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Mistake and Fraud in Wills--Part II: A Suggested Statutory Departure

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MISTAKE AND FRAUD IN WILLS—PART II: A SUGGESTED STATUTORY DEPARTURE†

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INTRODUCTION

In Part I of this article the conclusion was reached that the rules of law governing the granting of relief from the effects of mistake and fraud upon testamentary acts were overly restrictive and inadequate, and that improvement was called for.[1] It was acknowledged, however, that such criticisms are of value only in so far as they indicate the direction to be taken by meaningful reform. Therefore, the task set out for this Part II will be one of exploring the possibilities for change, and suggesting where and how such change might be accomplished. In the course of the analysis to follow, a statutory draft will be advanced as a sensible and workable departure from the restrictions and inadequacies of present law. If the tone of this Part II should appear more argumentative than in Part I the shift is at least understandable. Like one who has stood around the table endlessly kibitzing, I feel compelled at last to sit down and play. From here on out, "Put Up or Shut Up" is the name of the game.

I. THE NEED FOR COMPREHENSIVE STATUTORY REFORM

A. *The Nature of the Problem Presented*

Nowhere in our system of law is the problem of balancing legitimate yet competing interests more critical than in connection with the working out of specific exceptions to general, formalized rules such as those embodied in the Statute of Wills. On the one hand, the statutory requirements are imposed in the general interest of protecting the individual's expression of intent as an exercise of his "freedom of testation;" and on the other, these requirements are occasionally relaxed in the interest of relieving a few such expressions from the unwanted effects of mistake and fraud. Ideally, the rules established by, and surrounding, the Statute of Wills would protect from attack every legitimate expression of testamentary intent and yet would avoid giving refuge and asylum to the illegitimate products of error and inadvertence. In this real world of inadequate proof and inherent risks and delays of litigation, however, questions of fact concerning the legitimacy or illegitimacy of a particular expression of intent are almost always speculative. A practical compromise must be established between the interests of certainty and constancy, promoted by the general rule, and the interest of justice in the

† Part I of this article appeared in 47 B.U.L. Rev. 303 (Summer 1967).

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[1] See pp. 413-17, Part I, supra.

particular case, permitted by the occasional exception. The balance struck in favor of certainty and constancy, in the form of a presumption of legitimacy which attaches to expressions formally executed under the Statute of Wills, appears sensible and therefore supportable. The problems posed here concern the proper working out of the exceptions to the general rule. To what extent, and under what circumstances, should the presumption of legitimacy be rebuttable in cases of alleged mistake and fraud?

One way of answering the question generally, which will serve to focus attention upon the nature of the balance being struck and the difficulties which it presents, is as follows: the presumption of legitimacy should be rebuttable to the greatest extent possible without unreasonably subjecting formalized, and probably legitimate, expressions of intent to the risks and delays of litigation. Admitting that there is an area of uncertainty and speculation in which the presumption of legitimacy properly functions as a means of giving effect to the greatest number of expressions of testamentary intent, it is recognized that in some cases circumstances will support inquiry into questions of mistake and fraud. Of course, it is the "How much is too much?" sort of question which such an answer begs with its reliance upon "reasonableness" that makes this particular problem so typically legal—and difficult to solve. The difficulty is, of course, one of determining a criterion of "reasonableness" with which to judge whether the restrictions upon relief for mistake and fraud imposed by the present law, or any change therein, are justified in principle. One of the important tasks in the analysis to follow will be that of establishing such a criterion as the premise upon which to base suggestions for meaningful and comprehensive reform.

What the preceding formulation of the nature of the problem presented accomplishes is to place the problem in its proper, relief-oriented perspective. The Statute of Wills should not be viewed as some mystical assertion of absolute truth, but rather as a piece of man-made legal machinery established and maintained to serve intensely practical human ends. Restrictions upon judicial inquiry into the alleged effect upon wills of erroneous beliefs should be retained only to the extent to which they help to serve those ends. The proper approach to reform should be one of vigorously challenging the restrictions of existing law; the proper attitude, one of irreverence.

B. *Three Major Objectives for Reform*

Three aspects, or characteristics, of existing law emerge from the discussion and analysis in Part I as prime candidates for modification and reform: (1) the severe restrictions upon allowing mistake to be established as a ground for relief; (2) the severe limitations upon the

nature of the relief available even where erroneous beliefs are shown to have affected the will; and (3) the disjointed, fragmented and oftentimes arbitrary arrangement of special rules and exceptional remedies, both statutory and court-made, that have evolved in most jurisdictions to relieve pressures for liberalization in certain sensitive areas. As an objective for reform the third of these characteristics of existing law raises no significant questions of policy under the Statute of Wills and is in no particular need of extended development in the present discussion. Even a cursory inspection of Part I of this article supports the conclusion that a clear, consistent and comprehensive codification of the rules in this area, were it possible to achieve, would work a significant improvement over the existing patchwork product of hit-and-miss historical development.

In contrast to the third, however, the first and second of these characteristic restrictions, reform of which will most certainly involve fundamental policy questions of the "How much is too much?" variety discussed earlier, warrant some further discussion in the present context. It may be anticipated with respect to the rules governing cases of fraudulent misrepresentation that the second of these restrictions, relating to the nature of the relief granted for proven error, will be of greatest significance in considering various avenues for reform. In light of the liberality with which courts presently allow proof of fraud from extrinsic sources,[2] the ultimate policy question here will not be "Should proof of fraud be admitted?" but rather "What further relief, if any, should the courts be empowered to grant in cases of proven fraud?" Presumably, the thrust of such an inquiry will be largely in the direction of the courts' giving effect in probate—perhaps by means of a power to reform the will—to what the testator would have intended in the absence of fraudulently induced error.

Interestingly enough, under the approach taken presently by the courts in cases of alleged mistake, the situation with respect to the policies underlying the Statute of Wills is almost exactly the reverse from that just observed in connection with allegations of fraud. Here it is the first of the characteristic restrictions of existing law, relating to the permissibility of showing the testator to have been mistaken, which raises serious policy questions of the "How much is too much?" variety described earlier. Because existing restrictions upon admitting extrinsic evidence of mistake are so severe in comparison with the liberality observed in connection with allegations of fraud,[3] they all but swallow up

[2] For an earlier discussion of this comparative liberality see pp. 386-88, Part I, supra.

[3] For an earlier treatment of the sort of restrictions imposed in the context of mistakes in the inducement see pp. 322-29, Part I, supra. Cf. the discussion of mistakes in the expression, pp. 356-63, 366-80, Part I, supra.

any further question of whether there are reasons in principle for denying relief of one sort or another once a mistake has properly been shown to have materially affected the will. The restrictions presently imposed upon allowing proof of mistake may raise important and debatable questions of policy in connection with existing law, but the further limitations upon relief sometimes imposed by the courts do not. It is anticipated, therefore, that inquiry pointing toward basic reform of the rules governing cases of alleged mistake will focus mainly upon the proper balance to be struck in admitting evidence of such erroneous belief from sources extrinsic to the will.

Of course, it is by no means clear at this juncture whether presently existing restrictions upon proving mistake will be accepted and maintained in the process of codification and reform here contemplated. Ultimately, the question of basic policy will have to be faced of whether any relaxation of those restrictions would "unreasonably" expose the great majority of unaffected and legitimate expressions of intent to the risks and delays of litigation. The important point here is that it is only in the event that these restrictions are relaxed in order readily to allow mistake to be shown that the further question may for the first time properly be raised of whether relief of a more liberal sort—such as reformation of the instrument in question—should be granted based upon proven mistake. Instead of a single question of "Where to draw the line?" in light of underlying policy, there will then be two such questions, each relating to a different aspect of the attack being made upon the will. The first, a hold-over from existing law, will take the form of a reappraisal of the proper balance to be struck with respect to admitting extrinsic evidence in proof of mistake. The second, raised in connection with allegations of mistake for the first time by a shift toward greater liberality in the admission of extrinsic evidence, will involve the problem of the proper limitations to be placed upon the type of relief ultimately to be granted from the effects of proven mistake.

C. *Inherent Restrictions Upon Court-Made Reform*

Except for the fact that all of the problems in this area eventually may be traced back to a common statutory source insofar as they relate to the meaning and effect to be given to the Statute of Wills itself, and apart from occasional legislative enactments creating limited exceptions to the general approach, most of what might be described as the present law of mistake and fraud in wills is court-made, the product of centuries of Anglo-American decisional development. Even where sweeping statutory enactments in the form of Probate Codes and the like have occurred they have not contained anything approaching a reform or codifi-

cation of the substantive rules governing mistake and fraud.[4] Bearing in mind that much of the criticism of existing law in Part I of this article was directed at court decisions, it might at first glance appear that the courts themselves are the appropriate agencies through which to work any significant reform that is needed. Further reflection upon the nature of the problem presented, however, reveals several important restrictions upon accomplishing the necessary change by means of the adjudicative process.

First and most obviously, the type of codification and unification called for above as a major objective for reform is beyond the resources of the courts readily to accomplish. Due to the great diversification in approach and confusion in terminology, it is too much to expect that lawyers and judges involved in applying this confounding welter of rules to litigation are going to have the time or the patience or the resources to work out a unified approach to problems not even before them in a given case.[5] Moreover, since a variety of statutes have already been enacted in order to liberalize, piecemeal, some of the common law limitations upon relief,[6] the courts would find themselves statutorily handcuffed in a sufficient number of important areas to render them finally ineffectual in the role of reformers on a broad front. This much, at least, would appear to be straightforwardly simple and hardly worthy of special, or even separate, treatment. However, in addition to the more obvious limitations upon court-made change already noted above, there exists another important restriction upon the capability of courts to achieve meaningful reform—a restriction more closely related to the peculiar nature of the questions which cases of alleged mistake and fraud would present for judicial decision under any more liberal approach toward granting relief. The limitations upon court-made change described thus far relate to the relatively weak vantage point from which such change would have to be administered. Traditionally limited to the facts of the case before them, courts would be unable to render sweeping or comprehensive reform. However, this limitation in and of itself would not prevent their changing for the better, where justified in light of underlying policy, particular rules of law in cases not already governed by statute. They

[4] See, e.g., Iowa Code § 633.308 (1962); Miss. Code Ann. § 503 (1942); N.C. Gen. Stat. §§ 31-32 (1966). See also Simes, Model Probate Code § 72, Comment p. 99 (1942) (hereinafter referred to as M.P.C.). Some statutes attempt a broad outlining of general grounds, e.g., Ala. Code tit. 61, § 52 (1958); Cal. Prob. Code § 371; Del. Code Ann. tit. 12, § 1309 (1953); Fla. Stat. § 731.08 (1961); Ohio Rev. Code § 2107.18 (Anderson Supp. 1963); Okla. Stat. tit. 58, § 41 (Supp. 1963).

[5] For an interesting statement of this point in the context of a defense of the English Law Commissions Act of 1965 see Scarman, Codification and Judge-Made Law: A Problem of Coexistence, 42 Ind. L.J. 355, 366 (1967).

[6] E.g., the so-called pretermitted heir statutes discussed pp. 409-13, Part I, supra.

might begin, for example, by permitting references within a will to prior gifts believed by the testator to have been made by him to operate as valid testamentary gifts "by implication of law."[7]

In light of the further considerations about to be introduced, however, one must conclude that even in reforming the law in the more limited case-by-case manner just described the courts would almost surely be forced to avoid any basic shift in approach with respect to policy questions of the "How much is too much?" variety referred to earlier. In the phraseology already employed to describe the major objectives for reform, the courts would be forced to leave untouched their existing approach both to the admissibility of proof of mistake and to the nature of the relief to be granted for proven fraud, and would be compelled instead to concentrate their attention almost entirely upon the rather more limited and straightforward problem of eliminating the inconsistencies produced by their unjustifiably strict approach under existing law to the relief made available from the effects of proven mistake. Were the courts to do otherwise—were they to attempt materially to liberalize the rules concerning either proof of mistake or relief for fraud—they would in these cases find themselves trying to answer questions which are inherently beyond the capabilities of, and therefore totally unsuited to, the adjudicative process. It is not that the courts somehow lack power or authority to accomplish a fundamental shift in their approach to these cases, but rather that the decision-making process which they employ is not designed to handle the questions of fact or law which those cases would present for resolution following such a shift in approach. It would not be the shift itself that would cause the courts difficulty, in other words, but its aftermath in cases thereafter presented for adjudication. Having made the move toward a more liberal treatment of these cases, the courts would very quickly find themselves to be in over their heads.

