material be presented effectively in statutory forms.

a. Question and Answer Format

Preliminary information should be presented in a question and answer format to increase the likelihood that the material will be read by the user. When this technique is employed, large quantities of material will not appear as overwhelming. This may encourage more individuals to read carefully rather than skip over the material because they consider it to be mere boilerplate.
b. Close Proximity Between Provided Information and Location Needed

Key information should be provided at the exact location on the form where the information is needed. This proximity will increase the probability that the information is available to and read by the user at the time it is actually needed. Thus, the form will not only be easier to understand but the user's ability to complete it properly will be improved.51

5. Improved Layout

The overall physical appearance of most statutory estate planning forms needs to be changed. Borrowing a term from the field of computer science, the forms need to be "user friendly." All aspects of the format and organization of each form needs to be carefully evaluated to increase its appeal to the general public. The pages should use a readable typeface and a large enough font so that individuals are not scared away by "fine print." Sufficient space must be supplied for users to insert information. In addition, spacing, margins, bold typeface, and similar layout characteristics should be used to convey the necessary information and increase the user's ability to complete the form properly. The form should retain the appearance of a legal document so the user will appreciate the significance of completing the form, but this appearance should be tempered to avoid the fear that might be generated if the form looks too much like a complicated legal document.
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E. STEP TWO: EVALUATE IMPROVED FORMS

Earlier chapters detailed the vigorous debate regarding the wisdom of statutory estate planning forms. The steps outlined in § D of this chapter may resolve many of the criticisms of statutory forms. For example, detailed instructions, plain language, and improved layout may reduce completion errors as well as decrease the number of individuals who do not comprehend the impact of using the form. Greater opportunity for individualization will increase the likelihood that the form accurately represents the intent of the user. The instructions can also provide general information about estate planning so the user will realize that the completion of several documents may be needed for a complete estate plan.

It needs to be observed that some critics of statutory forms believe that the entire concept of statutory forms is flawed and that no amount of change in the forms themselves will make them acceptable. Accordingly, after preparing statutory estate planning forms in compliance with the previously presented recommendations, detailed empirical studies of the proposed forms should be conducted. These studies would focus on the non-attorney's ability to complete a proposed statutory fill-in-the-blank form in a manner that effectuates intent while simultaneously complying with statutory requirements. After compilation of this data, an educated decision would be possible concerning the wisdom of enacting particular statutory estate planning forms.
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The trial testing could produce a wide spectrum of results. They could reveal that the proposed forms are tremendously successful, are a miserable failure, or fall in between. The author would expect that the test results are likely to fall somewhere in the middle, i.e., some individuals could use statutory estate planning forms effectively while other persons would use them improperly or fail to comprehend the impact of their use.

At this juncture, legislatures would be confronted with the problem of whether statutory estate planning forms should be abandoned because the technique is capable of misuse by a segment of the population for which the forms are designed. If the studies revealed that a significant number of people were able to benefit from the forms, the forms should be retained. If, however, the data demonstrates that the forms are doing more harm than good, then they should be rejected. The point at which to draw this line, however, may be difficult to determine if the results are ambiguous. Legislatures would need to keep the welfare of the majority in mind as well as remember that a tool that is helpful to a broad segment of society should not be eliminated merely because it is capable of misuse or abuse.

F. ALTERNATIVE METHODOLOGIES

Improvements to the forms as described in § D of this chapter are likely to remedy many of the difficulties associated with the use of statutory estate planning forms.
Unfortunately, it is possible that even the best-drafted forms will not resolve all of the valid criticisms of statutory forms. Human behavior is neither consistent nor predictable and despite any safeguards that are taken, statutory forms could never be made into a fool-proof estate planning technique. Of course, no estate planning scheme, even one used by an attorney, is without fault. If the empirical studies reveal that the likelihood of statutory estate planning forms being improperly used is too great, a movement to repeal existing forms is likely to gain in strength. If such a movement were successful, the significant momentum towards making estate planning legal services available to a broader range of people in an efficient and cost-effective manner would be lost.

Despite difficulties that may be discovered in particular forms for particular uses, the entire concept and philosophy of statutory estate planning forms should not be abandoned or condemned. Instead, the following alternative methodologies that have their foundations in statutory forms should be seriously considered. These techniques may achieve some of the benefits of statutory forms but without many of the disadvantages.

