

1992

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Recommended Citation

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Citation: 55 Alb. L. Rev. 1035 1991-1992



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REVOCATION AND REVIVAL: AN ANALYSIS OF THE 1990 REVISION OF THE UNIFORM PROBATE CODE AND SUGGESTIONS FOR THE FUTURE

*Robert Whitman**

I. INTRODUCTION

The present statutory scheme for revocation and revival upon which the Uniform Probate Code is modelled dates back to 1677,¹ when Parliament enacted the Statute of Frauds.² Since that time, case law has periodically revealed the need to create statutory provisions to deal with a number of recurring problems arising in this area. The Uniform Probate Code ("UPC") has dealt with many of these problems, first in its 1969 edition,³ and more recently in the 1990 edition.⁴ A review and analysis of the 1990 UPC revisions will be found below, followed by some suggestions for the future.

In the hands of a competent lawyer, concern for creating ambiguity when a will is revoked is minimized. This is so because, unless there are extraordinary circumstances, an attorney can effectively provide for revocation of an old will by drafting a new will, which revokes all previous wills.

Based upon the best evidence available,⁵ the most common revocation and revival type problems arise when: there is no supervising

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¹ Concerns surrounding the proper rules and procedures for regulating the revocation and revival of wills are as ancient as the origins of the written will itself. Predecessors of the modern will have been traced back as far as the Fourth Egyptian Dynasty and mention of testamentary disposition has been found in the Code of Hammurabi and in the Book of Genesis. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 2, at 7 (2d ed. 1953).

² Statute of Frauds, 1677, 29 Car. 2, ch. 3 (Eng.). The Statute of Frauds is reprinted in part in ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* 195-97 (1928).

³ See *infra* text accompanying notes 52-56. The revocation and revival sections of the 1982 and 1987 editions of the UPC are identical to those of the 1969 edition.

⁴ UNIF. PROB. CODE ("U.P.C.") §§ 2-507 to 2-509 (1991).

⁵ Unlike other areas of trusts and estates where empirical study has been undertaken (see, e.g., Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717; Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966); John R. Price *The Transmission of Wealth*

attorney and revocation is attempted in an improper manner;⁶ there is an attorney, but the attorney is not aware of, or may not follow, the revocation and revival rules;⁷ or there is a disappointed heir who may engage in a fraudulent revocation.⁸ Law school casebooks, which tend to emphasize materials which reflect the most extraordinary of situations, fail to disclose the fact that relatively few cases presenting revocation and revival type problems arise in the system.⁹

The argument is made in this Article that, for the future, more instruction concerning proper procedures for dealing with revocation and revival, as well as other legal doctrines, should be made available to attorneys and other interested persons.¹⁰ Such information needs to be more efficiently disseminated to both groups. The author suggests that, in the future, the UPC drafters turn their attention to the idea that the UPC, and particularly its commentary, can be used more effectively to address the need to educate attorneys and other

at *Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277 (1975); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions Of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978)) no empirical study of the procedures for will revocation has been attempted. Indeed, the design of such a study might prove to be difficult or impossible.

⁶ See, e.g., *In re McGill's Will*, 128 N.E. 194 (N.Y. 1920). In *McGill*, the testatrix attempted to revoke her will by sending a note to a friend who had possession of the will, requesting him to destroy it. The friend took no action. *Id.* at 194-95. Upon the testatrix's death, the will was admitted to probate. The court held that there was no revocation since the note requesting the destruction was not executed in the same manner as a will, as required by the applicable statute. *Id.* at 195-96. Even if the testatrix's friend had destroyed the will, revocation still would not have been effective, since, by the terms of the statute, not only must the testatrix have intended the destruction of her will, but she would also have to have been present at the revocation event itself. *Id.* at 195. The statute also required that the revocation act be witnessed by at least two individuals. *Id.*

⁷ See, e.g., *Thompson v. Royall*, 175 S.E. 748 (Va. 1934). The testatrix, on the advice of her attorney, allowed the attorney to make a notation on the back of the cover of her will indicating her intent to revoke, and the testatrix signed beneath the notation. *Id.* at 749. Since the notation was not executed in the manner required by the applicable statute, the court ruled that the attempted revocation was ineffectual. *Id.* at 750. Because the signed notation was on the will cover rather than across written portions of the will, the court held that there was "no physical evidence of any cutting, tearing, burning, obliterating, canceling, or destroying" of the will as required by statute. *Id.* at 749.

⁸ In literature, a standard plot involves an heir (who would be disappointed by being disinherited) finding the decedent's will and destroying it. How often this actually occurs and the extent to which the legal system needs to be concerned with the problem is quite unclear. The matter may not be able to be resolved by empirical study. See *supra* note 5. The existence of a will registry could reduce the risk of the fraudulent destruction of the will. See *infra* note 179 and accompanying text.

⁹ On the other hand, judging the extent of existing problems based only on the reported cases may obscure the existence of a number of problem cases which never actually come before the courts. See *supra* note 5.

¹⁰ See *infra* text accompanying notes 176-83.

individuals concerning the most practical and sensible methods that can be used in order to achieve desired goals.¹¹ It is also suggested that the UPC Joint Editorial Board ("JEB")¹² make itself available for consultation to the courts called upon to interpret and apply the UPC¹³ and that the JEB invite a broad range of interested groups and individuals to participate in any further design of the UPC.¹⁴

II. ORIGINS OF REVOCATION AND REVIVAL

A. *Roman Law*

The principles underlying revocation concepts originated in Roman law. Under Roman law, a properly executed will could be rendered void in several ways, including:

[B]y the execution of a second valid will; by its intentional destruction by the testator; by the testator's erasure of the name of the instituted heir; by the death of an instituted heir either in the lifetime of the testator, or even after his death if prior to the time of acceptance of the inheritance; by the heir's refusal to accept [or] . . . comply with the terms and conditions of the will; and by the heir's incompetency to take under the will . . . on account of his being unmarried, or, if married, being childless.¹⁵

It is from the Romans that the English developed the concept of our modern will¹⁶ as well as the basic principles of revocation and revival.

¹¹ This concept has been embraced to some extent by the UPC drafters. See, e.g., U.P.C. § 2-504 (1991) (detailing the form to be used in a self-proved will); *id.* § 2-603 cmt. (giving advice on how to defeat the antilapse provisions of that section); *id.* § 2-901 cmt. (giving advice on how to draft a perpetuity saving clause).

¹² The JEB originated in 1970 when Uniform Law Commissioners and representatives of the Real Property, Probate and Trust Law ("RPPTL") Section of the ABA recommended the Board's formation to their respective organizations. In the beginning, the JEB consisted of ten members, five delegates named from the Uniform Law Commissioners, and five from the RPPTL Section of the ABA. When the American College of Trust and Estate Counsel later joined the organization, the number of delegates from each of the three organizations was reduced to three. The JEB delegates meet at least once a year. The duties of the JEB include: monitoring literature dealing with the UPC; educating attorneys and lay people about the Code; watching for problems that may develop both in the UPC itself and in the states which have enacted, or are considering enacting, the UPC; and reassessing the text of the UPC to see whether alterations or editing is necessary to remove errors or to incorporate improvements. JEB, Memorandum, Jan. 2, 1992.

¹³ See *infra* notes 180-81 and accompanying text.

¹⁴ See *infra* notes 182-83 and accompanying text.

¹⁵ WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 610 (1938).

¹⁶ ATKINSON, *supra* note 1, at 9.

B. English Law

In 1540, Parliament passed the Statute of Wills,¹⁷ providing that a devise of land must be in writing.¹⁸ It was generally assumed that a revocation would also have to be in writing.¹⁹ When presented with this issue, however, the courts held an oral revocation to be sufficient because the Statute of Wills did not specifically provide for revocation by writing.²⁰

The potential for a fraud based on an oral revocation was illustrated to Parliament by the 1676 case of *Cole v. Mordaunt*.²¹ In that case, an elderly testator had married a woman many years his junior.²² The testator had written a will three years before his death that devised a large portion of his estate to charity.²³ After the testator's death, the widow "induced nine persons to perjure themselves"²⁴ and testify that the testator had, while on his deathbed, orally revoked the will and made a new nuncupative will leaving his estate to his wife.²⁵ When the fraudulent scheme was uncovered on appeal, the nuncupative will was rejected at probate.²⁶ One judge who presided over the case, Lord Nottingham, "remarked that he hoped 'to see one day, a law, that no written will should be revoked but by writing.'"²⁷ In the following year, the Parliament passed the Statute of Frauds.

The 1677 Statute of Frauds provided that wills or codicils could be revoked by the testator only by specific procedures. A valid revocation under the statute could be accomplished only by: a subsequent

¹⁷ Statute of Wills, 1540, 32 Hen. 8, ch. 1 (Eng.). The Statute of Wills is reprinted in REPPY & TOMPKINS, *supra* note 2, at 188-90.

¹⁸ KENELM E. DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES 379 (5th ed. Oxford, Clarendon Press 1897). The Statute of Wills did not require any particular type of writing; "[c]onsequently 'bare notes in the handwriting of another person were allowed to be good wills within the Statute.'" *Id.* (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *376).

¹⁹ JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 321, at 266 (2d ed. 1926).