The basis in principle for the conclusions advanced in the preceding paragraph are contained in Professor Lon Fuller's "The Forms and Limits of Adjudication."[8] Professor Fuller suggests that certain kinds of questions, to which he applies the term "polycentric," are inherently unsuited to being resolved by means of the opposing proofs and adversary arguments which constitute the adjudicative process. A task is essentially polycentric, he explains, whenever it requires the exercise of

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[7] For a critical discussion of these cases see pp. 341-44, Part I, supra.

[8] Fuller, The Forms and Limits of Adjudication (1963) (unpublished paper in Harvard Law School Library) (hereinafter cited as Fuller). In granting me permission to refer to his work in this analysis, Professor Fuller suggested that a good portion of the ideas contained therein are also to be found in Fuller, Adjudication and the Rule of Law, American Society of International Law: Proceedings 1 (1960); Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc. L. Rev. 3.

a number of separate judgments which are interrelated in a manner so as to cause a decision with respect to any one of them to alter radically the considerations relating to the others. He employs the metaphor of a spider web, in which an increase of tension upon one of its strands results in a complicated redistribution of tensions throughout the web as a whole. Like the spider web, judgmental tasks may assume a "many-centered" form in which a decision with respect to one center of tension substantially alters the basic nature of the questions posed with respect to all of the others. Examples of polycentric problems suggested by Professor Fuller include the decision facing a football coach of which player should play at which position, or the decision facing a business manager of how much he can afford to pay in salary to his employees.[9] Although Professor Fuller goes on to develop alternative methods of solving these problems of polycentricity, the important point for present purposes is that problems of this sort are inherently unsuited to being resolved by means of adjudication. Relying as it does upon an arrangement of adversary argument aimed at presenting both sides of basically one-centered, two-sided issues, the adjudicative process is simply not equipped adequately to handle many centered problems of the type just described.

Bringing Professor Fuller's more generalized concepts to bear upon the question of the adaptibility of the adjudicative process to the fundamental reforms described above as being beyond the proper limits of court-made change, it is now possible to state the basis in principle for the foregoing conclusions. As long as the courts retain their restrictive approach with respect to the nature of relief available in cases of proven fraud, and as long as they adhere to the strict "on the face of the will" limitations imposed in admitting proof of mistake and its effects, the problems presented for adjudication thereunder will be essentially "unicentric" and therefore amenable to court-made resolution. Questions of whether a given will in whole or part has been produced by a fraudulent misrepresentation, for example, or whether a mistaken belief and its effect appear on the face of a particular instrument are essentially focussed and unicentric insofar as they call for a decision which almost always can be stated in a "yes-or-no" fashion. However difficult they may be to resolve in a given instance in light of radically contradictory evidence, they are phrased in such a manner as to admit of only a limited number of alternative solutions. In any event the will (or a separate portion thereof) either is or is not the product of fraud; the

[9] Fuller, supra note 8, at 38-39. Professor Fuller is careful to point out that it is not the presence of many parties interested in a particular problem which necessarily causes it to become polycentric, but rather the existence of many interrelated judgmental alternatives with respect to the issues ultimately presented for decision.

mistake either appears or does not appear in the language of the instrument. Viewed in this way and quite independent of their justification under the Statute of Wills, the traditional restrictions upon relief under existing law described earlier as major objectives for reform may be seen as factors which serve to maintain the important quality of unicentricity upon which rests the adjudicability of questions raised in cases brought thereunder.

However, were the courts to begin on their own substantially to relax or eliminate these restrictions in order to liberalize their approach to these cases in the manner suggested above—were they to begin to consider, based upon extrinsic evidence and for the purpose of reforming the will, questions of "what the testator would have done" in the absence of erroneous belief—they would for the first time face intricate questions whose polycentricity would clearly place such cases beyond the limits of adjudication. No longer would the court be asked simply "Did a fraudulent misrepresentation produce this will?" but also "What sort of a will would the testator have drafted had he not been in error?"[10] Occasionally there would arise a case in which uncontradicted proof would indicate exactly what the testator would otherwise have intended, and presumably such a case would lend itself appropriately enough to resolution by means of the adjudicative process. In the overwhelming majority of instances, however, the courts would be faced with proof not of specific, but only of general, would-be intent, leaving to adjudication the essentially polycentric, and therefore inappropriate, task of bridging the gap from proof of the testator's general inclinations to the specific expression of intent necessary to reform the will.[11] Without the necessary

[10] Of course, to some extent the willingness of courts of equity in cases of fraud to grant more positive relief by means of the constructive trust remedy (see pp. 390-95, Part I, supra) might be thought to represent a willingness on their part to face polycentric questions of would-be intent of the sort herein described as being unamenable to the adjudicative process. Further reflection will reveal, however, that the prerequisites to obtaining this equitable relief are designed to avoid any such difficulties. The constructive trust concept is rooted in notions of property ownership—the petitioner must be able to point to specific property which he claims to "own" in equity. This requirement effectively narrows the scope and nature of the court's inquiry. Part of the petitioner's burden in such a case is to present the court with an essentially unicentric problem for resolution by means of adjudication. An indication of this narrowing of the issues may be seen in the fact that the end result in almost every case of fraud preventing the execution of a will provision is a decree directing the heir or legatee to convey or pay over specific property outright to the successful petitioner.

[11] Interestingly enough, Professor Fuller suggests as an example of a polycentric problem a hypothetical case in which a father leaves a will which bequeaths a rather complicated estate "equally" to his two sons, without describing any method of apportionment. Without deciding whether a court would actually reach the difficult question of how to divide such an estate equally "in kind," Professor Fuller goes on to describe the intensely polycentric nature of the problem presented. The interesting point for our present purposes is that under existing law the court would almost certainly *avoid* the necessity of adjudicating such a problem in the first place. Either the will would be construed to require a sale of the assets and

guidelines and limitations upon inquiry, which would be difficult for the courts adequately to develop on a case-by-case basis, the adjudicative process would find itself at sea.

I believe the foregoing analysis to be an articulation, in somewhat more analytical terms than have been used traditionally, of the general feeling revealed in many court opinions that any shift judicially toward a more liberal approach to granting relief would result in opening a Pandora's Box of problems which the courts would find impossible rationally to resolve by means of adjudication.[12] It must be understood that I am not retreating at all from the criticisms advanced throughout this article that the courts are unjustifiably restrictive in many specific instances toward the question of the relief made available for proven mistake, especially mistakes in the inducement. Important and worthwhile changes in the rules in a number of these cases could, and should, be made by the courts. Nor am I suggesting that there is any consideration of policy which would prevent a more sweeping or fundamental shift in approach by the courts. However, I am suggesting that an inherent limitation upon the adjudicative process itself does exist which will prevent courts from accomplishing any meaningful change with respect to their basic approach to the general question of the relief ultimately to be granted based upon alleged erroneous beliefs of the testator. For the courts to undertake any significant shift in approach would, in the final analysis, be as unfortunate as it would be unlikely to occur.

D. *The Unlimited Potential for Reform by Statute*

It should by now be clear that the legislature is the proper forum in which to accomplish, initially at least, the type of general reform herein contemplated. The tasks of codification and clarification are uniquely suited to comprehensive treatment by statute. Especially in light of the degree to which important changes in this area have traditionally been accomplished through the piecemeal enactment of statutes dealing with circumstances of special sensitivity,[13] the legislature is the lawmaking body which should properly move to occupy the field. Most significant of the many factors dictating this conclusion, however, is the suitability

a division of the proceeds, or to authorize the exercise of a discretionary power of some sort by the personal representative; or the gift would be held to fail for indefiniteness insofar as it attempts an equal division of property in kind without supplying adequate criteria by which to make the division. As a practical matter, the parties would almost certainly be forced into a compromise agreement which the court could then give effect to in place of the will. Once the courts began to consider granting relief on a broad scale in cases of alleged erroneous belief, however, the type of problem envisioned by Professor Fuller would be precisely the type of problem courts would begin increasingly to face.

[12] See p. 323, note 29, Part I, supra.

[13] E.g., the so-called pretermitted heir statutes discussed pp. 409-13, Part I, supra.

of the legislature to handle the essentially polycentric problems of the testator's would-be intent which would be presented by any significant effort towards liberalizing the rules relating both to the proof of mistake and the nature of the relief to be granted from the proven effects of erroneous belief. It is perfectly obvious that the legislature will not be able to convene to decide each case on an individual basis. Instead, what is called for is legislation which would sufficiently reduce the polycentricity of the questions likely to be raised in these cases so that they might thereafter properly be decided by courts employing the process of adjudication. The role of the legislature may be described, from this point of view, as one of bridging the "unadjudicability gap" which might otherwise be created by a basic shift towards liberality in this area. Admittedly, the distinction between polycentric and unicentric problems is one of degree.[14] The task for statutory reform will be to reduce the polycentricity of questions of would-be intent to within tolerances acceptable to the adjudicative process.

The practical difficulty, of course, will be to achieve a sensible, workable set of guidelines for determining whether and to what extent erroneous beliefs of various kinds have affected the execution or revocation of wills. Some sort of limitations upon relief must be imposed as a means of turning the questions presented by the facts of a given case into essentially unicentric questions amenable to adjudication. And in addition to being workable and sensible, the approach taken by statute must be supportable in light of the underlying values reflected generally in our system of law and particularly in the Statute of Wills. The balance must, in the final analysis, be the proper balance.

E. *The Premises for Statutory Reform*

In an earlier discussion it was suggested that the problem here presented for determination is one of working out exceptions to the general rule establishing the legitimacy and inviolability of formally executed instruments. It has since been suggested that the legislature is the body most suited to working out a comprehensive approach, and further that certain objectives may be described toward which reform should be aimed. Before going on to consider a concrete proposal for accomplishing such reform by statute, it remains to state the policy considerations that will serve as the premises upon which will be based the suggested reforms which follow.

It will be recalled that the question raised here is one of the "How much is too much?" variety, relying for its ultimate resolution upon

[14] Fuller, supra note 8, at 39: "Now, if it is important to see clearly what a polycentric problem is, it is equally important to realize that the distinction involved is often a matter of degree."

conclusions with respect to underlying values. Assuming that relief for alleged mistake or fraud should not be denied except for reasons of policy, in the final analysis the need is for a criterion by which to judge the "reasonableness" of the restrictions placed upon such relief by present law or any change therein. I believe that the analysis of existing law contained in Part I of this article suggests the following criterion for making such a judgment: a court is justified in looking outside the will to evidence of erroneous belief and its effect whenever an indication of the likelihood of discovering such an erroneous belief is found to emanate from a source not subject to the dangers of abuse against which the will is supposed to be protected by the Statute of Wills. It will be observed that this statement does not purport to suggest what the "dangers" are which the Statute is supposed to guard against. If it becomes necessary later on to reach conclusions on this point, they will be reached. For the present, it will suffice to observe that at least two sources of such indications of error have traditionally been accepted by the courts as legitimate in this regard: the language of the will itself;[15] and extrinsic proof of a fraudulent misrepresentation affecting the will.[16]

II. A Suggested Statutory Departure

The statute contained in this section represents a tentative draft of legislation which I believe could serve as the starting point for major reform of existing law in this area. Because procedures in the probate of wills vary tremendously from jurisdiction to jurisdiction, it is impossible to suggest a single draft which would fit even a minority of jurisdictions without substantial modification. This statutory draft is aimed, therefore, at establishing a new and different approach upon which development may proceed in the future. Consistent with comments made earlier, it attempts a comprehensive codification of that which is believed to be valid and useful from past and present law, as well as much that may strike the reader as a rude departure from tradition. At the very least, it should stir thinking with respect to the question of whether and to what extent the conservatism of the traditional approach to mistake and fraud in wills is unavoidable.