1. Expand Scope of Statutory Estate Planning Forms

One of the potential problems with statutory estate planning forms is that the use of one particular form may lead some people to believe that they have done everything
necessary to plan their estates.\textsuperscript{54} For example, a person could complete a statutory will form and fail to take the appropriate steps to plan for the disposition of non-probate assets or for disability.\textsuperscript{55} To remedy this shortcoming, legislatures could enact a unified and comprehensive set of forms that would cover a variety of estate planning concerns.

This comprehensive arrangement would encompass both death and disability planning. Matters currently handled by use of traditional documents such as wills, trusts, powers of attorney, declarations of guardians, and living wills would be included. This estate planning package would encourage planning for the entire estate rather than one segment at a time. During the process of working through the package, the user would be led through the different aspects of estate planning and be given the opportunity to make arrangements that are most likely to carry out the person's actual intent.

Some significant criticisms of this technique are apparent. For example, the set of documents and accompanying instructions will be lengthy and will take more time to complete. The length will also give the forms an appearance of complexity. These factors may reduce the number of individuals who take advantage of this estate planning technique and hence one of the major advantages of statutory forms may be lost.\textsuperscript{56} On the other hand, the option of being able to prepare a comprehensive estate plan will provide a wider range of benefits to those individuals who elect to prepare their own estate plans.
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2. Improve Delivery Methods

Another valid concern with current statutory estate planning forms is the fear that they will be improperly completed or executed. As detailed in § D of this chapter, many improvements to current forms, such as using plain language, expanding the instructions, warnings, and explanations, and employing an effective layout will ameliorate this problem. In addition, state legislatures or bar associations could effectively use modern technology to reduce the likelihood that the forms are misunderstood or improperly filled out. The availability of these methods may also encourage a greater number of people to make provisions for death and incompetency.

a. Use of Computer Software

One innovative technique would be to computerize the form and accompanying instructions. Individuals could purchase, rent, or borrow computer software at a nominal charge that would lead the users through a series of questions and answers to gather the information necessary to prepare all of the basic estate planning documents. The program would be designed to educate the user as well as to generate the finished product. This technique is already successfully employed by private businesses who market such products to the legal and non-legal communities.

Using a computer program may simplify the estate planning process. To allow a significant degree of individualization
and to provide appropriate information, instructions, and warnings, statutory forms need to be rather lengthy and contain information that is not required by all users. The computer-generated questions would determine the information relevant to the user's needs and focus on that information. The program could also be written so a person's particular circumstances would trigger the program to warn the user that the statutory forms are inadequate and that legal counsel should be obtained.

Although a computerized estate planning technique may not be useful to many people at first, the acceptance of the technique would rapidly grow as society becomes more computer literate. Persons who own a computer would be able to plan their entire estates in the privacy of their own home. Probate courts, bar associations, attorneys, or public libraries could make computers available in their offices for use by people wishing to view the program. If attorneys provided this public service they may also receive estate planning business as a result. The attorneys could be available to answer questions about the program and forms for a nominal fee and, of course, provide additional estate planning assistance if the person's situation warrants. If the user discovered that the statutory forms were inadequate, the attorney would be able to make use of the data already collected and hence reduce the fee that would otherwise be charged.
b. Use of Videotaped Instructions

Another technique that could be used alone or in conjunction with the computerized system, would be to provide a printed booklet containing instructions and forms accompanied by a videotape. This videotape would be skillfully produced to be entertaining and informative. The tape would guide the viewer through a step-by-step completion of the estate planning form. For example, the tape would show the appropriate location on the form and instruct the user to "fill in your full legal name." The narrator would then tell the viewer to stop the tape while completing that step.

The videotape would probably gain widespread acceptance because of the popularity of television. People are accustomed to receiving information from television and are likely to own and know how to operate a videotape player. In addition, the probability that they would hear and understand important instructions and warnings is improved because the information is available to more senses, e.g., both sight and sound. This is especially important because recent statistics indicate that approximately twenty percent of adult Americans are functionally illiterate. As for individuals without computers, the probate court, bar associations, attorneys, or libraries could assist by providing viewing areas as a public service.
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3. Increase Education

Many individuals fail to execute wills, trusts, living wills, and durable powers of attorney because they are unaware of the critical importance of estate planning. One of the benefits of statutory forms is that their enactment is often accompanied by publicity in the media that alerts many people to the benefits of estate planning. Additional steps, however, must be taken. Each state should make a strong effort to educate its citizens regarding basic estate planning and the use of statutory forms. The State should advertise in newspapers as well as on radio and television as they currently do to encourage people to vote, pay their taxes, play the lottery, and not to start forest fires. A toll-free telephone number could be provided for individuals to call to receive additional information about estate planning.