²⁰ *Id.* (citing *Cranvel v. Sanders*, Cro. Jac. 497, 79 Eng. Rep. 424 (K.B. 1618); *Brook v. Warde*, 3 Dyer 310b, 73 Eng. Rep. 702 (1572); *Burton v. Gowell*, Cro. Eliz. 306, 78 Eng. Rep. 557 (Q.B. 1593); *Case of Rider's Heirs*, Moore (K.B.) 874, 72 Eng. Rep. 966 (K.B. 1613)).

²¹ A summary of this case can be found in a note to *Mathews v. Warner*, 4 Ves. Jr. 186, 196, 211, 31 Eng. Rep. 96, 100, 107 (1798); see also REPPY & TOMPKINS, *supra* note 2, at 9.

²² REPPY & TOMPKINS, *supra* note 2, at 9.

²³ *Mathews*, 4 Ves. Jr. at 211, 31 Eng. Rep. at 107.

²⁴ REPPY & TOMPKINS, *supra* note 2, at 9.

²⁵ *Id.* The court accepted this nuncupative will because at this time such a will was able to be probated provided that the will was made while the testator was *in extremis* (i.e. in the final stages of a fatal illness). *Id.* at 9 & n.60.

²⁶ *Id.* at 9.

²⁷ *Id.* (quoting Lord Nottingham's statement, made during the hearing of the case before the Court of King's Bench).

will or codicil, a subsequent writing declaring the testator's intent to revoke, or by "burning, cancelling, tearing or obliterating" the will.²⁸

In a general statutory revision of the law of wills that took place in 1837,²⁹ most of the basic rules regarding revocation were retained.³⁰ The major changes in the area of revocation brought about in 1837 were the codification of the rule of revocation by operation of the law and the requirement that a subsequent document revoking a will be executed in the same manner as a will.³¹

C. American Law

1. The Early Period

In general, three concepts greatly influenced the development of the law of wills in the American Colonies:

First . . . those aspects of living English law which the settlers brought with them.^[32] Second, there were those norms

²⁸ Statute of Frauds, 1677, 29 Car. 2, ch. 3, § 6 (Eng.). It is further stated in the Statute of Frauds that

all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

Id.

²⁹ Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26 (Eng.). The Wills Act of 1837 is reprinted in REPPY & TOMPKINS, *supra* note 2, at 211-20.

³⁰ The revocation language in the Wills Act is as follows:

AND BE IT FURTHER ENACTED, That no Will or Codicil, or any Part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the Testator, or by some Person in his Presence and by his Direction, with the Intention of revoking the same.

Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 20 (Eng.).

³¹ *Id.* Despite provision in the 1677 Statute of Frauds that no will was to be revoked except by a subsequent instrument executed in the same manner as a will, or by the performance of specified physical act(s) to the document, case law held that a man's will was revoked upon his marriage and the subsequent birth of issue, and a woman's by her subsequent marriage. ATKINSON, *supra* note 1, at 422. The courts explained that the statute dealt only with intentional revocations and not with revocation by operation of law where intent is immaterial. It was thought that the average testator would have desired revocation in these circumstances. "[R]evocation by operation of law in these two situations was well established in the English case law until the matter was altered by the Wills Act, 1837, which expressly provided for revocation by subsequent marriage" and abolished all other forms of revocation by operation of law. ATKINSON, *supra* note 1, at 423.

³² LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 35 (2d ed. 1985). Actually, different colonists brought with them different English law because the law was not consistent through-

and practices which developed indigenously, to cope with new, special problems of life in the settlements. . . . Third, there were norms and practices that the colonists adopted because of who they were—the ideological element.³³

By the time the colonists settled in North America, the use of a written will had become part of folk-law tradition in England.³⁴ Consequently, the tradition of using a will came over with the colonists and it became common for a person of some wealth in America to make a will.³⁵

During the period of early colonial legal development, there was little input made by England into the development of the law in the colonies because the English were absorbed in internal strife between King and Parliament.³⁶ As a result, English probate practice, which was based on the unique historical separation of courts that separated wills for realty and testaments for personalty,³⁷ did not take root in the colonies.

In very early colonial times testamentary jurisdiction was commonly given to the General Courts or vested in the governors and their councils. Somewhat later it was given to county or other trial courts as they were established, although the General Courts frequently continued to exercise some testamentary jurisdiction. By the middle of the seventeenth century numerous variations had developed in the colonies.

In some instances the governor was made the ordinary,^[38] although it was common for him to commission deputies or surrogates to probate wills and grant letters, reserving to himself supervisory control over their acts by way of appeal. Or-

out England. There were many local variations of the law. *Id.* Accordingly, it is not surprising to find many local variations of the trusts and estates law within this country. See *infra* note 37 and accompanying text.

³³ FRIEDMAN, *supra* note 32, at 35. The Puritan settlers in New England passed laws based upon their religious beliefs and not on local conditions nor on the laws of England. *Id.*

³⁴ FRIEDMAN, *supra* note 32, at 67.

³⁵ *Id.* at 66-68.

³⁶ 1 RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 44, at 100-02 (Patrick J. Rohan ed., 1992).

³⁷ The distribution of personalty was under the jurisdiction of the ecclesiastical courts while devises of land were a matter for the common-law courts. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America* (pt. 1), 42 MICH. L. REV. 965, 967-72 (1944). In addition, the courts of chancery could, after the will had been admitted to probate and an executor appointed by the ecclesiastical court, exercise jurisdiction to administer the estate. *Id.* at 972-74. This separation was ended by act of Parliament in 1857 which divested probate jurisdiction from the ecclesiastical courts. *Id.* at 974.

³⁸ An ordinary is a judicial officer empowered, under statute, to hear matters regarding wills, probate, administration, etc. BLACK'S LAW DICTIONARY 1097 (6th ed. 1990).

phans' courts were created in several states to include jurisdiction over executors and administrators as well as guardians. Elsewhere probate jurisdiction was lodged in the established courts—superior courts in some places, inferior courts in others.³⁹

After the American Revolution, state probate legislation and the establishment of local probate courts developed in a piecemeal fashion with little thought towards national uniformity.⁴⁰ With regard to revocation and revival doctrines, after 1837, the American states generally either followed the patterns set by the English Statute of Frauds, the 1837 Wills Act, or a combination of the two.⁴¹

2. Moving Towards Uniformity

By 1850, law in the United States was seen as a science that could be studied and improved.⁴² The American Bar Association was established in 1878⁴³ with one of its stated purposes being the improvement of the law, and another being the promotion of "uniformity of legislation."⁴⁴ The National Conference of Commissioners on Uniform State Laws was established in 1892.⁴⁵ The Real Property Law Section, formed as an ABA division in 1934, was expanded in 1936 to become the Real Property, Probate and Trust Law section,⁴⁶ with the proper administration of probate laws among its specific concerns. In 1940, Professor Atkinson suggested to the ABA Section on Real Property, Probate and Trust Law that their organization prepare a model probate code.⁴⁷ This resulted in the publication of the Model Probate Code ("MPC") in 1946.⁴⁸

With regard to revocation, the MPC of 1946 provided that a will may be revoked by a subsequent written will or by a physical act to

³⁹ Simes & Basye, *supra* note 37, at 977-78 (footnotes omitted).

⁴⁰ See LEWIS M. SIMES & PAUL E. BASYE, *PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE* 9 (1946).

⁴¹ FRIEDMAN, *supra* note 32, at 249.

⁴² DAVID D. FIELD, *Magnitude and Importance of Legal Science*, in *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 517 (A.P. Sprague ed., 1884).

⁴³ EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 3-13 (1953).

⁴⁴ *Id.* at 6 (quoting ABA CONST. of 1878, art. I).

⁴⁵ *Id.* at 53.

⁴⁶ *Id.* at 184-85.

⁴⁷ See Thomas E. Atkinson, *Wanted—A Model Probate Code*, 23 J. AM. JUDICATURE Soc'y 183, 189 (1940); see also SIMES & BASYE, *supra* note 40, at 5-6.

⁴⁸ The Model Probate Code was published in 1946 in SIMES & BASYE, *supra* note 40, at 41-238.

the document if such act is done by the testator with the intention to revoke, or by another at the testator's direction and in his presence.⁴⁹ In addition, the MPC further provided that if the act of revocation is performed by anyone other than the testator, the direction of the testator and the commission of the act must be proved by two witnesses.⁵⁰ While the MPC had a direct influence and effect on statutory revisions in several states, it was not designed as uniform legislation to be adopted by all of the states.⁵¹

D. *The UPC*

In 1962, the Real Property, Probate and Trust Law Section of the ABA and the National Conference of Commissioners on Uniform State Laws undertook the Uniform Probate Code project.⁵² An official text was approved in 1969 by the National Conference and by the House of Delegates of the ABA. The UPC drafters created a built-in mechanism for maintaining change in the form of the JEB, which was established in 1970.⁵³ It is the function of the JEB to suggest changes to the UPC as needed. Also, the JEB plays an active role in commenting on and criticizing court decisions which interpret the UPC.⁵⁴

Regarding revocation and revival concepts, the UPC drafters drew heavily upon the MPC. The 1969 UPC edition addressed the problems associated with revocation and revival in sections 2-507 through 2-509.⁵⁵ These revocation and revival sections of the UPC remained unchanged until 1990.⁵⁶

As will be seen below, the drafters of the 1990 edition retain the basic structure of the UPC revocation and revival sections while

⁴⁹ MODEL PROB. CODE § 51 (1946), printed in SIMES & BASYE, *supra* note 40, at 83.