A few words concerning the format employed in presenting the statute might be helpful. Comments accompany each section or subsection, wherever appropriate, and are designed to explain the purpose and function of each component of the statutory scheme and to relate it to prior law. An effort will be made to keep these comments as editorially neutral as possible, in order to permit the reader initially to formulate his own reactions to the suggestions for reform being made. Following

[15] See, e.g., pp. 322, 356-58, Part I, supra.
[16] Cf. pp. 385-88, Part I, supra.

the statutory draft arguments for and against the proposed statute will be considered in greater depth, accompanied by further explanations of a more general nature concerning how the statute relates to, and attempts to change, existing law. The statute is set forth in its entirety at page 544.

FIRST DRAFT OF A STATUTE TO PROVIDE FOR THE REFORMATION OF WILLS IN CERTAIN CASES OF TESTAMENTARY ERROR

SECTION 1. PURPOSE OF ACT. THE PURPOSES OF THIS ACT ARE TO PROVIDE A FLEXIBLE REMEDY OF REFORMATION IN CERTAIN CASES OF ERRONEOUS BELIEF AFFECTING THE EXECUTION AND REVOCATION OF WILLS, AND TO GIVE EFFECT AS FAR AS POSSIBLE IN SUCH CASES TO WHAT IT MAY BE SHOWN OR PRESUMED THAT THE TESTATOR WOULD HAVE INTENDED IN THE ABSENCE OF ERRONEOUS BELIEF; AND IT IS THE LEGISLATIVE INTENT THAT THIS ACT BE LIBERALLY CONSTRUED SO AS TO EFFECTUATE THESE PURPOSES.

SECTON 2. DEFINITIONS AND USE OF TERMS. WHEN USED IN THIS ACT:

(a) "ADVERSELY AFFECTED" PERSON INCLUDES ANY PERSON WITH AN INTEREST IN THE TESTAMENTARY ESTATE OF THE TESTATOR, WHETHER AS HEIR, LEGATEE OR DEVISEE, WOULD-BE LEGATEE OR DEVISEE, OR IN SOME OTHER CAPACITY, WHICH INTEREST MAY HAVE BEEN ELIMINATED, ABRIDGED OR IN ANY WAY DIMINISHED BY AN ERRONEOUS BELIEF OF THE TESTATOR ALLEGED IN CONFORMANCE WITH THE PROVISIONS OF THIS ACT TO HAVE MATERIALLY AFFECTED THE TESTATOR'S WILL.

Comment: It will be noted that the phrase "adversely affected" person is considerably broader than the phrase "interested person" commonly used under existing law to refer to persons who would take upon an adjudication that a will is invalid.[17] A petitioner not an heir, legatee or devisee would nevertheless be an adversely affected person within the meaning of this provision, for example, were he to allege under subsection (d) of section 3[18] that an erroneous belief of the testator appearing expressly in the will prevented the inclusion in the will of a dispositive provision in his favor. The "or in some other

[17] For a discussion of the meaning normally attributed to the term "interested person," see generally Atkinson, Wills § 99 (2d ed. 1953) (hereinafter cited as Atkinson); 3 Bowe-Parker, Page on Wills §§ 26.52, 26.53 (New Rev. 1961) (hereinafter cited as Bowe-Parker). See M.P.C. § 3(k), p. 43; Annot., 104 A.L.R. 359 (1936).

[18] See pp. 480-81, Part II, infra.

capacity" language should include persons who claim an interest by the operation of so-called "anti-lapse" statutes.[19]

(b) "AMBIGUITY" DENOTES THE PHENOMENON WHEREBY DESCRIPTIVE LANGUAGE IN A WILL MAY BE APPLIED WITH SUBSTANTIALLY EQUAL FACILITY TO A GREATER NUMBER OF PERSONS, OBJECTS OR OTHER REFERENTS THAN THE TESTATOR APPEARS FROM THE WORDING OF THE WILL TO HAVE INTENDED AND IN WHICH:

(1) THE CLASS OF REFERENTS TO WHICH SUCH DESCRIPTIVE LANGUAGE MAY BE APPLIED IS NOT UNREASONABLY LARGE; AND

(2) THE DESCRIPTIVE LANGUAGE IS SUFFICIENTLY DEFINITE TO PERMIT A DECISION TO BE MADE CONCERNING WHETHER ANY GIVEN PERSON, OBJECT OR OTHER ALLEGED REFERENT IS A MEMBER OF THE CLASS OF REFERENTS TO WHICH SUCH LANGUAGE MAY BE APPLIED.

Comment: The source and the justification of this definition of the term "ambiguity" are contained in a discussion in Part I of this article.[20] Simply stated, the attempt here is to establish a single, workable term to replace the confusing assortment of terms presently employed by the courts in treating cases of what were earlier referred to as mistakes in the expression.

(c) "CHILDREN" INCLUDES ADOPTED CHILDREN, BUT DOES NOT INCLUDE GRANDCHILDREN OR MORE REMOTE DECENDANTS, NOR ILLEGITIMATE CHILDREN.

Comment: This is substantially the definition contained in § 3(a) of the Model Probate Code.[21]

(d) "DEVISEE" DENOTES A PERSON ENTITLED TO REAL OR PERSONAL PROPERTY UNDER A WILL.

Comment: This is substantially the definition contained in § 3(c) of the Model Probate Code.[22]

(e) "ERRONEOUS BELIEF" INCLUDES BELIEFS RELATING TO THE EXISTENCE, NONEXISTENCE OR LEGAL EFFECT OF FACTS EXTRINSIC TO THE WILL AS WELL AS BELIEFS RELATING TO THE FORM, MEANING OR LEGAL EFFECT OF THE WILL ITSELF.

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[19] For a discussion of these statutes see generally Atkinson § 140, at 779-83; 6 Bowe-Parker §§ 50.10-50.13.

[20] See pp. 370-75, Part I, supra.

[21] M.P.C. § 3(a), p. 42.

[22] M.P.C. § 3(c), p. 42.

Comment: No distinction whatever is made in this Act between "errors of fact" and "errors of law,"[23] or between "errors in the inducement" and "errors in the expression" except as the various grounds for relief may indirectly suggest the latter distinction.[24]

(f) "ERRONEOUS BELIEF OF THE TESTATOR" INCLUDES ERRONEOUS BELIEFS OF PERSONS OTHER THAN THE TESTATOR TO THE EXTENT TO WHICH THE TESTATOR RELIES UPON SUCH BELIEFS IN PERFORMING AN ACT OF EXECUTION OR REVOCATION OF HIS WILL.

Comment: This rather obvious extension of the concept of erroneous belief will apply in cases where the testator has delegated to another person, most often an attorney, the task of preparing a will for formal execution.[25]

(g) "HEIRS" DENOTES THOSE PERSONS, INCLUDING THE SURVIVING SPOUSE, WHO ARE ENTITLED UNDER THE STATUTES OF INTESTATE SUCCESSION TO THE REAL AND PERSONAL PROPERTY OF A DECEDENT UPON HIS DEATH INTESTATE.

Comment: This is substantially the definition contained in § 3(j) of the Model Probate Code.[26]

(h) "ISSUE" OF THE TESTATOR INCLUDES ALL LAWFUL LINEAL DESCENDANTS OF THE TESTATOR IN EVERY DEGREE INCLUDING PERSONS ADOPTED BY LAWFUL LINEAL DESCENDANTS OF THE TESTATOR.

Comment: Compare § 3(i) of the Model Probate Code.[27]

(i) "LEGATEE" DENOTES A PERSON ENTITLED TO PERSONAL PROPERTY UNDER A WILL.

Comment: This is substantially the definition contained in § 3(o) of the Model Probate Code.[28]

(j) "PERSON" INCLUDES NATURAL PERSONS AND CORPORATIONS.

Comment: This is substantially the definition contained in § 3(s) of the Model Probate Code.[29]

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[23] See p. 312, note 16, Part I, supra.
[24] For a discussion of the distinction between "errors in the inducement" and "errors in the expression," see pp. 306-13, Part I, supra. An example of the way in which the Act may indirectly suggest this distinction is found in subsection (e) of section 3, p. 481, infra, wherein the presence in the will of an "ambiguity"—which in most instances will be produced by a mistake in the expression—is made a basis for seeking reformation of the will.
[25] Cf. p. 310, Part I, supra.
[26] M.P.C. § 3(j), p. 43.
[27] M.P.C. § 3(l), p. 43.
[28] M.P.C. § 3(o), p. 43.
[29] M.P.C. § 3(s), p. 44.

(k) "SPECIAL OBJECT OF THE TESTATOR'S BOUNTY" INCLUDES PERSONS WITH WHOM THE TESTATOR HAD A CLOSE PERSONAL RELATIONSHIP AND TO WHOM OR FOR WHOSE BENEFIT, BECAUSE OF THAT RELATIONSHIP, IT MAY BE CONCLUDED THAT THE TESTATOR WOULD HAVE INTENDED SOME PORTION OF HIS TESTAMENTARY ESTATE TO PASS BY WILL AT HIS DEATH NOTWITHSTANDING AN ERRONEOUS BELIEF OF THE TESTATOR WHICH MAY BE FOUND TO HAVE MATERIALLY AFFECTED A PROVISION IN THE TESTATOR'S WILL FOR THE BENEFIT OF SUCH PERSON.

Comment: This is one of the most important innovations contained in this statutory draft insofar as it plays a central role in the attempt hereinafter made to bridge the "unadjudicability gap" in connection with questions of would-be intent.[30] It will be noted that the term is not confined in any way to members of the testator's family, and would even include corporations within the meaning of the term "person" established in subsection (j) of this section 2.

(l) "TESTAMENTARY ESTATE" OF THE TESTATOR INCLUDES ALL OF THE REAL AND PERSONAL PROPERTY WITH RESPECT TO WHICH THE TESTATOR HAD AT HIS DEATH A POWER OF TESTAMENTARY DISPOSITION AND WHICH EITHER:

(1) PASSES, SUBJECT TO ADMINISTRATION AND THE RIGHTS OF CREDITORS IF ANY, IN ACCORDANCE WITH EITHER THE INTESTATE SUCCESSION STATUTES APPLICABLE AT THE TESTATOR'S DEATH OR A PROVISION IN THE TESTATOR'S WILL; OR

(2) IS REFERRED TO IN A PROVISION IN THE TESTATOR'S WILL WHICH SPECIFICALLY ATTEMPTS TO DISPOSE OF SUCH PROPERTY.

Comment: The concept of the testamentary estate includes everything normally included in the concept of the probate estate of a decedent, as well as a few additions which are completely unique to this Act.[31] To the extent that the testator possesses a power of appointment by will over property and exercises that power, such property will be included in his testamentary estate. Even if he does not actually exercise such a power the property will nevertheless be included if he attempts to exercise it or if the gift in default of appointment causes such prop-

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[30] See subsection (b)(1) of section 11, pp. 503-04, Part II, infra.

[31] For a general discussion of the concept of the probate estate see Atkinson § 116. The policy reflected in subsection (1)(2) of this section 2 is that whenever the testator attempts to dispose of property over which he had a power of disposition, the property should be taken into account in reforming the will whether or not the attempted disposition is effective. See, e.g., subsection (b)(2) of section 11, pp. 505-06, infra and comments thereto.

erty to pass according to some provision in the testator's will or in accordance with the intestate succession statute.