For persons attending a State regulated secondary school or college/university, the coverage of estate planning matters should be mandatory in a required government, civics, or family planning course. Each succeeding generation will thus be more informed about estate matters and more likely to make appropriate arrangements for death and incompetency.

G. CONCLUSION

The goals of statutory estate planning forms are commendable. As with any technique, however, critics are quick to point out both real and imagined problems. Despite the wide range of benefits available to citizens if the
legislature enacts statutory forms, the forms are subject to valid criticisms. Accordingly, the first step that legislatures should take is to develop improved forms. The forms need to provide a greater opportunity for individualization, expand the use of plain language, provide more detailed instructions, warnings, and explanations, and present them in a more effective manner.

After developing these improved forms, they need to be carefully tested to determine if they may be effectively used by the non-legal community. It is anticipated that the results of this evaluation will leave some areas of use uncertain. Some people will correctly use the forms while other individuals will be unable or unwilling to use them properly. Legislatures will then need to decide the viability of continuing with the statutory estate planning form technique by balancing the benefits to be gained with the resulting problems.

Those members of the public who can benefit should not be deprived of an important method of self-help estate planning. A nation which bases its financial support on the average person's ability to complete fill-in-the-blank income tax returns, certainly can rely on its citizens to prepare fill-in forms for simple and modest estates. The benefits of self-help estate planning are too great to remove the option totally unless the results of the form studies reveal that complete disaster is the inevitable outcome of their use. In addition to making improvements to the forms, legislatures
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should consider alternative methodologies to make inexpensive, convenient, and quality estate planning available to a wide segment of the population by incorporating modern technologies such as computer programs and videotapes. The State should then educate its citizens in schools and in the media about the availability and benefits of estate planning.
1. See, e.g., Where There's a Will, There's a Way, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills); Isn't it Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985) ("more than two-thirds of all adult Americans die without wills"); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATE AND TRUSTS 13 (4th ed. 1987) ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate."); ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING 1 (2d rev. 1983) ("Three out of four Americans die without a will."). Cf. The Law Commission, Distribution on Intestacy 3 (Working Paper No. 108, 1988) ("about half the population [of England and Wales] die intestate"). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of studies and surveys demonstrating high percentage of intestate deaths).

2. See Chapter I(B)(3)(a).


4. See Chapter I(B)(3)(c).

5. See Chapter I(B)(3)(d).


7. See Chapter I(B)(3)(f).

8. See Chapter I(B)(3)(g).


10. See, e.g., ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING (2d rev. 1983).


14. See, e.g., P. Flynn, Estate Planning and Trusts (Nov. 9, 1989) (a seminar held for the residents of the Army Retirement Center in San Antonio, Texas); American Association of Retired Persons & Women's Center at San...
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Antonio College, Take Charge of Your Life by Taking Charge of Your Money (May/June 1989) (seminar held in San Antonio, Texas).

15. See Chapter II.

16. See Chapter III (wills and testamentary trusts); Chapter IV (inter vivos trusts); Chapter V (durable powers of attorney); Chapter VI (self-designations of guardians); Chapter VII (forms relating to critical medical decisions); Chapter VIII (self-proving affidavits, anatomical gifts, marital property agreements).

17. See Chapters IX - XII.

18. See Chapter XIII.

19. See generally W. CASEY, NEW ESTATE PLANNING IDEAS 1 (1958) (estate planning "involves the selection, arrangement and disposition of family assets in a way best calculated, not only to save death taxes, but to fit the needs and the aptitudes of family beneficiaries"); E. GERTZ, T. GERTZ & R. GARRO, A GUIDE TO ESTATE PLANNING ix (1983) ("Estate planning is really a lifetime process of arranging assets (property) so that a person may dispose of them during his lifetime and at his death in a manner that best carries out his desires for his family (or other objects of his bounty) consistent with a minimizing of income, gift, and death taxes, and an easing of transfer.").