⁵⁰ *Id.*

⁵¹ SIMES & BASYE, *supra* note 40, at 10 (The objective of the MPC is "not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought." *Id.*).

⁵² 94 A.B.A. Rep. 930-31 (1969) (providing a history of the project that led to the Uniform Probate Code). Since the 1960s, the law of wills has been undergoing major revisions. The initial impetus for change was brought about by a swelling public demand for cheaper and simpler ways for transferring property at death. The publication, in 1965, of Norman Dacey's *How to Avoid Probate!* clearly sparked the movement toward meaningful probate reform. *Id.* at 930.

⁵³ See *supra* note 12.

⁵⁴ The method the JEB has taken in guiding the courts in their decision making is the subject of some concern to the author. See *infra* notes 179-81 and accompanying text.

⁵⁵ These same section numbers have been retained in each subsequent edition of the UPC. See, e.g., U.P.C. §§ 2-507 to 2-509 (1975); U.P.C. §§ 2-507 to 2-509 (1982); U.P.C. §§ 2-507 to 2-509 (1987); U.P.C. §§ 2-507 to 2-509 (1990).

⁵⁶ See U.P.C. §§ 2-507 to 2-509 (1991).

"fine-tuning" these sections to give greater effect to the testator's actual intent, to deal with the problems that have surfaced in post-1969 case law, and to apply the rules governing probate transfers to non-probate transfers,⁵⁷ in UPC jurisdictions and elsewhere.⁵⁸

III. REVOCATION AND REVIVAL LAW

In the discussion that follows, the major revocation and revival issues are presented and the changes in the UPC from 1969 to 1990 are considered.

At common law, the basic legal rules designed to govern revocation and revival were devised as a set of technical legal principles designed to reduce the chance of fraud. The general guiding principle in the revocation and revival area, underlying the original 1969 UPC provisions and, to an even greater extent the refined 1990 edition, is not only to retain the basic common law structure, but also to change the application of the rules so that where the testator's actual intent can be proved, that intent prevails. This shift away from the adherence to technical rules towards the search for, and the implementation of, the testator's actual intent will be evident in the following discussion of each of the UPC sections.

A. *Revocation by Writing*

1. The General Rule

Section 2-507 in both the 1969 and 1990 UPC editions provides for revocation by writing.⁵⁹ This is the standard method used by attorneys to accomplish the revocation of a previous will. Ordinarily, in any will there will be included at the start of the document a standard form of revocatory clause which can be found in any set of will forms.⁶⁰ (E.g., This will hereby revokes all wills and codicils heretofore made by me.) A major issue presented by such a standard revo-

⁵⁷ Impetus for broadening the UPC in this manner stems from Professor Langbein's work. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

⁵⁸ The UPC has been "fully" adopted in some 15 states and many other states have enacted portions of it into law. See U.P.C., 8 U.L.A. 1 (1983 & Supp. 1992) (providing a table of jurisdictions that have adopted the UPC). When the term "case law" is referred to in this Article, unless the term is otherwise qualified, it means case law found in both UPC jurisdictions and non-UPC jurisdictions.

⁵⁹ U.P.C. § 2-507(1) (1969); U.P.C. § 2-507(a)(1) (1991).

⁶⁰ See, e.g., CONTINENTAL ILLINOIS NAT'L BANK AND TRUST CO. OF CHICAGO, WILL AND TRUST FORMS 9-1 (1987).

cation clause is the time when the clause actually becomes effective. For instance, if testator executes will #1 and then executes will #2, which revokes all previous wills, and will #2 is then revoked prior to the testator's death, does will #1 remain effective because the revocation clause does not actually take effect until the death of the testator? The UPC, both in the pre-1990 and the 1990 editions,⁶¹ and the majority of jurisdictions in this country, hold that a previous will becomes revoked at the time that a subsequent will is validly executed.⁶²

Another issue concerns whether a revocatory clause, standing alone, is sufficient to revoke a will. To avoid this issue, the 1969 UPC and the 1990 UPC consider a will to be "any testamentary instrument that . . . revokes or revises another will . . ."⁶³ In addition, the 1990 UPC edition specifically provides that a later will can revoke a previous will by inconsistency even without a revocatory clause if "the testator intended the subsequent will to replace rather than supplement the previous will."⁶⁴

2. Revocation By Inconsistency

Section 2-507(1) of the 1969 UPC provides that a will or any part thereof is revoked when the testator executes "a subsequent will which revokes the prior will or part expressly or by inconsistency."⁶⁵ When a will is expressly revoked by subsequent instrument there is usually not a concern with regard to intent because the testator's intent is clearly manifested in the revocation clause. It is when a will is revoked by inconsistency that uncertainty with regard to intent is more likely to arise.

Revocation by inconsistency, or "implied revocation," usually occurs when a testator, without consulting an attorney or informing his attorney of a previous will, executes a new will without an express revocation provision. When the testator dies with two or more wills,

⁶¹ U.P.C. § 2-507 cmt. (1969); U.P.C. § 2-507(a)(1) (1991).

⁶² A few jurisdictions follow the English rule that neither the previous nor the subsequent will are in effect until the testator's death. The subsequent will does not revoke the previous will but merely "covers" it; should that cover be removed by the testator's act of revoking it, then the previous will takes effect. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 242 (4th ed. 1990).

⁶³ U.P.C. § 1-201(56) (1991); *see* U.P.C. § 1-201(48) (1969).

⁶⁴ U.P.C. § 2-507(b) (1991).

⁶⁵ U.P.C. § 2-507(1) (1969). The drafters of the UPC left it to the courts to determine whether in the absence of an express revocation clause a subsequent will is inconsistent with a prior will. *Id.* § 2-507 cmt. (1969).

and the most recent fails to expressly revoke the others, litigation can ensue. The question to be resolved is whether the testator intended the subsequent will to replace the previous wills, in whole, or in part. This situation arose in the 1983 case of *Gilbert v. Gilbert*.⁶⁶

In *Gilbert*, the Jefferson Circuit Court of Kentucky held that a 1978 holographic instrument was a codicil and not a later will which would have superseded the testator's original will drawn in 1976.⁶⁷ The holographic instrument was comprised of writings on the back of a business card⁶⁸ and on the back of one of the testator's pay stubs.⁶⁹ These documents were found folded together in a sealed envelope.⁷⁰

A will contest was brought seeking to have the holographic instrument, which had been admitted to probate as a codicil, interpreted as a second and superseding will.⁷¹ The circuit court, after a hearing, entered a judgment construing the second instrument as a codicil thereby affecting only the money mentioned specifically in that codicil. On appeal, the finding was affirmed.

The Kentucky Court of Appeals pointed to the fact that the appellant's proposed construction⁷² would eliminate James Gilbert, the testator's brother, from sharing in any portion of the testator's estate, beyond the \$20,000.00 that had been bequeathed to him and his wife in the second set of documents.⁷³ The appeals court decided to characterize the second set of documents as a second will, rather than a codicil, because no reference was made in the second set of documents to the original typewritten will. The court pointed out that the second will operated as a codicil because it did not contain a revocation clause and also because it distributed only a portion of the residuary estate.⁷⁴

In the court's judgment, it seemed "very unlikely that [the testator] intended to supplant the elaborate distribution of his estate con-

⁶⁶ 652 S.W.2d 663 (Ky. 1983).

⁶⁷ *Id.* at 664.

⁶⁸ The testator wrote the following on the back of the business card: "12/8/78 Jim and Margaret I have appro \$50,000.00 in Safe. See Buzz if anything happens [signed] Frank Gilbert." *Id.*

⁶⁹ On the pay stub, the testator wrote: "Jim & Margaret \$20,000.00 the Rest divided Equally the other Living Survivors Bro. & Sisters [signed] Frank Gilbert 12/8/78." *Id.*

⁷⁰ The following language appeared on the envelope: "This day 12/8/1978 I gave to Jim and Margaret this card which I Stated what to do." *Id.*

⁷¹ *Id.*

⁷² The appellants argued that the pay stub was the sole holographic instrument that was "testamentary in character" and therefore was a will that revoked the testator's prior written will. *Id.*

⁷³ *Id.* at 664-65.

⁷⁴ *Id.* at 665.

tained in [an] eight-page typewritten will with a single phrase scratched out on the back of a pay stub."⁷⁶ Furthermore, the court indicated that "Kentucky courts have consistently held that one testamentary instrument revokes another only if it is the clear intent of the testator to do so, and even then the revocation is only to the extent necessary."⁷⁶ The court further noted that it "must resolve [the testator's] intent by looking at the four corners of the two wills, . . . and harmonizing any conflicting provisions to give effect to every provision of each instrument."⁷⁷

Both non-UPC statutes⁷⁸ and pre-1990 UPC section 2-507 were essentially silent on how one determines the question presented in the *Gilbert* case. The commentary to section 2-507 of the 1969 UPC provided that: "Revocation of a will may be by . . . a subsequent will If revocation is by a subsequent will, it must be properly executed."⁷⁹ Long before the enactment of the UPC, many courts had interpreted the "traditional language" that appears in section 2-507.⁸⁰ The drafters of the UPC left it to the courts to decide if a subsequent will that does not contain an express revocation clause is inconsistent with a prior will thereby resulting in a full or partial revocation of the prior will.⁸¹

The problem of revocation by inconsistency illustrated by the *Gilbert* case was addressed and clarified in section 2-507 of the 1990 UPC edition.⁸² In drafting the 1990 revision, the UPC drafters adopted the distinction applied by the *Gilbert* court as to whether the later instrument does or does not completely dispose of the estate. Three subsections were added: section 2-507(b) provides that "the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will";⁸³ section 2-507(c) provides that "[t]he testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will

⁷⁶ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (citations omitted).