(m) "UNNATURAL DISPOSITION" REFERS TO A DISPOSITION OF THE TESTAMENTARY ESTATE OF A TESTATOR LEAVING A SPOUSE OR ISSUE, OR BOTH, SURVIVING WHICH IS SUBSTANTIALLY DISSIMILAR TO THE DISPOSITION WHICH WOULD HAVE BEEN MADE FOR THE BENEFIT OF THE TESTATOR'S SPOUSE OR ISSUE, OR BOTH, HAD THE TESTATOR DIED INTESTATE OWNING THE PROPERTY CONTAINED IN SUCH TESTAMENTARY ESTATE.

Comment: The concept of an unnatural disposition of the testamentary estate is a synthesis of the old and the new. Courts and commentators have long referred to "unnatural wills" and "unnatural dispositions" in a vague way aimed more at social commentary than supplying relief.[32] Most earlier definitions attempt to judge a disposition to be unnatural in light of all the surrounding circumstances, including the views and feelings of the testator and the peculiar needs of his family. The definition adopted for purposes of this Act, however, establishes a much clearer and more concrete test for determining whether a disposition is unnatural—*i.e.* whether with respect to the testator's family it is substantially dissimilar to what would have been achieved under applicable intestate statutes.

(n) "WILL" INCLUDES CODICIL; IT ALSO INCLUDES A TESTAMENTARY INSTRUMENT WHICH MERELY APPOINTS AN EXECUTOR AND A TESTAMENTARY INSTRUMENT WHICH MERELY REVOKES OR REVIVES ANOTHER WILL.

Comment: This is substantially the definition contained in § 3(x) of the Model Probate Code.[33]

(o) THE SINGULAR NUMBER INCLUDES THE PLURAL: AND THE PLURAL NUMBER INCLUDES THE SINGULAR.
(p) THE MASCULINE GENDER INCLUDES THE FEMININE AND NEUTER.

SECTION 3. GROUNDS FOR RELIEF. **UPON OR AFTER THE FILING OF A PETITION FOR THE PROBATE OF AN INSTRUMENT AS THE LAST WILL OF A TESTATOR, ANY PERSON WHO QUALIFIES UNDER SECTION 4 OF THIS ACT (OR THE COURT IN THE CIRCUMSTANCES SET FORTH IN SECTION 5) MAY, WITHIN THE TIME LIMITS ESTABLISHED IN SECTION 6, PETITION THE COURT FOR RELIEF**

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[32] See p. 325, note 33, Part I, supra.
[33] M.P.C. § 3(x), p. 44.

UNDER THIS ACT UPON ONE OR MORE OF THE FOLLOWING GROUNDS:

Comment: References to "the court" in this section and throughout this tentative statutory draft are intended to refer to whatever court in a given jurisdiction would ordinarily handle more complex phases of wills litigation of the sort contemplated hereunder.[34] Procedures vary a great deal in this area, and therefore it is necessary to keep this draft general on this point. In order properly to raise questions under this Act it is, of course, necessary that there be an instrument filed for admission to probate as the last will of the testator. Presumably this would include holographic[35] or even nuncupative wills reduced to writing,[36] and would permit relief to be sought in connection with wills proven under so-called lost will statutes.[37] However, it does prevent a petition

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[34] See generally Simes & Basye, The Organization of the Probate Courts in America, 42 Mich. L. Rev. 965, 43 Mich. L. Rev. 113 (1944). An idea of the wide variety of court systems may be suggested by the following break-down: (1) jurisdictions in which the contestant is permitted to elect which court among several in which to oppose probate, e.g., Alabama, New Jersey and New Mexico; (2) jurisdictions in which contests are removed from a court or register of probate to a court of superior jurisdiction, e.g., Delaware, North Carolina, Pennsylvania and Virginia; (3) jurisdictions in which contests are handled in a probate court which is unified and merged with a court of general jurisdiction, e.g., California, Montana, Utah and Wyoming; (4) jurisdictions in which contests are brought in courts of inferior jurisdiction with a trial de novo on appeal at the district court level, e.g., Kentucky, Rhode Island, Texas and Vermont; and (5) jurisdictions in which contests are brought in separate courts of probate of superior jurisdiction but not merged with other courts of general jurisdiction, e.g., Massachusetts.

[35] For cases in which questions of fraud and undue influence are raised in connection with the contest of holographic wills see Stead v. Curtis, 191 F. 529 (9th Cir. 1911); In re Clark's Estate, 55 Cal. App. 2d 85, 129 P.2d 969 (1942). For cases in which these issues were not raised but in which the court suggests in dictum that fraud and undue influence may be raised in opposition to probate of holographic wills see In re Tyrrel's Estate, 17 Ariz. 418, 153 P. 767 (1915); Chambers v. Younes, 399 S.W.2d 655 (Ark. 1966). For a general treatment of holographic wills see Atkinson § 75; 2 Bowe-Parker §§ 20.1-20.12.

[36] Because of the relative scarcity of reported decisions involving nuncupative wills, no cases have been found raising the question of contesting a nuncupative will found by the court to satisfy the prima facie requirements for allowance. All of the cases, in other words, deal with the preliminary question not here at issue of whether the will meets the strict requirements of the statute. See, e.g., In re Mason's Will, 121 Misc. 142, 200 N.Y.S. 901 (1923) (question of testator's death or apprehension of same); In re Estate of Morton, 428 P.2d 725 (Wyo. 1967) (question of testator's incompetency). For a general treatment of nuncupative wills see Atkinson § 76; 2 Bowe-Parker §§ 20.13-20.24; Comment, The Nuncupative Will, 18 Baylor L. Rev. 77 (1966).

[37] Once again, most of the cases arising under lost will statutes involve questions of the proponents satisfying the prima facie requirements for admission to probate. See, e.g., Wright v. McDonald, 361 Mo. 1, 233 S.W.2d 19 (1950); In re Fox's Will, 84 Ohio App. 135, 85 N.E.2d 585 (1948). For a general treatment of lost will statutes see Atkinson § 97, at 507-08; 3 Bowe-Parker §§ 27.1-27.15. See also Note, Probate of Lost Wills in New England, 42 B.U.L. Rev. 338 (1962); Note, Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions, 32 Cal. L. Rev. 221 (1944); Evans, The Probate of Lost Wills, 24 Neb. L. Rev. 283 (1945).

for relief where mistake or fraud has allegedly completely prevented the execution of a will in the first place. The reasons in policy for this important limitation upon the reach of the statute are echoed in a later section.[38]

(a) THAT THE EXECUTION OR REVOCATION, OR BOTH, OF THE WILL IN WHOLE OR PART HAS BEEN MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR PRODUCED BY A MISREPRESENTATION MADE TO THE TESTATOR BY SOME OTHER PERSON, WHETHER SUCH MISREPRESENTATION WAS MADE FRAUDULENTLY, INNOCENTLY, OR OTHERWISE; OR,

Comment: This subsection (a) of section 3 represents in part a codification of existing law—*i.e.* a reaffirmation of fraudulent misrepresentation as a basis for questioning the probate of a will;[39] and in part a significant change from existing law—*i.e.* the extension of similar treatment to cases of innocent misrepresentation. The justification in principle for this latter change is suggested in Part I of this article.[40] The "or otherwise" language is intended to eliminate difficulty in any case where the exact nature of the misrepresentation is not clear. It should be noted that "misrepresentation" is not a defined term under section 2. It is believed that any attempt statutorily to impose a definition would create more problems than it would solve, and that the courts will be able to draw on a rich prior experience in giving meaning to the term.[41] The generality of the language in this subsection should include in its sweep all eight types of fraud analyzed in Part I.

(b) THAT THE EXECUTION OR REVOCATION, OR BOTH, OF THE WILL IN WHOLE OR PART HAS BEEN MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR IN SUCH A MANNER AS TO PRODUCE AN UNNATURAL DISPOSITION OF THE TESTAMENTARY ESTATE OF THE TESTATOR; OR,

Comment: This subsection (b) of section 3 represents a marked departure from existing law insofar as it establishes the unnaturalness of the dispositional scheme as an opening wedge toward obtaining relief. Up until the present time, the courts have professed to apply the general rule that the unnaturalness or unreasonableness of a will is not enough, in and of itself, to show the testator to have been mistaken or to permit

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[38] See pp. 514-15, Part II, infra. Essentially, the point here is that where no will has ever been executed, there is nothing for the court to reform.

[39] For a discussion of cases of fraudulent misrepresentation see pp. 382-403, Part I, supra. It will be noted that the misrepresentation under subsection (a) of section 3 may be made by "some other person," whether or not that person benefits from the misrepresentation. Cf. note 137 and accompanying text, Part II, infra.

[40] See p. 406, Part I, supra.

[41] See pp. 384, 406, Part I, supra.

extrinsic evidence to be admitted in proof thereof.[42] Under the traditional approach to cases of alleged mistake of this type, however unnatural or unreasonable the scheme of disposition might be, if the will can be given effect it will be given effect. While this subsection (b) does not purport to *establish* the existence of an erroneous belief in a given case (section 3 merely sets forth the grounds upon which relief may ultimately be based, and the burden is upon the petitioner under subsection (b) of section 9[43] to prove the material effect of such erroneous belief clearly and convincingly), in light of later sections of this Act which encourage the free admissibility of evidence in all cases including mistake[44] and which establish presumptions of erroneous belief in several important instances of unnatural disposition,[45] it is fair to say that this subsection (b) of section 3 represents a sharp break with the "closed door" policy of the past. It is important to recognize in connection with this subsection (b) of section 3 that, unlike subsection (a) just preceding, here the source of the erroneous belief is not at issue. Any one or more of the eight basic types of mistake analyzed in Part I of this article may be proven under this subsection (b) so long as it produces an "unnatural disposition"[46] of the "testamentary estate."[47]

(c) THAT THE REVOCATION BY PHYSICAL ACT OF THE WILL IN WHOLE OR PART HAS BEEN PRODUCED BY AN ERRONEOUS BELIEF OF THE TESTATOR; OR,

Comment: This subsection (c) of section 3 is a straightforward codification of the present majority position of the courts that questions of erroneous belief may be raised quite freely in connection with physical act revocation.[48] The rationale upon which this traditional liberality has

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[42] See p. 325, note 33, Part I, supra. Because it is anticipated that this subsection (b) of section 3 will have its most vital effect upon cases of mistake under the Act, the comment is couched in terms of mistake. However, it should be recognized that this subsection (b) is not limited to cases of mistake, but would cover cases of misrepresentation as well. The narrower "mistake" terminology is rejected in favor of the broader "erroneous belief" terminology in order to permit, if not to encourage, judicial recognition of the cumulative effect of several different grounds for relief in appropriate cases. For example, where it is alleged that a misrepresentation has materially affected the will in such a manner as to produce an unnatural disposition, the availability of the grounds established in both subsection (a) and subsection (b) of section 3 might aid the petitioner in carrying the burden of proof imposed in subsection (b) of section 9, p. 490, Part II, supra.

[43] See p. 490, Part II, infra.

[44] See subsection (c) of section 9, pp. 490-92, Part II, infra.

[45] See subsection (a) (1) of section 11, pp. 497-99, Part II, infra.

[46] See subsection (m) of section 2, p. 476, Part II, supra.

[47] See subsection (1) of section 2, p. 475, Part II, supra.

[48] See p. 333, notes 59, 60, Part I, supra. Of course the Act must be read as a whole to reach this conclusion. It is not subsection (c) of section 3 itself which establishes the free admissibility of evidence to prove erroneous beliefs in connection with physical act revocations. Cf. subsection (c) of section 9, pp. 490-92, infra. However, as one of the grounds for relief under the Act, subsection (c) of section 3 supplies the basis upon which operate the other sections of the Act.

been based is that such physical acts of revocation are inherently ambiguous, and that extrinsic evidence must always be admitted to explain the intent of the testator. It will be observed that here the erroneous belief must have "produced" rather than "affected" the act of revocation. It is only where an act of cancellation, tearing, burning or other mutilation has been performed by the testator that any evidence whatever of the effects of the erroneous belief may be said to "appear" on the legal face of the instrument. Where the sufficiency of the physical act of revocation is alleged to have been prevented by the erroneous belief of the testator, the springboard to extrinsic inquiry is not present and the supporting rationale breaks down.[49] Similar policy reasons have dictated a limitation in section 12[50] upon the relief available on this ground, a further reflection in this statute of the feeling that physical act revocations are simply too informal, in and of themselves, to serve as the basis for any widespread or sweeping extension of relief beyond that available under existing law.