20. See generally The Limits to a Do-it-Yourself-Will, CHANGING TIMES, Nov. 1984, at 82, 84 (primary goal of statutory wills is to encourage the use of wills).

21. See generally Chapter IX(B)(1)(a).

22. See Chapter IX(B)(1)(a)(1).

23. See Chapter IX(B)(1)(a)(2).


25. See Chapter IX(B)(1)(b).

26. See Chapter IX(B)(2).

27. See Chapter IX(B)(3)(b).

28. See Chapter IX(B)(3)(c).

29. See Chapter XI(B)(1).
30. See Chapter XI(B)(2).
31. See Chapter XI(B)(3).
32. See Chapter XI(B)(4).
33. See Chapter IX(C)(1)(a).
34. See Chapter X(G)(1).
35. See Chapter X(G)(3).
36. See Chapter XII (Tables XII-15 & XII-18).
37. See Rice, Too Little Too Late, CAL. LAW., June 1989, at 36, 36 ("forms are often improperly filled out, which is causing many of these wills to be thrown out of probate court").
38. See Chapter X(G)(4) (problems arose from two perspectives: participants did not understand the effect of what they had done in the forms while others simply did not properly follow the form's instructions).
39. See Table XII-24.
40. See Chapter IX(C)(1)(e).
41. See generally Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 (statutory wills lead to cursory treatment of disposition which is not true estate planning).
42. See Chapter XII (Tables XII-15 & XII-18).
43. See generally Chapter XIII(E)(1).
44. The survey of estate planning practitioners discussed in Chapter XII revealed a considerable dissatisfaction with statutory will forms because they were not suited to their clients' needs, often because of insufficient ability to individualize. See Chapter XII(E)(3) & Tables XII-5 & 12. Likewise, the statutory will form completion study revealed that many participants believed that the statutory forms would stifle their ability to create the desired distribution plan. See Chapter X(G)(3).
45. See California Lawyers Struggle for Plain English, TRIAL, Feb. 1990, at 100, 100 (discussing actions by California and Michigan Bars to encourage plain English writing). See generally Chapter X(d)(17) (describing complaints of participants in statutory will completion study that
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included ambiguous or unclear language and lack of definitions and explanations).

46. See, e.g., Est. Plan., Tr. & Prob. L. Sec. St. B. Cal., Possible Legislation -- Statutory Will 5 (Dec. 16, 1980) ("An attempt has been made to write the [California] statutory will in layman's language in order to encourage its use and to respond to public pressure for 'plain English' legal documents.").

47. See Table XII-18. Cf. Table XII-15 (fourth most popular reason cited for disapproval of statutory will concept was forms are confusing and difficult to understand).

48. Some current forms provide extensive instructions and warnings while others are devoid of such material. Compare Ch. 491 1989 Tex. Sess. Law Serv. (Vernon) (durable power of attorney for health care form containing extensive instructions and warnings including a detailed disclosure statement) with TEX. PROB. CODE ANN. § 118A (Vernon Supp. 1989) (self-designation of guardian form lacking instructions and warnings).

49. See generally Chapter XIII(E)(2).

50. See Bullard, The Michigan Statutory Will 3-4 (April 1988) (27 questions and answers used in statutory will brochure distributed by Michigan congressmen); Letter from Michael V. Vollmer to Gerry W. Beyer, at attachment 73-74 (Sept. 7, 1989) (discussion draft of proposed questions and answers for use in California statutory will).

51. See generally Chapter XIII(E)(2).

52. See Chapters IX & XI.

53. See, e.g., Lustgarten, Against Such Wills, TR. & EST., Jan. 1984, at 9, 9 ("No matter how many disclaimers there are in the instructions [accompanying a statutory will] or on the form, will the consumer really understand that a will disposes of what is usually only a small portion of the estate of a moderately wealthy person - not including insurance, joint property, or plan benefits?"); Blattmachr, "Statutory Will" Positive Development, TR. & EST., Jan. 1984, at 8, 8 ("It may well be unwise to allow people to complete and execute a form of statutory will by themselves, regardless of the number of warnings and disclaimers contained in the instrument.").

54. See generally Chapter IX(C)(1)(e); Table XII-15 (second most cited reason by estate planning specialists for disapproving of the concept of a statutory will was that it prevents the user from seeking the legal advice which is necessary for the preparation of a comprehensive
estate plan); Table XII-18 (fourth most cited reason by
estate planning specialists for disliking the statutory
will form of their particular state was the implication
that the form will was a sufficient estate plan).