⁷⁸ See 1 J. G. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION (Including Wills) § 51, at 139-40 (William F. Woerner ed., 3d ed. 1923).

⁷⁹ U.P.C. § 2-507 cmt. (1969).

⁸⁰ *Id.* See, e.g., *Graham v. Birch*, 49 N.W. 697 (Minn. 1891); *In re McGill's Will*, 128 N.E. 194 (N.Y. 1920) (discussed in n.6, *supra*); *Thompson v. Royall*, 175 S.E. 748 (Va. 1934) (discussed in n.7, *supra*); *In re Peirce's Estate*, 115 P. 835 (Wash. 1911).

⁸¹ U.P.C. § 2-507 cmt. (1969).

⁸² U.P.C. § 2-507 & cmt. (1991).

⁸³ *Id.* § 2-507(b).

makes a complete disposition of the testator's estate";⁸⁴ under section 2-507(d), "[t]he testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate."⁸⁵

The 1990 UPC changes should help resolve future *Gilbert*-type cases. If strong evidence regarding actual intent is lacking, clear rules are provided. A subsequent will replaces a previous will when it completely disposes of the testator's estate and only supplements a previous will when the subsequent will does not completely dispose of the testator's estate.⁸⁶ By adopting presumptions which can be rebutted by clear and convincing evidence, the 1990 revision permits courts to effectively enforce actual intent where it can be clearly shown.

B. Revocation by Act to the Instrument

1. Revocation by Cancellation

(a) Pre-1990 UPC Rule

The 1677 English Statute of Frauds provides for revocation by act to the document.⁸⁷ Under that statute, revocation could be accomplished by the act of "burning, cancelling, tearing or obliterating" all or part of the will document.⁸⁸ The codification of revocation acts at that time was heavily influenced by the fact that a large number of people consistently chose to revoke by using the acts validated by the statute.⁸⁹ Thus, the statute writers in 1677 codified only what was already being practiced by the public.

The 1969 UPC framers adopted, virtually verbatim, the provisions of the 1677 English Statute of Frauds. Section 2-507 of the 1969 UPC provides that: "A will or any part thereof is revoked . . . by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction."⁹⁰

⁸⁴ *Id.* § 2-507(c).

⁸⁵ *Id.* § 2-507(d).

⁸⁶ This rule is based on the standard presented in the RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 33.2 cmt. b (1990). See U.P.C. § 2-507 cmt. (1991).

⁸⁷ Statute of Frauds, 1677, 29 Car. 2, ch. 3, § 6 (Eng.).

⁸⁸ *Id.*

⁸⁹ WAGGONER ET AL., FAMILY PROPERTY LAW 253 (1991).

⁹⁰ U.P.C. § 2-507(2) (1969).

In cases questioning proper revocation, the courts have historically taken a reasonable approach to the need to prove that revocation was done by the testator, or by someone in his presence. The revocatory act, itself, ordinarily serves as sufficient evidence to prove that the testator intended to revoke the will in whole, or in part.⁹¹ Since, in a number of cases, the questioned act of revocation was not actually witnessed by another person, a rebuttable presumption arose at common law to the effect that where an instrument was lost or had been destroyed, the testator was presumed to have committed the revocatory act.⁹² This rebuttable presumption was drafted into the 1969 UPC and retained in the 1990 edition.⁹³

On the other hand, in litigation surrounding the validity of an attempted cancellation, courts have been more prone to require technical exactness in spite of the fact that the circumstances clearly demonstrate that revocation was intended by the testator.⁹⁴ Cancellation litigation most often occurs when the testator simply places marks on the document,⁹⁵ or writes words on it such as "canceled"⁹⁶ or "null and void."⁹⁷ Pre-1990 case law holds that, in order for the words to constitute a valid revocation by cancellation, the writing

⁹¹ WAGGONER ET AL., *supra* note 89, at 253.

⁹² See, e.g., *In re Thomas' Estate* 263 N.W. 891, 893 (Mich. 1935); *McTamney v. McTamney*, 46 A.2d 444, 445 (N.J. Ch. 1946); *Campbell v. Cavanaugh*, 125 A. 569, 570 (N.J. Ch. 1923), *aff'd per curiam sub nom. Campbell v. Smullen*, 125 A. 926 (N.J. 1924); *In re Lawrence's Will*, 47 A.2d 322, 322 (N.J. Prerog. Ct. 1946); *In re Bernhardt's Estate*, 143 A. 92, 95 (N.J. Prerog. Ct. 1928); *In re Schnebel's Will*, 141 A. 313, 314 (N.J. Prerog. Ct. 1928), *aff'd per curiam*, 146 A. 916 (N.J. 1929); *Appeal of Deaves*, 21 A. 395, 395-96 (Pa. 1891); *Parsons v. Balson*, 109 N.W. 136, 138-39 (Wis. 1906).

⁹³ U.P.C. § 2-507 (1969); U.P.C. § 2-507 (1991).

⁹⁴ See, e.g., *Dowling v. Gilliland*, 122 N.E. 70 (Ill. 1919); *In re Akers' Will* 77 N.Y.S. 643 (App. Div. 1902), *aff'd per curiam*, 66 N.E. 1103 (N.Y. 1903); *Estate of Minsinger v. United States Nat'l Bank of Portland*, 364 P.2d 615 (Or. 1961) (testator's act of drawing lines through some of the provisions of the will and writing "canceled" in the margin held not effective as a revocation of those portions because statute does not provide for cancellation of part of a will by physical act); see also G. Gordon Battle, *Does the Writing of Words of Revocation Across the Face of a Will Constitute Such a Cancellation or Obliteration as Will Revoke the Will?*, 9 VA. L. REV. 98 (1922) (discussing the distinction between "cancellation" and "obliteration" as means of effecting the revocation of a will).

⁹⁵ See, e.g., *In re Glass' Estate*, 60 P. 186 (Colo. Ct. App. 1900); *Evans' Appeal*, 58 Pa. 238 (1868).

⁹⁶ See, e.g., *In re Parsons' Will*, 195 N.Y.S. 742 (Sur. Ct.), *aff'd*, 197 N.Y.S. 935 (App. Div. 1922), *aff'd per curiam*, 142 N.E. 291 (N.Y. 1923) (writing words of cancellation across face of will held sufficient to revoke); *Estate of Minsinger*, 364 P.2d at 616.

⁹⁷ *Franklin v. Bogue*, 17 So. 2d 405 (Ala. 1944) (will held revoked); *In re Barnes' Will*, 136 N.Y.S. 940 (Sur. Ct. 1912) (testator's act of writing "null and void" along with name and date across face of will held sufficient to revoke).

must touch the words of the will.⁹⁸ These pre-1990 cases can be viewed as unfair in result since the intent of the testator to revoke appears clear.

The pre-1990 UPC provision on revocation by cancellation does not address the issue of whether a canceling writing must touch the words of the will.⁹⁹ A good example of the problems that can arise as a result of the silence of the pre-1990 UPC provision on this subject is presented in the 1972 case of *Kronauge v. Stoecklein*.¹⁰⁰

In *Kronauge*, the Ohio Court of Appeals was called upon to determine the validity of an attempted revocation by cancellation. The testatrix, Helen L. White, executed a will on October 4, 1968 with Jennifer Jones named as the principal beneficiary.¹⁰¹ This will was written on her attorney's stationery.¹⁰² The attorney was a witness to the will, and was not contacted by the testatrix to supervise a change or revocation of the will. On April 17, 1971, the testatrix wrote in the blank margin of the will, not touching any of the writing, that she wanted the will to be void and did not want to leave Jennifer anything. The testatrix also stated her reasons for doing so.¹⁰³ Plaintiffs, the heirs at law of the testatrix, brought an action to contest the will. Defendants, her executor and beneficiaries, moved for summary judgement. The trial court sustained the motion and entered judgement for the defendants. Plaintiffs, as appellants and contestants, then appealed.

On appeal, the testatrix's intention to revoke was not challenged; the sole issue was whether the writing of the words in the margin was a sufficient form of revocation.¹⁰⁴ In construing the Ohio statute,¹⁰⁵ the court, citing precedent,¹⁰⁶ affirmed the lower court's holding that

⁹⁸ See, e.g., *Noesen v. Erkenwick*, 131 N.E. 622 (Ill. 1921) (words of cancellation across face of will and signed by testator, sufficient to revoke); *In re Estate of Cox*, 621 P.2d 1057 (Mont. 1980) (will revoked by testator's act of crossing out virtually all paragraphs in will); *Akers' Will*, 77 N.Y.S. at 647 (words of revocation written in the margin of the will held not sufficient to revoke). In *Akers' Will*, the court stated that "a mere writing upon a will, which does not in any wise physically obliterate or cancel the same, is insufficient to work a destruction of the will by cancellation, even though the writing may express an intention to revoke and cancel." *Id.*

⁹⁹ See U.P.C. § 2-507(2) (1969).

¹⁰⁰ 293 N.E.2d 320 (Ohio Ct. App. 1972).

¹⁰¹ *Id.*

¹⁰² *Id.* at 321.