As for the practical operation of this subsection (c) of section 3, it is anticipated that invocations of the doctrine of "dependent relative revocation" in cases involving revocation by physical act will hereafter be based upon this ground for relief.[51] It should be noted also that the "in whole or part" language should be deleted in any jurisdiction which does not recognize partial revocation by physical act.[52]

(d) THAT THE EXECUTION OF THE WILL IN WHOLE OR PART HAS BEEN MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR, WHICH ERRONEOUS BELIEF CLEARLY APPEARS, TOGETHER WITH AN INDICATION OF ITS EFFECT UPON THE WILL, EXPRESSLY OR IMPLIEDLY IN THE WILL WHEN READ IN LIGHT OF SURROUNDING CIRCUMSTANCES; OR,

Comment: The ground for relief in this subsection (d) affirms in general statutory language what could be described as a basic theme running throughout the entire body of law governing mistake and fraud in wills and developed extensively in Part I of this article. With the exception of the ground of misrepresentation established in subsection (a) of this section 3, all of the other grounds for relief under this Act may be said to involve, to some degree, the phenomenon described in

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[49] See p. 346, Part I, supra. This more limited approach under subsection (c) of Section 3 to cases involving physical act revocations may be contrasted to that taken in connection with the ground for relief established in subsection (a) of section 3. Where a misrepresentation may be proved to have prevented the revocation of a will in whole or part, relief would be available under subsection (a) notwithstanding the limitation contained in subsection (c).

[50] See pp. 510-14, Part II, infra.

[51] See pp. 332-34, Part I, supra.

[52] See generally Atkinson § 86, at 444-45.

this subsection (d) of "appearing in the will." The "unnatural disposition" of subsection (b), for example, may be viewed as a manifestation upon the face of the will of the testator's erroneous belief. The limitation in subsection (c) to cases where an act of revocation has been produced by an erroneous belief is similarly based upon the necessity that some evidence of the error appear in the will itself. And it is even clearer that subsection (e) of this section 3, with its phenomenon of "ambiguity," reflects this theme of some evidence of error "appearing on the face of the will."

The type of case in which this subsection (d) may supply a separate and unique ground for relief will be one in which the testator accompanies his dispositions with statements indicating an erroneous belief affecting the will;[53] or in which the context of the instrument strongly suggests the unintentional omission of a provision[54] or an error with respect to the identity of the instrument signed and executed by the testator.[55] The fact that the ground for relief here established is more general than the others, or that some overlap between and among them may occur, creates no problem whatever in light of the identical nature of the relief available regardless of what the ground for relief may be.[56]

It should be noted that under subsection (a)(2) of section 11[57] a presumption of erroneous belief appearing on the face of the will is created in certain cases of the failure of dispositions due to a limitation upon the power of testation. In light of that presumption and its express reference to clauses of revocation, it is anticipated that the doctrine of dependent relative revocation by subsequent instrument will hereafter be applied in connection with this subsection (d) of section 3.[58]

(e) THAT THE EXECUTION OF THE WILL IN WHOLE OR PART HAS BEEN MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR IN SUCH A MANNER AS TO PRODUCE AN AMBIGUITY IN CONNECTION WITH THE DESCRIPTIVE PORTIONS OF THE WILL ALLEGED TO HAVE BEEN AFFECTED BY SUCH ERRONEOUS BELIEF.

Comment: The ground for relief established in this subsection (e) reaffirms an existing case-law approach which underwent intensive analysis in Part I of this article.[59] Traditionally it has been employed almost exclusively in the treatment of cases of mistake in the expression

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[53] See pp. 323-24, 341-44, Part I, supra.
[54] See p. 368, Part I, supra.
[55] See p. 369, Part I, supra.
[56] As was pointed out earlier, p. 479, note 42, Part II, supra, this overlap may even develop into an important feature of the statutory scheme.
[57] See pp. 499-501, Part II, infra.
[58] For a discussion of these cases under existing law see pp. 334-38, Part I, supra.
[59] See pp. 356-63, 369-80, Part I, supra.

both causing and preventing the execution of wills. In Part I of this article, one of the criticisms of existing law in this area was that terminology has become so complex and multitudinous as to be confusing and oftentimes useless as an aid to proper analysis. The attempt here is to establish a single concept under the term "ambiguity," defined in section 2,[60] with which to treat these cases consistently and yet with maximum opportunity for flexibility and growth. To the extent to which the presumptions of intent established in subsection (a)(3) of section 11[61] permit or encourage the courts to find "ambiguities" where none might otherwise be found, it is hoped that this subsection (e) of section 3 will have supplied the basis for a meaningful extension of relief in cases of probable misdescription.[62]

SECTION 4. PERSONS WHO MAY ASSERT VARIOUS GROUNDS FOR RELIEF. **ANY PERSON SURVIVING THE TESTATOR AND ADVERSELY AFFECTED BY AN ALLEGED ERRONEOUS BELIEF OF THE TESTATOR, OR THE SUCCESSOR IN INTEREST OF SUCH ADVERSELY AFFECTED PERSON, MAY PETITION FOR RELIEF UNDER THIS ACT FROM THE MATERIAL EFFECTS OF SUCH ERRONEOUS BELIEF UPON THE EXECUTION OR REVOCATION, OR BOTH, OF THE TESTATOR'S WILL**

Comment: Under the definition contained in subsection (a) of section 2,[63] a person is "adversely affected" whenever he claims an interest in the testamentary estate which has in any way been eliminated, abridged or diminished due to the effects of the alleged erroneous belief of the testator. The requirement that the petitioner survive the testator is included to prevent confusion under this Act in cases involving the lapse of gifts in the will.[64] The "successor in interest" provision is included in this section 4 and the subsections which follow in order to avoid any implication that the rights created by this Act are personal to the petitioner in the sense that surviving the testator, the petitioner's subsequent death would terminate them.

PROVIDED, HOWEVER, THAT
(a) ONLY THOSE ADVERSELY AFFECTED PERSONS SURVIVING THE TESTATOR WHO ARE HEIRS OF THE TESTA-

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[60] See subsection (b) of section 2, p. 473, Part II, supra.
[61] See pp. 501-02, Part II, infra.
[62] For a discussion leading to the conclusion that courts are in fact extending relief under existing law in these cases of probable misdescription, see pp. 360-63, Part I, supra.
[63] See pp. 472-73, Part II, supra.
[64] The point here is simply that in cases where an erroneous belief has allegedly prevented the inclusion of a provision in favor of a person who has predeceased the testator, no relief will be available under this Act unless the petitioner is someone surviving the testator who can claim under the applicable "anti-lapse" statute to be an "adversely affected person" within the meaning of that term established in subsection (a) of section 2. See pp. 472-73, note 17, Part II, supra.

TOR OR WHO ARE DEVISEES OR LEGATEES UNDER A PRIOR WILL OF THE TESTATOR, OR THE SUCCESSORS IN INTEREST OF SUCH ADVERSELY AFFECTED PERSONS, MAY ASSERT THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (a) of SECTION 3; AND

Comment: It will be noted that the persons described in this subsection (a) of section 4 are those who in most jurisdictions are referred to as "interested parties"—*i.e.* persons who may contest a will.[65] It should be further noted that the ground established in subsection (a) of section 3 and referred to in the present subsection, along with the ground for relief established in subsection (b) of section 3, is very similar to, and in large measure codifies certain of the grounds for contest under existing law.[66] No change will have been affected by the Act, therefore, with respect to the question of who may raise grounds for relief under this Act which would, under existing law, be considered a "contest" of the will. It might also be noted in the present context that these same grounds established in subsections (a) and (b) of section 3 should be the only grounds under the Act assertion of which brings into operation the typical "anti-contest" clause in a will.[67]

(b) ONLY SUCH OF THE TESTATOR'S SURVIVING SPOUSE OR ISSUE, OR BOTH, WHO ARE HEIRS OF THE TESTATOR AND WHO ARE ADVERSELY AFFECTED, OR THEIR SUCCESSORS IN INTEREST, MAY ASSERT THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (b) OF SECTION 3.

Comment: Under the definition of "unnatural disposition"[68] and "adversely affected persons"[69] contained in section 2 the only persons adversely affected by an erroneous belief of the sort referred in subsec-

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[65] See p. 471, note 16, Part II, supra.

[66] A distinction is here introduced between subsections (a), (b) and (c) of section 3, on the one hand, and subsections (d) and (e) of section 3, on the other, which will carry forward throughout much of the discussion to follow. The first three subsections establish grounds for questioning the will which are basically negative in posture, most often being advanced to defeat rather than uphold the terms of the instrument in question. See generally Atkinson § 98, at 517; 3 Bowe-Parker §§ 26.72-26.74; Annot. 69 A.L.R. 1129 (1930). The last two subsections, in contrast, involve grounds which most often will be used to give meaning to the language of the testator and in that sense uphold the terms of the will. See generally Atkinson § 146; 4 Bowe-Parker §§ 30.1, 30.2.

[67] To the extent that petitions for relief under subsections (d) and (e) of section 3 are in the nature of petitions for the construction of the will, they should not be considered "contests" of the will within the meaning of such clauses. See Browder, Testamentary Conditions Against Contest Re-Examined, 49 Colum. L. Rev. 320 (1949); Browder, Testamentary Conditions Against Contest, 36 Mich. L. Rev. 1066, 1078 (1938); Goddard, Forfeiture Conditions in Wills as Penalty for Contesting Probate, 81 U. Pa. L. Rev. 267, 278 (1933). See generally Atkinson § 82, at 412; 5 Bowe-Parker § 44.29, at 473.

[68] See subsection (m) of section 2, p. 476, Part II, supra.

[69] See subsection (a) of section 2, pp. 472-73, Part II, supra.

tion (b) of section 3 will, properly viewed, be those described in this subsection (b) of section 4.

SECTION 5. CERTAIN QUESTIONS WHICH MAY BE CONSIDERED BY THE COURT ON ITS OWN MOTION. **WHENEVER THE COURT IN ITS DISCRETION DETERMINES THAT A QUESTION OF FACT OR LAW IN CONNECTION WITH THE GROUNDS FOR RELIEF ESTABLISHED IN SUBSECTIONS (d) OR (e), OR BOTH, OF SECTION 3 SHOULD BE RESOLVED PRIOR TO THE ASSERTION BY THE PERSONS ADVERSELY AFFECTED OF THE GROUNDS CONTAINED IN THOSE SUBSECTIONS, THE COURT MAY, AFTER CAUSING SUCH NOTICE TO BE GIVEN AS THE COURT IN ITS DISCRETION DETERMINES TO BE NECESSARY, CONSIDER SUCH QUESTION ON ITS OWN MOTION.**

Comment: As sections 6[70] and 8[71] and the comments appended thereto will reveal, most often the grounds for relief established in subsections (d) and (e) of section 3 on its own motion. The provision for at a later point in the proceedings, since they are not likely to involve anything in the nature of a will contest. There may be circumstances in a particular case, however, which make it appropriate to treat these questions early, perhaps to avoid later duplication of proof of the same fact patterns. In order to deal adequately with the problem of timing, the court is given a discretionary power to raise questions under subsections (d) and (e) of Section 3 on its own motion. The provision for additional notice in the court's discretion is necessitated by the fact that the phrase "adversely affected persons" is a much broader term under the definition in section 2 than "interested parties" under existing law.[72] Additional notice may be necessary, therefore, if the persons adversely affected by an erroneous belief under subsections (d) and (e) of section 3 have not already received notice at probate as parties interested in the estate.[73]