55. See generally Lustgarten, Against Such Wills, TR. & EST.,
Jan. 1984, at 9, 9 (statutory will forms lead to cursory
treatment of disposition which is not true estate
planning).

56. See Chapter I(B)(3)(d & e) (discussing that people avoid
preparing estate plans due to the time and effort
involved as well as perceived complexity).

57. See Chapter IX(C)(1)(b) (general discussion of completion
difficulties); Chapter X(G)(4) (statutory will form
completion study demonstrated that individuals had
difficulty following instructions to complete the forms);
Rice, Too Little Too Late, CAL. LAW., June 1989, at 36,
36 (statutory will forms are "often improperly filled
out, which is causing many of these wills to be thrown
out of probate court"); Tables XII-15 & XII-18 (estate
planning specialists ranked improper completion as the
third most important reason for their disapproval of the
concept of statutory wills as well as the form of their
particular state).

58. See Attorneys' Computer Network, The Texas Wills Library,
as advertised in 52 TEX. B. J. 1082 (1989) ("The programs
ask multiple-choice and fill-in-the-blank questions, and
then compose tailored documents in minutes . . . The
program also prepares living will declarations, powers of
attorney, family tree affidavits, asset summaries,
exection checklists, and other ancillary documents.").

59. See, e.g., BLOC PUBLISHING, PERSONAL LAWYER (1988);
EXPERT SOFTWARE, WILL POWER (1989); LFGISOFT (program) &
NOLO PRESS (manual), WILLWRITER (1985); SELF-HELP LEGAL
SERVICES, DISKWILL (198_).

60. See Ad for Coalition for Literacy, A.B.A. J., Sept. 1986,
at 85. In addition, a growing percentage of the United
States' immigrant population is unable to read English,
especially in border states like California and Texas.

61. See generally W. AYERS, WHAT YOUR HEIRS CAN NEVER TELL
YOU 2 (1943) ("it has been one of the surprises of my
life to observe that a man who has accumulated his wealth
through ability and foresight will often be found to have
been astonishingly neglectful in providing for those he
leaves behind"); Weil, Will Draftsmanship and the New
York Statutes, 28 N.Y. ST. B. BULL. 60, 60 (1956) ("The
ignorance of laymen about wills is legendary."); Isn't it
Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985)
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(noting that most individuals, even wealthy and politically astute persons such as Howard Hughes and Presidents Lincoln, Jackson, Grant, and Garfield, died without valid wills).

62. See Chapter IX(B)(1)(a)(3).

63. In San Antonio, for example, local law firms sponsor a telephone number which anyone may call to listen to a recording that supplies free information about estate planning. The topics currently available include "What is a Will?", "What is a Joint Tenancy?", "What is a Trust?", "What is a Guardian?", "Other Facts About Your Will," and "How to Protect Your Estate if You Become Sick or Disabled." See SOUTHWESTERN BELL, SAN ANTONIO TELEPHONE DIRECTORY Select Talk 33 (1989-90).
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B.A., Summa Cum Laude, Eastern Michigan University (1976)
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BAR MEMBERSHIPS

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CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-1981)
Assistant Professor of Law, St. Mary's University (1981-1984)
Associate Professor of Law, St. Mary's University (1984-1987)
Tenure Granted, St. Mary's University (1986)
Professor of Law, St. Mary's University (1987-present)

CLASSES TAUGHT

Wills & Estates
Advanced Wills & Estates Seminar
Trusts
Gratuitous Transfers Seminar
Commercial Paper
Secured Transactions
Sales
Legal Writing and Research
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SELECTED HONORS

Distinguished Faculty Award - St. Mary's University Alumni Association (1988)
Outstanding Faculty Member - Delta Theta Phi (1989)
Outstanding Professor Award - Phi Delta Phi (1988)
Most Outstanding Third Year Class Professor (1982)
Order of the Coif
Order of Barristers (honorary member)
Phi Alpha Delta Service Award (1985)
Certificate of Service - Student Bar Association (1985)
American Bar Association Friend of the Law Student Division Award (1986)
Certificate of Appreciation - Texas Young Lawyers Association (1987)
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PUBLICATIONS - WRITTEN

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