¹⁰³ Testatrix explained, in the margin of her will, that "[w]e have never heard or seen Jennifer Jones or did she come to Jess' funeral so I do not leave her anything." *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ OHIO REV. CODE ANN. § 2107.33 (Anderson 1990).

¹⁰⁶ *Kronauge*, 293 N.E.2d at 322-23. The Ohio Court of Appeals cited *Dowling v. Gilliland*, 122 N.E. 70 (Ill. 1919); *Cummings v. Nichols*, 5 N.E.2d 923 (Ohio Ct. App. 1936); *Evans' Appeal*, 58 Pa. 238 (1868); *Lewis v. Lewis*, 2 Watts & Serg. 455 (Pa. 1841).

the statute required that the methods of effectively revoking a will must be executed literally, so that a revocatory writing had to actually touch the words of the will.¹⁰⁷ The court held that, although the testatrix's intent to revoke was not at issue, the revocation was invalid because it did not satisfy the formalities required to revoke a will by cancellation. Because the testatrix placed the words in the margin, not touching the words of the document, the testatrix's act could not be construed as a cancellation. The writing could revoke the will only if it satisfied the statutory formalities for revocation by a subsequent writing, which it did not.¹⁰⁸

The *Kronauge* court followed a pre-1990 group of cases distinguishing between revocation by cancellation and revocation by burning or tearing. As the *Kronauge* case illustrates, under pre-1990 UPC case law, revocation by cancellation was valid only if there was an actual touching of the words on the will; no touching of the words was required for a revocation by tearing or burning.¹⁰⁹ As will be seen below, this result is changed by the UPC 1990 edition.

(b) *The 1990 Changes*

The UPC 1990 revision specifically addresses the issue of the validity of a cancellation by a writing that does not touch the words of the instrument. Section 2-507(a)(2) provides that: "A burning, tearing, or canceling is a 'revocatory act on the will,' whether or not the burn, tear, or cancellation touched any of the words on the will."¹¹⁰ Under the 1990 revision, the previous distinction between the revocatory act of canceling and the acts of tearing or burning is eliminated. In all cases, for the act to have effect as a revocation, the words of the will need not be touched.

The benefits gained from the 1990 provision are two-fold: arbitrary distinctions among the several revocatory acts are ended, and strict formality requirements that may defeat the obvious intent of the testator are eliminated.

¹⁰⁷ *Kronauge*, 293 N.E.2d at 321-23.

¹⁰⁸ *Id.* at 322. Most pre-1990 case authority is consistent with the outcome of the *Kronauge* holding, that the placing of words or marks that fail to touch the words of the document, regardless of the obvious intent to revoke, is not sufficient to constitute a revocation by cancellation. See WAGGONER ET AL., *supra* note 89 at 255.

¹⁰⁹ See U.P.C. § 2-507 cmt. (1991).

¹¹⁰ *Id.* § 2-507(a)(2) (1991).

2. The "Presence" Requirement

(a) Pre-1990 UPC Rule

Statutory authority that provides for revocation by act to the instrument consistently includes a provision allowing for the revocatory act to be performed by someone other than the testator.¹¹¹ The pre-1990 UPC provision, section 2-507(2), provides that if the revocatory act is performed by another person, then that act must take place in the presence of the testator and at the testator's direction. This language is similar to the UPC requirements for execution of the will by another person.¹¹²

The "presence" requirement has caused problems in both the execution and revocation contexts because one can not be sure how a court will define "presence." Under pre-1990 case law, courts interpreting presence took one of two approaches: they either liberally defined presence as a type of "conscious presence," meaning that the testator need only be aware of the other person and what that person was doing; or, the courts adhered to a strict common law requirement of actual physical presence requiring the testator to be physically present when the revocatory act was being done and to actually see the act being performed.¹¹³

In cases where the strict physical presence test was applied, unjust decisions often seemed to result. For example, in the 1970 Florida case of *In re Estate of Bancker*,¹¹⁴ the testator wanted to revoke his will and thereby reinstate an earlier will he had made.¹¹⁵ He directed his wife, step-daughter, and her husband to destroy the will. While the testator remained in bed, the three family members went into

¹¹¹ Percy Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 283, 289-90 (1929); ATKINSON, *supra* note 1, at 440.

¹¹² See, e.g., U.P.C. § 2-502 (1969) (When a testator has someone other than himself sign the testator's name on his behalf, this act of executing the will must be done in the presence of the testator and at his direction.).

¹¹³ See, e.g., *In re Estate of Gross*, 144 So. 2d 861 (Fla. Dist. Ct. App. 1962) (burning of testator's will at his instruction, at a time when testator was in a different city, was not a proper revocation of the will even though there was substantial compliance with the statute); *In re Mitchell's Estate*, 27 N.E.2d 606 (Ill. App. Ct. 1940) (will was not revoked when an attorney at the instruction of the testatrix destroyed the will outside the presence of the testatrix); *In re Estate of Kraus*, 385 N.Y.S.2d 933 (Sur. Ct. 1976) (destruction of will by attorney at the direction of the client but not in the presence of the client was not a valid revocation because it failed to meet the formalities required by the statute).

¹¹⁴ 232 So. 2d 431 (Fla. Dist. Ct. App. 1970).

¹¹⁵ *Id.* at 431.

another room and ripped the will into pieces which they then flushed down the toilet. The issue before the court was whether under the agreed upon set of facts the act of revocation was done in the testator's "presence."¹¹⁶ The Florida court held that the will was not revoked, since the Florida statute calls for the revocation to be made in the presence of the testator.¹¹⁷ The court defined "presence" to require both physical and mental presence, and adhered to a strict formality requirement.¹¹⁸ Thus, although the testator's intent to have a valid revocation was clear, the application of a technical presence requirement frustrated the testator's wishes.

The question of determining presence was not addressed in the pre-1990 UPC. As will be seen below, the UPC 1990 edition specifically speaks to the issue and would change the result reached in the *Bancker* case.

(b) *The 1990 Changes*

The language in the revised UPC section 2-507(a)(2), explicitly adopts the more liberal "conscious presence" test over strict compliance with statutory formalities.¹¹⁹ By adopting this liberal presence requirement, the 1990 UPC edition accepts revocatory acts that are performed by others under the direction of the testator, when the others are so close that the testator is able to know using any of his senses that another person is nearby and what that person is doing.¹²⁰ This 1990 revision frees a court in a UPC jurisdiction from following established case law precedents that impede giving effect to the testator's obvious intent.

C. *Revocation By Change of Circumstances (Operation of Law)*

The pre-1990 and 1990 UPC sections that deal with revocation by change in circumstances are substantially the same in content. The drafters of the 1990 UPC have revised pre-1990 section 2-508 so that the rule expands in order to include nonprobate transfers.¹²¹ Both the

¹¹⁶ *Id.* at 432.

¹¹⁷ *Id.* (citing FLA. STAT. ANN. § 731.14(1) (West 1973) (current version at FLA. STAT. ANN. § 732.506 (West 1976))).

¹¹⁸ *Id.* at 432-33.

¹¹⁹ See U.P.C. § 2-507(a)(2) & cmt. (1991).

¹²⁰ See, e.g., *In re Demaris' Estate*, 110 P.2d 571, 585 (Or. 1941); see also U.P.C. § 2-502 cmt. (1991) (discussing the "conscious presence" test).

¹²¹ Compare U.P.C. § 2-508 (1969) with U.P.C. §§ 2-508, -803, -804 (1991); see also Langbein, *supra* note 57 (arguing in favor of a unified law of succession).

pre-1990 UPC and the 1990 edition provide for revocation upon divorce or annulment¹²² and note that a subsequent marriage is not a cause for revocation of a premarital will.¹²³

At common law, the rule on revocation by change of circumstances included the rule that premarital wills were revoked upon a woman's subsequent marriage or by a man's marriage and birth of issue.¹²⁴ In accordance with the common law rule, many state statutes provide for revocation upon changes in the circumstances of the testator.¹²⁵ In particular, marriage is specified as a cause for revocation of a premarital will.¹²⁶ As divorce and remarriage rates have skyrocketed in the United States, it has not been uncommon for this revocation by marriage statute to become a major source of litigation with the decedent's children by a prior marriage fighting against the decedent's second spouse.¹²⁷

The pre-1990 UPC deals with revocation by change in circumstances in section 2-508. Section 2-508 provides for revocation by divorce or annulment only, and emphasizes that "[n]o change of circumstances other than as described in this section revokes a will."¹²⁸ The section does not allow for revocation by subsequent marriage.¹²⁹

Section 2-508 of the 1990 UPC revision states, "[e]xcept as provided in Sections 2-803 and 2-804, a change of circumstances does not revoke a will or any part of it."¹³⁰ The 1990 UPC section 2-803 deals with the effect of homicide on probate and nonprobate transfers, and although it substantially revises the format of the pre-1990 UPC version of section 2-803, it makes few substantive changes to the section.¹³¹

¹²² U.P.C. § 2-508 (1969); U.P.C. §§ 2-508, -804 (1991).

¹²³ U.P.C. § 2-508 cmt. (1969); U.P.C. §§ 2-508, -804(f) (1991).

¹²⁴ See *supra* note 31 and accompanying text. ATKINSON, *supra* note 1, § 85.

¹²⁵ See, e.g., CONN. GEN. STAT. ANN. § 45a-257 (West Supp. 1992).