SECTION 6. TIME LIMITS UPON THE ASSERTION OF VARIOUS GROUNDS FOR RELIEF. **EXCEPT UPON A SHOWING THAT WOULD SUPPORT A REVOCATION OF THE DECREE, IF ANY, THE DATE OF WHICH IN EACH INSTANCE MAY SERVE TO MEASURE THE FOLLOWING TIME LIMITS:**

Comment: This section 6 is not intended to change existing practices with respect to the opening up of decrees which may, under present

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[70] See pp. 484-86, Part II, infra.
[71] See pp. 487-88, Part II, infra.
[72] See p. 481, note 16, Part II, supra.
[73] It should be observed that except for this section 5 and an "additional notice" provision in section 8, this draft of the statute contains no general notice provision of its own. It is anticipated, therefore, that the general notice provisions relating to the filing of petitions for allowance of wills to probate will continue to operate to require notice to be given in these cases.

law, measure the time periods described in each of the following subsections.[74]

(a) NO RELIEF SHALL BE GRANTED UPON THE GROUNDS ESTABLISHED IN SUBSECTIONS (a), (b) OR (c) OF SECTION 3 UNLESS THE PETITION ASSERTING SUCH GROUNDS IS FILED BY AN ADVERSELY AFFECTED PERSON OR HIS SUCCESSOR IN INTEREST BEFORE THE EXPIRATION OF THE PERIOD DURING WHICH, UNDER [EXISTING LAW] SUCH PERSONS MIGHT HAVE CONTESTED THE ADMISSION OF THE WILL TO PROBATE; AND

Comment: Of all the sections contained in this tentative statutory draft, this section 6 is the one most difficult to phrase in such a way as to make it apply sensibly to existing law in all jurisdictions. It would be much easier simply to refer to existing statutes or rules of court establishing the time limits here more generally referred to. Following through on the theme introduced in the comments to section 4, a distinction is here being made between those grounds for relief under the statute which are in the nature of will contests and those which are not. The conclusion here reached is that the former, in keeping with existing practices, should be raised relatively early in the proceedings.

One important change worked by this section 6 relates to the time during which a child may assert his rights as a pretermitted heir. Under existing law, an omitted child is often given a considerably longer period during which he may assert a claim as a pretermitted heir than the period during which he may contest the will.[75] Because the present statutory draft treats his claim as an attack upon the will—which, given its theoretical basis in presumed unintentional omission,[76] it certainly is—the omitted child must act early or be barred.[77] It is not believed to be unduly harsh or unreasonable to require the person for whose benefit

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[74] See generally Atkinson § 96, at 500-02.

[75] See generally 2 Bowe-Parker §§ 21.110, 21.111. The differences in treatment from jurisdiction to jurisdiction stem largely from differences in relevant statutory language. For example, where the statute renders the testator's will void with respect to the omitted child, there is generally no need that such child contest the will.

[76] See, e.g., Goff v. Goff, 352 Mo. 809, 179 S.W.2d 707 (1944); Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1949). The same approach is taken where the statute provides that such child shall succeed to an intestate share of the testator's estate. See, e.g., Matter of Gall, 5 De. 374, 7 N.Y. St. R. 760 (1887); In re McGraw, 217 N.Y.S.2d 770 (1961). The omitted child in such cases is sometimes given a statutory cause of action against legatees and devisees to recover his share of the estate. See, e.g., Ariz. Rev. Stat. Ann. § 14-131 (1956); Ark. Stat. Ann. § 60-120 (1947); N.Y. Deced. Est. Law § 28.

[77] See p. 409, note 294, Part I, supra. It might be noted that in this respect the pretermitted heir statutes may be contrasted with the so-called "forced share" statutes for the benefit of the surviving spouse. These last-mentioned statutes are based upon the legislature's policy decision that the spouse should take a share of the estate irrespective of whether the omission or inadequate provision in the will was deliberate or inadvertent. See generally Atkinson § 33; 1 Bowe-Parker § 3.13.

a presumption of erroneous belief may be available[78] to assert his rights along with whatever objections he or others may make to the allowance of the will. However, if it is concluded to the contrary that pretermitted heirs should be given a longer period during which to assert the ground for relief established in subsection (b) of section 3,[79] then this section 6 should be amended accordingly to reach that objective.[80]

(b) NO RELIEF SHALL BE GRANTED UPON THE GROUNDS ESTABLISHED IN SUBSECTIONS (d) OR (e) OF SECTION 3 UNLESS THE PETITION ASSERTING SUCH GROUNDS IS FILED BY AN ADVERSELY AFFECTED PERSON OR HIS SUCCESSOR IN INTEREST PRIOR TO THE ENTERING OF A DECREE OF DISPOSITION RELATING TO THAT PORTION OF THE TESTAMENTARY ESTATE AFFECTED BY SUCH PETITION FOR RELIEF; PROVIDED THAT THIS SUBSECTION (b) OF SECTION 6 SHALL NOT BE CONSTRUED TO AFFECT THE AVAILABILITY OF A SUIT FOR CONSTRUCTION OF THE WILL AFTER THE ENTERING OF A DECREE OF DISTRIBUTION TO THE EXTENT THAT SUCH SUIT MAY BE AVAILABLE UNDER ANY STATUTE, DECISION OR RULE OF COURT OTHER THAN THIS ACT.

Comment: In most instances, this will be a considerably longer period of time in which to petition for relief than that established in subsection (a) of this section 6. Being more in the nature of proceedings for the construction and support of the will than its contest, proceedings raising the grounds for relief established in subsections (d) and (e) of section 3 should be allowed a longer period of time in which to be brought. It is not intended by this subsection (b) of section 6 to prohibit proceedings for the construction of a will, other than under this Act, from being brought at any time at which they may be brought under existing law or any future development thereof.[81] In connection with such proceedings the provisions of this Act shall in no way apply.[82]

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[78] Of course, if the child is a minor, or has not been given proper notice of the petition for allowance of the will, he may be able to open up or revoke the decree admitting the will to probate or otherwise limiting rights to further contest. See note 74, Part II, supra. The Act operates to bar only those omitted family members who are properly notified or who otherwise participate in the proceedings allowing the will to probate. Cf. 2 Bowe-Parker § 21.110, at 556, notes 4-7 and accompanying text.

[79] See pp. 478-79, Part II, supra.

[80] Extending the period during which the omitted family member may assert his claim beyond the time for contest will undoubtedly create problems with respect to persons who may have relied upon the allowance of the testator's will. However, these problems will to no less degree be present in jurisdictions which permit the pretermitted heir to institute separate actions against the various devisees and legatees. See 2 Bowe-Parker § 21.111, at 558. One advantage under the Act might be to consolidate such actions in a single proceeding brought by the omitted family member seeking to open up the decree which would otherwise terminate the right to contest.

[81] See generally Atkinson § 145; 4 Bowe-Parker § 31.

[82] See subsection (b)(2) of section 15, p. 516, Part II, infra.

SECTION 7. CONTENTS OF PETITION FOR RELIEF. EVERY PETITION FOR RELIEF UNDER THIS ACT UPON ONE OR MORE OF THE GROUNDS ESTABLISHED IN SECTION 3 SHALL BE SWORN TO UNDER OATH BY THE PETITIONER OR HIS ATTORNEY TO THE BEST OF HIS KNOWLEDGE AND BELIEF AND SHALL CONTAIN, IN ADDITION TO ANY REQUIREMENTS IMPOSED BY RULE OF COURT OR BY STATUTE OTHER THAN THIS ACT, THE NAME AND ADDRESS OF THE PETITIONER; A DESCRIPTION OF THE RELATION, IF ANY, BETWEEN THE PETITIONER AND THE TESTATOR; A STATEMENT OF THE PARTICULAR GROUNDS FOR RELIEF ASSERTED; A REFERENCE TO THE PORTIONS OF THE WILL AFFECTED BY THE ERRONEOUS BELIEFS OF THE TESTATOR; A DESCRIPTION OF THE RELIEF SOUGHT IN CONNECTION WITH EACH SEPARATE GROUND ASSERTED; A DESCRIPTION OF THE EVIDENCE UPON WHICH THE PETITIONER INTENDS TO RELY IN SUPPORT OF HIS CLAIMS FOR RELIEF; AND, IN CONNECTION WITH EVERY ASSERTION OF THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (b) OF SECTION 3, A STATEMENT OF HOW AND TO WHAT EXTENT THE DISPOSITION OF THE TESTATOR'S TESTAMENTARY ESTATE IS "UNNATURAL" WITHIN THE MEANING OF THAT TERM AS DEFINED IN SECTION 2 OF THIS ACT.

Comment: In light of what could be described as the "extraordinary" nature of the relief being made available under this Act, the requirements here imposed are not unreasonably burdensome. Moreover, to the extent that they will permit early disposition of groundless or spurious cases,[83] these requirements will help to reduce to a minimum any nuisance value which might otherwise accompany the creation of remedies in this area.

SECTION 8. DECREE SETTING TIME AND PLACE FOR HEARING; ADDITIONAL NOTICE; DISCRETION IN THE COURT TO POSTPONE CONSIDERATION OF CERTAIN QUESTIONS. UPON THE FILING BY AN ADVERSELY AFFECTED PERSON OF A PETITION FOR RELIEF UNDER THIS ACT THE COURT SHALL, AFTER SUCH ADDITIONAL NOTICE AS THE COURT IN ITS DISCRETION DETERMINES TO BE NECESSARY, ENTER A DECREE SETTING A TIME AND A PLACE FOR A HEARING TO CONSIDER THE MERITS OF THE ISSUES PROPERLY RAISED THEREBY,

Comment: Under this section 8 the court would, presumably, act in accordance with established practice in related cases involving either

[83] Presumably, petitions which on their face reveal the inadequacy of the asserted grounds for relief would be vulnerable to demurrer or motion to dismiss. See, e.g., Cal. Prob. Code § 370. See generally Atkinson § 100, at 532; 3 Bowe-Parker § 26.77. It should be noted in this context that under a later section of the Act the court must find each and every element statutorily described in connection with a particular ground for relief. See subsections (a)(1)-(a)(5) of section 10, pp. 492-94, Part II, infra.

will contests or proceedings for the construction of wills. The provision for further notice in the court's discretion is designed as a catchall measure to provide necessary notice where it is required.[84]

PROVIDED FURTHER, HOWEVER, THAT WHENEVER GROUNDS FOR RELIEF ESTABLISHED IN SUBSECTIONS (d) OR (e), OR BOTH, OF SECTION 3 ARE ASSERTED BY PETITION AT A TIME WHICH THE COURT IN ITS DISCRETION DETERMINES TO BE INAPPROPRIATE, THE COURT MAY ENTER A DECREE POSTPONING INDEFINITELY CONSIDERATION OF THE QUESTIONS RAISED BY THE ASSERTION OF ANY OR ALL SUCH GROUNDS UNDER SUBSECTION (d) AND (e) OF SECTION 3 UNTIL SUCH TIME AS THE COURT DETERMINES TO BE APPROPRIATE WITHIN THE TIME LIMITATIONS ESTABLISHED IN SUBSECTION (b) OF SECTION 6 FOR THE FILING OF PETITIONS UNDER THIS ACT. QUESTIONS POSTPONED IN ACCORDANCE WITH THE PROVISIONS OF THE PRECEDING SENTENCE OF THIS SECTION 8 MAY BE CONSIDERED THEREAFTER IN THE COURT'S DISCRETION UPON MOTION OF THE COURT OR SOME ADVERSELY AFFECTED PERSON, WITH SUCH ADDITIONAL NOTICE AT THAT TIME AS THE COURT IN ITS DISCRETION SHALL DETERMINE TO BE NECESSARY.

Comment: The great majority of cases in which relief will be sought under subsections (d) or (e) of section 3 will be cases involving some kind of mistake in the expression, typically a misdescription of persons or objects referred to by descriptive language in the will.[85] Many of these cases will involve dispositive provisions of relatively minor importance. A remotely contingent charitable beneficiary, for example, may have been referred to ambiguously. It would be untenable to permit two or more remotely or insubstantially interested legatees to delay the probate of the entire will in order to settle such a relatively minor matter at the outset. The court is therefore given discretion to postpone these questions until a more suitable time for their disposition arrives. This section should, of course, be read in connection with section 5,[86] which gives to the court discretion on its own motion to raise these same questions earlier in the proceedings.