¹²⁶ *Id.* In pertinent part: "If, after the making of a will, the testator marries or is divorced or his marriage is annulled or dissolved or a child is born to the testator . . . such marriage, divorce, annulment, dissolution, birth or adoption of a minor child shall operate as a revocation of such will . . ." CONN. GEN. STAT. ANN. § 45a-257(a) (West Supp. 1992).

¹²⁷ See, e.g., *In re Estate of Spencer*, 591 P.2d 611 (Haw. 1979).

¹²⁸ U.P.C. § 2-508 (1969).

¹²⁹ *Id.* § 2-508 cmt.

¹³⁰ U.P.C. § 2-508 (1991).

¹³¹ *Id.* § 2-803 cmt. ("Although the revised version does make a few substantive changes in certain subsidiary rules (such as the treatment of multiple party accounts, etc.), it does not alter the main thrust of the pre-1990 version." U.P.C. § 2-508 cmt. (1991)). While the pre-1990 version was bracketed to indicate that it may be omitted upon state enactment of the UPC, the revised version omits the brackets indicating the JEB's desire that the law be uniform on this basic question. *Id.*

Section 2-804 of the 1990 UPC revises pre-1990 section 2-508 which deals with revocation by divorce. The revisions made to this rule by the 1990 edition of the UPC are meant to unify the law applied to probate and nonprobate transfers.¹³² Although materially the same as pre-1990 UPC section 2-508, 1990 UPC section 2-804 expands the section to include "will substitutes" such as revocable inter vivos trusts, beneficiary designations on life insurance and retirement plans, transfer-on-death accounts, and other kinds of revocable dispositions that were established by the testator prior to the divorce.¹³³ In light of the increasing use of such nonprobate transfers, the expansion of the UPC section appears to be warranted.¹³⁴

D. Revival of a Revoked Will

The English Statute of Frauds of 1677 did not address the issue of revival of a revoked will. The issue arises in the following circumstance: Testator executes a will (will #1). He then executes a subsequent will (will #2) which revoked will #1. Later testator revokes will #2. Is will #1 revived by the revocation of will #2, or does the estate pass under the intestacy laws?

It was not until the 1837 English Wills Act¹³⁵ that the question of revival was dealt with statutorily.¹³⁶ Prior to that time, the courts applied one of two emerging approaches when deciding the early cases on the subject of revival.¹³⁷ Under one approach, which came from the ecclesiastical courts, no presumptions are applied regarding whether or not a previously revoked will is revived when a subsequent will is revoked.¹³⁸ Rather, the first will's revival depends purely upon the testator's intention. The facts and circumstances surrounding the revocation of the revoking will are gathered to help the court determine if it was the testator's intention to revive the original will.¹³⁹ Under the other approach, the common law rule, the original will is automatically revived upon revocation of the revoking instrument.¹⁴⁰ Under this doctrine, revival automatically occurs without

¹³² See U.P.C. § 2-804 cmt. (1991).

¹³³ See *id.*

¹³⁴ See Langbein, *supra* note 57, at 1134-40.

¹³⁵ Wills Act, 1837, 7 Wm. 4 & 1 Vict., ch. 26 (Eng.).

¹³⁶ *Id.* § 22.

¹³⁷ ATKINSON, *supra* note 1, at 474-76; WAGGONER, *supra* note 89, at 284-85.

¹³⁸ ATKINSON, *supra* note 1, at 474-75.

¹³⁹ *Id.* at 474 (citing *Wilson v. Wilson*, 3 Phill. Ecc. 543, 161 Eng. Rep. 1409 (1821); *Usticke v. Bawden*, 2 Add. 116, 162 Eng. Rep. 238 (1824)).

¹⁴⁰ *Id.* at 474, 475.

proof of the testator's intent, provided that the first will is not destroyed.¹⁴¹

Too often in practice, under these pre-1837 approaches, revival would be found to exist by a court in circumstances in which it appeared likely that no intention to revive actually existed.¹⁴² The 1837 English Wills Act was drafted to replace both the ecclesiastical and the common-law based rules on revival, adopting a presumption against revival upon revocation of a revoking, later will.¹⁴³ Under this anti-revival statute, revival occurs only if the testator re-executed the original will, or executed a codicil showing an intention to revive the first will.¹⁴⁴

1. Pre-1990 UPC Rules on Revival

Section 2-509(a) of the 1969 UPC provides that

[i]f a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.¹⁴⁵

The pre-1990 UPC revival doctrine is similar to the 1837 Wills Act provision. Under both statutes, there exists a presumption against the revival of the first will upon revocation of the second will. Revival occurs under the UPC pre-1990 rule only if the testator's intent to revive the first instrument can be clearly proven.¹⁴⁶ Unlike the 1837 statute, which basically precludes revival, the pre-1990 UPC section on revival allows the court the discretion to find that a revival occurred if adequate evidence of the testator's intent exists. As will be seen below, the 1990 version of the UPC on the subject of revival

¹⁴¹ *Id.* at 474. (citing *Harwood v. Goodright*, 1 Cowp. 87, 98 Eng. Rep. 981 (K.B. 1774); *Goodright ex dem. Glazier v. Glazier*, 4 Burr. 2512, 98 Eng. Rep. 317 (K.B. 1770).

¹⁴² *Whitehill v. Halbing*, 118 A. 454 (Conn. 1922), noted in Samuel A. Persky, Comment, *Effect Upon a Prior and Existing Will of the Revocation of a Subsequent Will Containing an Express Revocatory Clause*, 32 YALE L.J. 70, 71 (1922); *Succession of Dambly*, 186 So. 7 (La. 1938); *Cheever v. North*, 64 N.W. 455 (Mich. 1895), noted in Recent Cases, 9 HARV. L. REV. 364 (1895).

¹⁴³ Wills Act, 1837, 7 Wm. 4 & 1 Vict., ch. 26, § 22 (Eng.).

¹⁴⁴ *Id.*

¹⁴⁵ U.P.C. § 2-509(a) (1969).

¹⁴⁶ U.P.C. § 2-509 & cmt. (1969).

stresses the distinction between wholly and partially revoked instruments.

(a) *Distinctions Between Wholly and Partially Revoked Instruments*

The pre-1990 UPC section on revival does not distinguish between completely and partially revoked instruments.¹⁴⁷ Regardless of whether the subsequent will wholly or partly revoked the original will, the pre-1990 section creates a rebuttable presumption that no revival of the original will occurs upon the second will being revoked by act.¹⁴⁸ In practice, this rebuttable presumption against revival may result in an unfair outcome when it is applied to a partial revocation situation, because the testator's actual intent could be thwarted.

In a partial revocation situation, the testator might wrongly believe that, upon his revoking his partial revocation document, all of the original provisions of his will would be revived. Except for what had been partially revoked, the rest of the will would have remained unchanged. This could reasonably lead a testator to believe that once he undid a partial revocation his will would remain in force and effect as originally written. The pre-1990 UPC section on revival did not bring about this result. Rather, under the pre-1990 UPC section, the presumption made is that regardless of whether a subsequent instrument wholly or partially revokes the previous will, the revocation of a subsequent instrument does not revive the previous document.¹⁴⁹

An example of how the pre-1990 UPC could defeat a testator's reasonable intent is presented in the 1980 case of *In re Estate of Hering*.¹⁵⁰ In that case, the decedent, Henry R. Hering, executed a will on October 21, 1976.¹⁵¹ By the will, Elaine Bockin was named to receive a specific portion of the testator's effects.¹⁵² On January 13, 1977, the testator executed a codicil to the will, in which he deleted Elaine's name and inserted Evelyn Salib's name in all the pertinent sections.¹⁵³ On December 2, 1977, the testator, in the presence of his attorney, effectively revoked this codicil by drawing a large "X"

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ 166 Cal. Rptr. 298 (Ct. App. 1980).

¹⁵¹ *Id.* at 298-99.

¹⁵² *Id.*

¹⁵³ *Id.* at 299.

through each page of the codicil and writing the words "Revoked December 2, 1977 Henry R. Hering."¹⁵⁴ The attorney testified that shortly before Henry made these revocatory marks on the codicil, Henry stated that he believed that the revocatory act to the codicil would reinstate the provisions of the previous will, which named Elaine as the beneficiary.

The California Court of Appeals decided to give effect to Henry's 1976 will as originally written, but the court did not base its decision on the revival statute. Rather, the California Court held that the California revival statute,¹⁵⁵ which was similar to the pre-1990 UPC revival statute, did not apply to cases of partial revocation.¹⁵⁶ Apparently, the court concluded that it would be unfair to hold against revival in a case of partial revocation where parol evidence indicated that the testator believed revival would occur. Instead, the court applied the common law rule under which a subsequent revocation of a codicil "leaves the will in force and effect as written."¹⁵⁷ As will be seen below, this problem is addressed in the 1990 revision of the UPC and a new rebuttable presumption is adopted.

(b) *Pre-1990 Case Law*

The pre-1990 UPC revival provision, section 2-509(a), established a rebuttable presumption against revival of an earlier instrument upon the revocation of a subsequent instrument. The presumption applied regardless of whether the second will revoked the first will in whole, or in part. The presumption against revival could be overcome if it was "evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed."¹⁵⁸ This pre-1990 Code language created a problem when the phrase, "the circumstances of the revocation" in the language of UPC section 2-509(a) was interpreted for the first time by the Minnesota Supreme Court in *In re Estate of Boysen*.¹⁵⁹

¹⁵⁴ *Id.*

¹⁵⁵ CAL. PROB. CODE § 75 (repealed 1983). This statute was superseded by CAL. PROB. CODE § 6123 (Deering 1991). The language in this new statute is almost identical to that in § 2-509 of the pre-1990 U.P.C. edition. See U.P.C. § 2-509 (1969).

¹⁵⁶ *In re Estate of Hering*, 166 Cal. Rptr. at 304.

¹⁵⁷ *Id.* at 300 (citing *In re Simpson*, 56 How. Pr. 125 (N.Y. Sur. Ct. 1878); W.W. Ferrier, Jr., *Revival of a Revoked Will*, 28 CAL. L. REV. 265, 267, 269 (1940)).

¹⁵⁸ U.P.C. § 2-509(a) (1969).

¹⁵⁹ 309 N.W.2d 45 (Minn. 1981).

In the *Boysen* case, decedent, Chris Boysen, was the father of two children, Genevieve Thompson and Raymond Boysen.¹⁶⁰ Chris Boysen executed his will in 1964, when he was 75 years old, his wife having predeceased him. Genevieve, his daughter, had married and moved to Austin, Minnesota. After Raymond Boysen married, his father moved in with him and his wife in Hayfield, Minnesota. In 1964, Raymond was appointed guardian of his father's person and estate. In 1973, Chris Boysen moved to a residence for the elderly and died there in 1977.

In his will, Chris Boysen bequeathed his personal property equally to his children. He left his farm to his son on the condition that his son pay Genevieve Thompson \$7,000. The will was filed with the Dodge County clerk of court after it had been executed. The will was later lost after it was removed from the courthouse vault in 1972 for review in connection with a proceeding for Raymond's divorce. In making a new will in 1975, Chris Boysen raised the amount of money to be paid to his daughter by his son, as a condition of taking his farm, to one quarter of the property's appraised value of approximately \$600,000. Chris Boysen again filed the new will with the clerk of the court, giving his son an unsigned copy, which Raymond put in a safe deposit box. Later in 1975, the decedent's attorney was notified by the clerk of the court that the old will had been found. Within the next year, the decedent instructed his attorney to remove his new will from the court files.

At his attorney's office, the decedent retrieved the new will and signed a receipt for it. The decedent on the drive home with his son tore the new will in half. "At the probate court hearing Raymond testified that decedent handed him the torn will and said: 'They maybe have lost it yet. This will give us . . . some sort of an idea on my likes . . . you take care of it.'"¹⁶¹ The torn will was then kept in a locked box at Raymond's home. Raymond then returned his copy of the new will to the decedent who then tore it in half.

Upon Chris Boysen's death, Raymond, as executor, filed a petition for probate of the 1964 will.¹⁶² His sister, Genevieve, objected to the petition for probate, seeking intestacy. The probate court found that the 1975 will had been revoked and the 1964 will had been revived. The order was affirmed by a three-judge panel of the district court. Genevieve appealed to the Supreme Court of Minnesota.

¹⁶⁰ *Id.* at 45-46.

¹⁶¹ *Id.* at 46.

¹⁶² *Id.* at 47.

The applicable Minnesota statute¹⁶³ was the same as the pre-1990 UPC Section 2-509(a). Accordingly, the court found that there would be no revival "unless from 'the circumstances of the revocation' of the 1975 will or from decedent's 'contemporary or subsequent declarations' it is evident that he intended the 1964 will 'to take effect as executed.'"¹⁶⁴ The probate court found such an intent on the part of the decedent. This holding was not clearly erroneous according to the district court panel.

On appeal, the court, sitting without a jury, was also limited to the question of whether the finding was clearly erroneous. The appeals court pointed out that the decedent never made any statement indicating an intent for revival to occur.¹⁶⁵ For the court, the question under the statute was: "whether a testator, at the time he revoked a will, intended to die intestate or to revive an earlier will."¹⁶⁶ Because the statute permitted the trier of fact to take into account "the circumstances of the revocation," the court believed that the legislature meant to permit an examination of all matters relevant to the testator's intent. Accordingly, the court indicated that there were three questions which would go to the circumstances of the revocation that should be answered by the factfinder. First,

[d]id the testator, at the time he revoked the later will, know whether the earlier will was in existence? [Second,] [i]f the testator did know that the earlier will was in existence, did he know the nature and extent of his property and the disposition made of his property by the earlier will, particularly with respect to persons with a natural claim on his bounty? [Finally,] [d]id the testator, by action or non-action, disclose an intent to make the disposition which the earlier will directs?¹⁶⁷

The court indicated that only if all three questions were answered affirmatively, should the first will be treated as revived and admitted to probate.¹⁶⁸ By translating the general statutory provisions into "discrete subsidiary elements," the court essentially changed a statu-

¹⁶³ MINN. STAT. ANN. § 524.2-509(a) (West 1975).

¹⁶⁴ *Estate of Boysen*, 309 N.W.2d at 47 (quoting MINN. STAT. ANN. § 524.2-509(a) (West 1975)).

¹⁶⁵ The appeals court finding does not address the testimony given by Raymond. *Id.* It might be as reasonable to conclude that, based on that testimony, Chris did make declarations indicating his intent to revive.

¹⁶⁶ *Estate of Boysen*, 309 N.W.2d at 47.

¹⁶⁷ *Id.* at 47-48.

¹⁶⁸ *Id.* at 48.

tory standard into a strict set of rules, thus making the case for revival a much harder case to prove.¹⁶⁹

2. 1990 UPC Changes to the Revival Provision

In the comment to section 2-509 of the 1990 revision, the UPC drafters specifically criticized and rejected the *Boysen* court's analysis which placed restrictive limits on the factfinder's interpretation of the relevant evidence that went to prove the testator's intent to revive.¹⁷⁰ The drafters stated that "all relevant evidence of intention is to be considered by the court on this question; the open-ended statutory language is not to be undermined by translating it into discrete subsidiary elements, all of which must be met, as the court did in *Estate of Boysen*."¹⁷¹

Beyond this, the 1990 UPC revival section distinguishes between wholly and partially revoked instruments. Regarding wholly revoked wills, the 1990 UPC revision adopts virtually verbatim the pre-1990 UPC provisions on the matter. For whole revocations, the 1990 revision, section 2-509(a), imposes a rebuttable presumption against revival of an instrument that had been revoked by a subsequent instrument. To the 1990 UPC drafters, the pre-1990 provisions for a rebuttable presumption against revival make good sense. The testator, by executing the second will, would ordinarily be under the impression that the first will no longer continues.¹⁷² The testator can be assured that by executing the second will the first will is void and nonrevivable, unless the testator clearly indicates that he intends otherwise.

¹⁶⁹ U.P.C. § 2-509 cmt. (1991). On remand, the trial court in *Boysen* applied the supreme court's test and determined that the original will of the testator was not revived. *In re Estate of Boysen*, 351 N.W.2d 398, 400 (Minn. Ct. App. 1984). The trial court did, however, hold that the 1975 will was still valid because its revocation was dependent on the revival of the original will. *Id.* The court of appeals later reversed this decision holding that on remand the trial court was required to follow the stipulation that there was a valid revocation of the 1975 will upon its destruction. *Id.* at 400-01.

Professor Waggoner and his other casebook authors criticize the court's approach to deciding this case. In their opinion, the Minnesota court could have denied revival of the 1964 will without adversely affecting other revival cases by concentrating on the statutory phrase "as executed." Since the evidence suggests that Chris did not know the contents of the 1964 will, he could not possibly have manifested an intent that "the first will take effect as executed." If the court had taken that tact, the outcome of the case would have been the same, but the court would not have influenced future courts' interpretations of the UPC. See WAGGONER ET AL., *supra* note 89, at 290.

¹⁷⁰ U.P.C. § 2-509 cmt. (1991).

¹⁷¹ *Id.*

¹⁷² *Id.*

Regarding partial revocations, however, section 2-509(b) of the 1990 UPC substantially changes the pre-1990 UPC rule on revival of a partially revoked instrument. This subsection establishes a rebuttable presumption that when a second revoking will only partially revokes the first will, then revocation of the second will revives the part or parts of the first will that had been revoked unless "it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed."¹⁷³ This section shifts the burden of persuasion to the party arguing that the revoked part, or parts, of the original will were not meant to be revived.¹⁷⁴ The presumption in favor of revival of the partially revoked first instrument is based on the reasoning that the testator's act of revoking the second will (the codicil) was accompanied by an intent to revive the revoked part, or parts, of the first will.¹⁷⁵ The 1990 UPC framers judged that, where there is an absence of evidence indicating actual intent, more often than not, codicil type instruments are revoked with the intent to revive the original instruments.

CONCLUSION

As seen above, underlying the 1990 UPC changes in the area of revocation and revival is a desire to reduce rigid adherence to formalistic systems originally created to lessen the chance of fraud.¹⁷⁶ The 1990 UPC drafters have stressed the need for greater concern for giving effect to the actual intentions of the testator, as they may be revealed by the available evidence that exists, or as they are reasonably presumed, where there is an absence of adequate evidence regarding actual intent.

The changes brought about by the 1990 UPC drafters are constructive and helpful in the proper resolution of revocation and revival issues once they arise. For the future, however, additional thought should be given to developing UPC approaches that can resolve the underlying three basic root causes of litigation in the revocation and revival area which remain largely unaffected by the present UPC provisions.¹⁷⁷

¹⁷³ *Id.* § 2-509(b).