SECTION 9. HEARING ON THE MERITS; PROCEDURE; JURY TRIAL; BURDEN OF PROOF; ADMISSIBILITY OF EVIDENCE. THE HEARING TO CONSIDER THE MERITS OF A CLAIM FOR RELIEF UNDER THIS ACT SHALL IN EVERY PARTICULAR BE CONDUCTED IN ACCORDANCE WITH THE RULES APPLICABLE TO SUCH PROCEEDINGS BEFORE THE COURT,

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[84] See note 73, p. 484, Part II, supra.
[85] See pp. 351-63, 365-80, Part I, supra.
[86] See p. 484, Part II, supra.

Comment: In no other portion of this Act are references to existing law so difficult as they are in these middle sections dealing with matters of procedure, for in no other respect do jurisdictions vary so greatly from one to the next. It is believed that for purposes of this first tentative draft a general reference to existing procedural rules will make it clear that no sweeping change in procedure is being worked by this Act. Wherever possible, existing formats should be retained.[87]

SUBJECT, HOWEVER, TO THE FOLLOWING PROVISIONS:

(a) *JURY TRIAL.* THERE SHALL BE NO RIGHT TO TRIAL BY JURY OF THE QUESTIONS OF FACT RAISED BY THE ASSERTION OF THE GROUNDS FOR RELIEF ESTABLISHED UNDER THIS ACT; HOWEVER, THE COURT IN ITS DISCRETION MAY CALL A JURY TO DECIDE ANY ISSUES OF FACT, UPON SPECIAL ISSUES FRAMED OR OTHERWISE, BUT THE VERDICT IN SUCH CASE SHALL BE ADVISORY ONLY.

Comment: There should be no serious question concerning the constitutionality of this provision abolishing the right to trial by jury with respect to issues of fact raised under this Act.[88] If serious doubts may be raised concerning the appropriateness of the jury generally in will contest proceedings,[89] it should be clear almost to a certainty that the unusual remedies afforded under this Act are ill-suited to determination by a jury. The trial by jury provisions for will contests contained in most wills statutes[90] could be retained, of course, with respect to grounds other than those codified and established under this Act. Were an alternative to outright abolition to be preferred, the author recom-

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[87] One example of an element of existing law which is "retained" by this section 9, but which might be made the subject of exceptional statutory treatment in the subsections which follow, concerns the subject of necessary—or permissable—parties defendant to proceedings under the Act. Presumably, the personal representative would defend the will in cases involving a contest of the will. However, it might be advisable to include a provision expressly permitting persons benefitted by portions of the will alleged to have been affected to defend also. See, e.g., Cal. Probate Code § 370; Ohio Rev. Code § 2741.02 (1953). See generally 3 Bowe-Parker § 26.67; Note, Will Contest: Necessary Parties Defendant, 19 Ohio S.L.J. 772 (1958).

[88] See, e.g., In re Land's Estate, 166 Cal. 538, 137 P. 246 (1914); In re Dolber's Estate, 153 Cal. 652, 96 P. 266 (1908); Gauthier v. Gosselin, 94 N.H. 496, 56 A.2d 13 (1947); Shaw v. Shaw, 28 S.D. 221, 133 N.W. 292 (1911). See generally Atkinson § 100, at 534; 3 Bowe-Parker § 26.85; Annot. 62 A.L.R. 82 (1929).

[89] See M.P.C. § 18, Comment pp. 54-55. But see Laube, The Right of a Testator to Pauperize His Helpless Dependents, 13 Cornell L.Q. 559 (1928). At the risk of sounding unscholarly, I will simply add that I have for some time had the suspicion that in many jurisdictions the incidence of reversal-on-appeal with respect to will contest jury verdicts was disproportionately high.

[90] E.g., Ala. Code tit. 61, § 67 (Supp. 1959); Ariz. Rev. Stat. Ann. §§ 14-373 (1956); Cal. Prob. Code § 371; Del. Code Ann. tit. 12, § 1331 (1953); Mass. Gen. Laws Ann. ch. 215 § 16 (1958); Vt. Stat. Ann. tit. 12, § 2565 (1959). See generally Atkinson § 100, at 534; 3 Bowe-Parker § 26.86.

mends consideration of the draft contained in the Model Probate Code,[91] which preserves the right to jury trial only insofar as that right may be constitutionally protected in a given jurisdiction.

(b) *BURDEN OF PROOF.* EXCEPT WHERE PRESUMPTIONS ESTABLISHED IN SECTION 11 PROVIDE TO THE CONTRARY, IN CONNECTION WITH EACH CLAIM FOR RELIEF UNDER THIS ACT THE BURDEN SHALL BE UPON THE PETITIONER TO PROVE BY CLEAR AND CONVINCING EVIDENCE EACH AND EVERY ALLEGATION OF FACT UPON WHICH SUCH CLAIM FOR RELIEF IS BASED.

Comment: Notwithstanding the important limitations upon the assertion of grounds for relief under this Act, it is appropriate to place a heavy burden upon the petitioner who seeks to reform the testator's will. Assuming it to be conscientiously applied by the courts, this subsection should provide the necessary counterbalance in the statute to the free admissibility of evidence under subsection (c) of this section 9.[92] In its application to the findings of "what the testator would have wanted" required in subsection (b) of section 10,[93] this subsection (b) of section 9 attempts to ensure the unicentricity of the problems presented by cases in which the presumptions in section 11[94] either do not apply or are inadequate in and of themselves sufficiently to reduce the polycentricity of questions of would-be intent.[95]

(c) *ADMISSIBILITY OF EVIDENCE.* EVIDENCE OTHERWISE ADMISSIBLE OF EVERY KIND, INCLUDING STATEMENTS MADE BY THE TESTATOR TO ANY OTHER PERSON, SHALL NOT BE INADMISSIBLE DUE TO THE APPLICATION OF THE POLICIES UNDERLYING [THE STATUTE OF WILLS] IN CONNECTION WITH ANY QUESTION OF FACT RAISED BY A CLAIM FOR RELIEF PROPERLY BEFORE THE COURT IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT.

Comment: There are two great sources of limitations upon the admissibility of evidence in proceedings of the sort anticipated in connection with this Act. On the one hand, there are what may properly be termed "rules of evidence" which deal with the relevancy, materiality, and competency of evidence, and also with questions of privilege. On the other hand, there are what might be termed "policies of the Statute of Wills," which support special limitations upon the use of extrinsic evidence to impeach formally executed instruments. Confusion sometimes occurs with respect to which of these sources is involved in deter-

[91] M.P.C. § 18, pp. 54-55.
[92] See pp. 490-92, Part II, infra.
[93] See pp. 494-97, Part II, infra.
[94] See pp. 497-510, Part II, infra.
[95] See p. 495, Part II, infra.

mining a given dispute. Especially in connection with certain kinds of evidence—such as declarations of intent by the testator—[96] which may be open to attack from both sides, general principles from the law of evidence are likely to get mixed up with the more specialized policies of the Statute of Wills.

This Act is uniquely and particularly concerned with the policy questions arising under the Statute of Wills. Careful attention has been given, therefore, to building limitations into each section to avoid too disruptive an overthrow of these policies. However, having taken care in the body of the Act to safeguard wills from irresponsible attack, the effort here is being made to avoid any possible confusion that there remain "special reasons" under the Statute of Wills for refusing to admit evidence of erroneous belief or its effect upon the will. This provision should make it clear that the only restrictions remaining upon the admissibility of evidence in these cases, beyond those built into the substantive provisions of the Act itself, will be those which emanate from the general rules of evidence applicable to these proceedings.[97]

A further point relating to a possible alternative wording of this provision should be noted in passing. A preliminary draft of this provision earlier contained language to the effect that before the court admitted evidence of the erroneous belief or its effect upon the will in cases involving the grounds for relief established in subsections (b), (d) or (e) of section 3,[98] a finding should be made relating respectively to the unnaturalness of the disposition, the manner in which the testator's erroneous belief appeared in the will, or the nature of the ambiguity in the descriptive portions of the instrument. These requirements have been removed from the present draft because they do not seem necessary in light of the requirement in subsections (a)(1) through (5) of section 10[99] that these elements expressly be found by the court before going on to consider the question of would-be intent under subsection (b) of section 10. Unless the court is able to find these elements to be present in connection with the will, relief will be denied. Because they are the most "obvious" part of the petitioner's case, their absence will

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[96] For a discussion of the special problems in connection with the Statute of Wills see p. 375, notes 197, 198, Part I, supra, and accompanying text. For a discussion of the types of evidentiary problems that may arise see 3 Bowe-Parker §§ 29.26-29.29, 29.110. In Massachusetts, a statute provides that a declaration of a deceased person shall not be inadmissable as hearsay if made in good faith and upon the personal knowledge of the declarant. Mass. Gen. Laws Ann. ch. 233, § 65 (1958). See also 5 Wigmore, Evidence § 1576, at 440-42 (1940).

[97] Presumably, rules of evidence will be somewhat eased in their application generally to questions arising in probate litigation. See generally Atkinson § 100, at 535-40; 3 Bowe-Parker §§ 29.1, 29.3; 1 Newhall, Settlement of Estates in Massachusetts § 17 (4th ed. 1958).

[98] See pp. 480-82, Part II, supra.

[99] See pp. 492-94, Part II, infra.

almost certainly lead to a dismissal of the related grounds for relief before reaching the more general question of the admissibility of evidence to prove the existence and effect of the alleged erroneous belief of the testator.

SECTION 10. FINDINGS OF FACT CONCERNING NATURE AND EFFECT OF ERRONEOUS BELIEFS. AT THE CONCLUSION OF THE EVIDENCE AT THE HEARING ON THE MERITS OF THE CLAIMS FOR RELIEF UNDER THIS ACT THE COURT SHALL MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT:

Comment: In light of the provision in subsection (a) of section 9[100] denying right to trial by jury under this Act and making jury verdicts advisory only, the findings will in every case be those of the court. Were a substantially different approach to be taken to the jury issue, then amendment of the wording of this section 10 would be necessary to reflect that difference.

(a) WITH RESPECT TO EACH SEPARATE GROUND FOR RELIEF PROPERLY BEFORE THE COURT, THE COURT SHALL FIND WHETHER OR NOT THE ERRONEOUS BELIEF ALLEGED IN THE PETITION DID IN FACT MATERIALLY AFFECT THE EXECUTION OR REVOCATION, OR BOTH, OF THE WILL IN WHOLE OR PART

Comment: This is the basic finding upon which all others under this Act are premised. A finding by the court under this provision that an alleged erroneous belief of the testator did not in fact materially affect the will in any way will necessitate a denial of the relief sought on that ground.

INCLUDING

(1) WITH RESPECT TO THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (a) OF SECTION 3, THE NATURE AND CIRCUMSTANCES OF THE MISREPRESENTATION WHICH PRODUCED SUCH ERRONEOUS BELIEF OF THE TESTATOR; AND

Comment: The requirements in subsection (a)(1) through (a)(5) of this section 10 parallel the statutory descriptions of the grounds for relief in subsections (a) through (e) of section 3.[101] The thrust of this subsection (a)(1) of section 10, and the others which follow dealing with different grounds for relief, is that the court should be required to find specifically the facts supporting each separate ground for relief asserted by the petitioner—in this particular instance, the sort of misrepresentation which produced that erroneous belief.

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100 See pp. 489-90, Part II, supra.
101 See pp. 478-82, Part II, supra.