¹⁷⁴ *Id.* § 2-509 cmt.

¹⁷⁵ *Id.*

¹⁷⁶ *See supra* part III.

¹⁷⁷ *See supra* notes 6-8 and accompanying text.

First, persons who attempt a revocation without the assistance of an attorney may not grasp the proper procedures to be followed in effecting a valid revocation; they may not leave adequate evidence with regard to their actual intentions. A lay person may not even understand the ambiguity that is being created by a revocation. If an original will is being drawn up for the testator with the assistance of an attorney, why should the client not be given some guidance in writing at the time that the original document is being drawn with regard to the precautions and appropriate steps that should be taken in the event that a revocation is later desired?

Some suggestion in the UPC comments that this be done as a "basic standard of practice" would help the legal profession to develop and improve the level of practice in this area. The commentary to the UPC might be expanded in the future to set forth specific instructions and material on what would constitute "basic standards of practice," not only in this area, but also in a number of other areas.

In the revocation area, the comments could include a sample set of written instructions that could be given to the client at the time the will is executed guiding the client regarding what should and should not be done if a later revocation is desired. A warning about the need to follow proper procedures could reduce ambiguity or the use of improper procedures for revocation. It likely would reduce the number of revocations attempted by lay persons without the assistance of a lawyer. For the future, an expanded commentary with the inclusion of basic practice forms and advice for attorneys would make the UPC a far more useful document.

Second, an expanded UPC commentary would also be helpful to attorneys who are unfamiliar with the basic law and the proper practice procedures required to effectively deal with revocation. The commentary to the UPC could provide simple examples of what to do as opposed to what not to do, and/or checklists of procedures. Such an expanded commentary would be most helpful to practitioners and might, in time, help to broaden the UPC's appeal.¹⁷⁸

Third, as a guard against a disappointed heir engaging in a fraudulent revocation, the UPC drafters might emphasize the desirability of

¹⁷⁸ If expanded comments could be drawn in a way that would help the bar to see the UPC as helpful in reducing the risk of malpractice, the bar might be more inclined to vigorously support the UPC movement. Suggestions for "basic standards of practice" that could be included in the commentary could be solicited from the bar and the academic community. The commentary could clarify that the suggestions made are not to be considered as mandatory or essential for proper practice.

utilizing the UPC's registry system.¹⁷⁹ For those testators who realistically fear the possibility of a disappointed heir fraudulently revoking a will, the use of some inexpensive depository procedures for safeguarding wills with a provision for allowing entry only to trusted persons could be encouraged.

In addition, better communication between the JEB and the courts should be encouraged. As mentioned above, the UPC drafters have not yet created a mechanism for attempting to head off a judicial interpretation of the UPC that the JEB would deem inappropriate. When this occurs, it forces the UPC drafters to resort to an after-the-fact criticism, as they did following the *Boysen* decision.¹⁸⁰ With better communication, local state courts could know in advance how the UPC drafters intended the UPC to be interpreted. To aid courts in cases involving the interpretation of the UPC, instead of criticizing the court after a decision is reached, the JEB should publicize that it is available to provide an opinion when such advice is sought.¹⁸¹ Beyond that, the JEB, when invited to do so, should file an advisory opinion or amicus brief with the court in which it may explain, advocate and clarify the UPC drafters' intentions on the specific rule in question. By using the JEB as an additional source of information on what was intended by the drafters in promulgating a specific section,

¹⁷⁹ See U.P.C. §§ 2-515 to 2-516 (1991). For a description of the registry system see *id.* § 2-1010. Even where a registry is available and used, it may not be an absolute protection. See *In re Estate of Boysen*, 309 N.W.2d 45 (Minn. 1981); see also *supra* text accompanying notes 160-69.

¹⁸⁰ See U.P.C. § 2-509 cmt. (1991); see also *supra* notes 170-71 and accompanying text. Another example of the JEB's criticism of a judicial interpretation of the UPC is found in a recent memorandum from the JEB wherein it criticizes the holding in *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991). See JEB, Memorandum, Nov. 1, 1991 [hereinafter JEB Memo]. In *Ritter*, the court of appeals found an Oklahoma statute, which was very similar to UPC § 2-804 (1990), that dealt with the disposition of life insurance proceeds following a divorce to be unconstitutional as a violation of the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1, when applied to contracts in existence prior to the enactment of the statute. *Ritter*, 929 F.2d at 1322. "The JEB believes that the *Ritter* opinion is manifestly wrong. Were the error to go unnoticed and be followed elsewhere, it could seriously hamper an important and benign trend toward unifying the law of probate and nonprobate transfers." JEB Memo.

¹⁸¹ An inquiry to the Chicago office of the National Conference of Commissioners on Uniform State Laws (312-915-0195) can facilitate contact with someone close to the UPC drafting process who can be helpful.

Canon 3 (B)(7)(b) of the ABA Code of Judicial Conduct provides that a judge may obtain the advice of a disinterested expert on the law so long as the judge "gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." The commentary to this section states that: "[a]n appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*." MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990).

courts will be able to have the benefit of the JEB's thinking in advance of reaching their own conclusion.

Finally, the JEB should be encouraged to continue its efforts to expand and diversify its membership.¹⁸² An open invitation to any concerned group to make suggestions to the Board could broaden its outlook.¹⁸³ Representation and/or input by consumer groups, the ju-

¹⁸² For information regarding the composition of the JEB see *supra* note 13. The JEB recently invited the American Association of Retired Persons ("AARP") to nominate liaisons to the JEB and this invitation was accepted. See NATIONAL COUNCIL OF COMMISSIONERS ON UNIFORM STATE LAWS REFERENCE BOOK 60 (1991-92). AARP is now sponsoring adoption of the UPC. A similar invitation sent to the American College of Probate Judges was declined. Letter from Richard Wellman, Executive Editor, Joint Editorial Board for the Uniform Probate Code, to Robert Whitman, Professor of Law, University of Connecticut Law School (Feb. 7, 1992).

¹⁸³ Undoubtedly, an expanded JEB could be helpful in the effort to enact the UPC across the country. Beyond this, in the future, new problems will arise that will require creative solutions. An expanded JEB, with wider representation and input, could be useful in finding appropriate solutions in the future that lie in the public interest.

For instance, Congress has recently passed the Patient Self Determination Act which requires health care facilities to inform patients of their rights, under state law, to determine at what point life prolonging medical care should be removed, the so-called "right to die." 42 U.S.C.A. § 1395dd(b) (West 1992). The question has arisen over whether this determination should not be made before admission to a health care facility. Informing patients of their right to die upon admission may not be the most desirable way of gaining information regarding the patient's intentions in this area. Also many patients may not be capable at that time to make the determination for themselves or to understand the question. See Alexander Capron, *Living Wills: Deciding When to Pull the Plug*, THE HARTFORD COURANT, Dec. 9, 1991, at C11. One idea that has been suggested might be the use of bracelets identifying terminally ill patients who do not wish to be kept alive by extraordinary means. Similar to the so-called "medic-alert" bracelets worn by sufferers of chronic illnesses such as diabetes or heart disease to advise medical personnel of conditions when the wearers themselves are unable to do so, these bracelets would serve to inform medical personnel of the wearers' desires regarding life prolonging care. For a broader discussion on these bracelets see Marcia Saft, *Bracelets Convey Patients' Wishes*, N.Y. TIMES, Jan. 12, 1992, at 12. Just as the 1990 revisions expanded the UPC rules into the area of nonprobate transfers, perhaps the JEB in the future should attempt to broaden its coverage to deal with living wills.

Additionally, the JEB might also address with greater specificity the question of excessive attorney's fees, a root issue in the fight for probate reform. With unsupervised administration available under the UPC, a court would not now necessarily supervise attorney's fees. Thus far, the JEB's approach to the problem of excessive fees has rested on deregulation with the expectation that the consumer would monitor the matter. See U.P.C. §§ 3-721, 7-201 (1991). But, in the future, this approach might be reconsidered and suggested guidelines for notice provisions to benefit consumers relating to the need for early discussion of fees and for a fee structure related to the time spent on the work might be promulgated. See, e.g., *In re Estate of Platt*, 586 So. 2d 328 (Fla. 1991). In this case the Florida Supreme Court recently spoke to the issue of excessive attorney's fees. There the court overturned a lower court decision awarding attorney's and administrator's fees based on a percentage of the estate and held instead that such fees were to be awarded on a reasonable hourly rate. *Id.* at 329, 336-37. The attorney in the case sought \$236,800 in fees based on a \$7,000,000 estate. *Id.* at 329. Evidence presented indicated that the time the attorney spent on the estate was 274 hours. At the attorney's normal hourly rate of \$350 the fee would have added up to \$95,900. The court heard expert testimony to the effect that the standard billing rate for this type of service was between \$200 and \$300 per

diciary and others might lead to helpful solutions to future problems and this should, in time, widen national acceptance of the UPC.

hour. If in the future the JEB does decide to address the question of curbing excessive attorney's fees, perhaps a requirement of some notice to beneficiaries on the subject would be appropriate. The development of a standard of practice urging the negotiation of fees at the start of the engagement would also be a possibility. On the importance of the JEB taking responsibility in the future for monitoring probate costs, see Robert Whitman, *Preparing for the Future of Probate in America*, 5 CONN. L. REV. 557 (1973).