(2) WITH RESPECT TO THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (b) OF SECTION 3, THE MANNER IN WHICH SUCH ERRONEOUS BELIEF PRODUCED AN UNNATURAL DISPOSITION OF THE TESTAMENTARY ESTATE OF THE TESTATOR, INCLUDING THE FACTS, IF ANY, UPON WHICH THE PRESUMPTION OF ERRONEOUS BELIEF ESTABLISHED IN SUBSECTION (a)(1) OF SECTION 11 IS BEING RELIED UPON BY THE COURT IN MAKING SUCH FINDING; AND

Comment: Whenever a presumption of erroneous belief arises in a case of an omitted spouse or child under subsection (a)(1) of section 11,[102] it is anticipated that in making the finding required in this subsection (a) (2) of section 10 that the court will specifically refer to the presumption and the circumstances giving rise to it.

(3) WITH RESPECT TO THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (c) OF SECTION 3, THE MANNER IN WHICH SUCH ERRONEOUS BELIEF PRODUCED THE REVOCATION BY PHYSICAL ACT OF THE WILL IN WHOLE OR PART; AND

Comment: Of all the findings required under this subsection (a) of section 10, this one comes the closest to preempting the further finding of "what the testator would have done" under subsection (b) of this section 10.[103] To the extent that the narrowing in focus from "materially affected" to "produced" in subsection (c) of section 3[103] has eliminated the necessity for a separate finding of "effect" under subsection (b) of this section 10, a single finding under this subsection (a) (3) of section 10 will suffice to permit relief to be granted.

(4) WITH RESPECT TO THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (d) OF SECTION 3, THE MANNER IN WHICH SUCH ERRONEOUS BELIEF AND THE EFFECT THEREOF APPEAR, EXPRESSLY OR IMPLIEDLY, IN THE WILL, INCLUDING THE EXTENT, IF ANY, TO WHICH THE COURT IS RELYING UPON THE PRESUMPTION OF ERRONEOUS BELIEF ESTABLISHED IN SUBSECTION (a)(2) OF SECTION 11 IS BEING RELIED UPON BY THE COURT IN MAKING SUCH FINDING; AND

Comment: The finding under this subsection (a)(4) may, of course, be very easy to make whenever the erroneous belief in question manifests itself in the will in the form of an express preamble to a dispositive provision.[104] Experience has shown, however, that more often the erroneous belief will have appeared less obviously, by implication,[105]

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[102] See pp. 497-99, Part II, infra.
[103] See pp. 494-97, Part II, see also 540-41, infra.
[104] See pp. 323, 341-44, 348-50, 356, Part I, supra.
[105] See pp. 324-25, 356-60, Part I, supra.

and may require substantial reference by the court to various portions of the will and to surrounding circumstances. In making the finding required under this subsection (a)(4) of section 10, whenever the court relies upon a presumption established in subsection (a)(2) of section 11[106] in connection with a will provision which has for some reason failed to take effect, it is anticipated that the court will refer specifically both to the presumption and the circumstances giving rise to it.

(5) WITH RESPECT TO THE GROUND FOR RELIEF ESTABLISHED IN SUBSECTION (e) OF SECTION 3, THE NATURE OF THE AMBIGUITY PRODUCED BY SUCH ERRONEOUS BELIEF, INCLUDING THE EXTENT, IF ANY, TO WHICH THE COURT IS RELYING UPON THE PRESUMPTIONS ESTABLISHED IN SUBSECTION (a)(3) OF SECTION 11.

Comment: As in the related cases referred to in the preceding subsection (a) (4) of this section 10, here the findings may range from the very simple to the not-so-simple, depending on how far the court is willing to extend the concept of ambiguity in order to make sense out of the will.[107] Whenever the court relies upon the presumptions of the testator's intent established in subsection (a)(3) of section 11,[108] specific reference must be made by the court in its findings both to the nature of the presumption and the manner in which it helps to support a finding of ambiguity.

(b) WHENEVER THE COURT FINDS IN ACCORDANCE WITH THE PROVISIONS OF SUBSECTION (a) OF THIS SECTION 10 THAT AN ERRONEOUS BELIEF OF THE TESTATOR OF THE TYPE ALLEGED IN THE PETITION DID IN FACT MATERIALLY AFFECT THE WILL IN QUESTION, THE COURT SHALL MAKE A FURTHER FINDING WITH RESPECT TO THE NATURE AND EXTENT OF THE EFFECT OF SUCH ERRONEOUS BELIEF UPON THE EXECUTION OR REVOCATION, OR BOTH, OF THE WILL IN WHOLE OR PART, INCLUDING THE EXTENT, IF ANY, TO WHICH THE COURT IS RELYING UPON THE PRESUMPTIONS ESTABLISHED IN SUBSECTIONS (b), (c) AND (d) OF SECTION 11, SUCH FURTHER FINDING UNDER THIS SUBSECTION (b) OF SECTION 10 TO CONSIST OF A CONCLUSION CONCERNING WHAT THE TESTATOR WOULD HAVE INTENDED WITH RESPECT TO SUCH EXECUTION OR REVOCATION, OR BOTH, IN THE ABSENCE OF SUCH ERRONEOUS BELIEF.

Comment: The findings required under this subsection (b) of section 10 will form the basis for the decree under section 12[109] reform-

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[106] See pp. 499-501, Part II, infra.
[107] See subsection (e) of section 3, pp. 481-82, Part II, supra.
[108] See pp. 501-02, Part II, infra.
[109] See pp. 510-14, Part II, infra.

ing the will to conform it to "what the testator would have wanted." Some overlap is certain to occur between the findings under subsection (a) of this section 10 and the findings under this subsection (b). Undoubtedly, there will be many cases in which the court, in determining that an erroneous belief has "materially affected" the will under subsection (a), will have determined the effect of that erroneous belief to the greatest degree of specificity possible under the circumstances. In such a case, the notion of two "separate" findings under subsection (a) and (b) of this section 10 may appear anomolous. The statute makes the separation between the two findings, however, for two basic and important reasons. First, because inevitably there will be cases which support such a separation—*i.e.* wherein proof of the existence of an erroneous belief, and even of its material effect generally upon execution, will be possible and yet where further proof of "what the testator would have done" will be necessary—and perhaps may prove insufficient—to support a finding of specific effect upon the will; and second, because the separation here being made between findings of erroneous belief and findings of specific effect serves as the basis for later separating the presumptions of erroneous belief, material effect and "what the testator would have intended" which are established in subsections (a) and (b) of section 11.[110]

The first of these reasons is most easily explained by reference to the generality of the "materially affected" language in most of the subsections of section 3 in which are established the grounds for relief. The facts of a given case may support a conclusion that an erroneous belief of the testator did in fact exist and did most certainly have an effect upon the will, and yet fail adequately to indicate what the testator would otherwise have done with the precision necessary to support reformation. A belief that a beloved son is dead, for example, may most clearly and certainly have materially affected a will leaving the entire estate to the testator's needy sister. But would the sister have been left out completely had the testator not been mistaken? It is believed that separating out these two issues of fact as much as possible will permit a clearer analysis and evaluation of the evidence and will help greatly in many instances to indicate specifically those areas in which the proof is or is not adequate.

The second reason suggested above for separating these issues for purposes of making findings—*i.e.* in order to facilitate the separate application of different presumptions—is closely related to the first, for it is to the extent to which the proof of particular factual elements fails or falls short that the presumptions established in section 11 operate to fill gaps in the evidence. Simply stated, the presumptions of "what the

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[110] See pp. 497-504, Part II, infra.

testator would have done in the absence of erroneous belief" established in subsection (b) of section 11, and there expressly limited in their application to the findings required under this subsection (b) of section 10, are supportable in principle only upon the assumption in a given case that an erroneous belief has already been shown in a general way to have materially affected the will in question. They may not legitimately be used to reach that prerequisite conclusion of erroneous belief.[111] The premise upon which these presumptions are based, in other words, is this: assuming the testator to have been laboring under an erroneous belief which materially affected the will in a certain general manner, what would he specifically have intended in the absence of such erroneous belief? The reasons in policy which support such presumptions where a finding of material effect has already been made under subsection (a) of section 10 would not support using them in order to conclude that a will which does not conform to them must have been the product of testamentary error. Although a certain degree of "carry over" from the findings of material effect under subsection (a) of section 10 is inevitable in making the further findings under subsection (b) of section 10 of "what the testator would have done," it is a carry *forward* which must not be allowed to operate in reverse.

A concrete example may help to indicate the reasons for denying any application of the presumptions established in subsection (b) of section 11[112] to the preliminary findings of erroneous belief required under subsection (a) of this section 10. Where a testator has died and leaves a will in which the greatest portion of his estate has been left to his wife and children, there would almost certainly be no ground for relief available to his family under subsection (b) of section 3[113] (the "unnatural disposition" subsection), notwithstanding the fact that the testator left a modest pecuniary legacy to his friend, *F*. However, the presumption of "what the testator would have intended" established in subsection (b)(1) of section 11—that he would have preferred the family to the exclusion of *F*—might very well cause *F* to be removed from the will if that presumption were applied by the court in order to make the preliminary finding of erroneous belief under subsection (a) of this section 10. This rather more severe encroachment upon the testator's freedom of testation[114] is avoided by carefully limiting the application of the presumption established in subsection (b)(1) of section 11 to provisions

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111 For an interesting use of the same principle in connection with the common law presumption against intestacy, see pp. 338-39, Part I, supra.

112 See pp. 502-04, Part II, infra.

113 See pp. 478-79, Part II, supra.

114 For a discussion of the extent to which the "unnatural disposition" provisions of the Act may properly be said to involve an encroachment upon the testator's freedom of testation, see pp. 535-37, Part II, infra.

of the will already found under subsection (a) of this section 10 to have been materially affected by an erroneous belief of the testator. In order finally and fully to appreciate the point here being made concerning the manner in which the separation of findings in subsections (a) and (b) of this section 10 serves to support the separation later in section 11 of presumptions established to aid the court, one need only observe the very different—and, from the point of view of the testator's would-be intent, the much more limited—sort of presumptions established in subsection (a) of section 11.[115]

Having established the relation between findings required in this subsection (b) of section 10 and those required in the preceeding subsection (a), and the relation generally between the findings required in this section 10 and the presumptions established in section 11, it remains merely to note that whenever the presumptions established in subsection (b) of section 11 are relied upon by the court in making the findings herein required in this subsection specific reference must be made to those presumptions and the use to which they have been put.

SECTION 11. PRESUMPTIONS WHICH OPERATE IN CERTAIN CASES. IN MAKING THE FINDINGS OF FACT REQUIRED UNDER SECTION 10 THE COURT SHALL, WHERE APPLICABLE, RELY UPON THE FOLLOWING PRESUMPTIONS:

(a) FOR PURPOSES OF MAKING THE FINDINGS RELATING TO THE EXISTENCE AND NATURE OF ERRONEOUS BELIEFS REQUIRED UNDER SUBSECTION (a) OF SECTION 10:

Comment: The reasons for limiting the application of this subsection (a) of section 11 to the finding required in subsection (a) of section 10 were developed earlier in a comment to section 10.[116]

(1) WHENEVER THE TESTATOR'S WILL FAILS TO PROVIDE FOR HIS SPOUSE OR ANY OF HIS CHILDREN, WHETHER SUCH CHILDREN ARE BORN OR ADOPTED BEFORE OR AFTER THE MAKING OF HIS LAST WILL, IT SHALL BE PRESUMED THAT SUCH OMISSION WAS THE PRODUCT OF AN ERRONEOUS BELIEF OF THE TESTATOR PRODUCING AN UNNATURAL DISPOSITION OF HIS ESTATE UNDER SUBSECTION (b) OF SECTION 3 UNLESS

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115 See pp. 497-502, Part II, infra.

116 Most of the presumptions of fact established in this Section 11 are expressly made rebuttable, and should not give rise to any serious questions concerning whether they are presumptions "of law," or whether, once rebutted, they "continue as some evidence of erroneous belief or material effect." See generally 9 Wigmore, Evidence § 2491, at 290 (1940); Maguire, Evidence, Common Sense and Common Law 190 (1947). However, if a particular jurisdiction were to have an unfortunate history of difficulties of the sort just mentioned, some further clarification in the statute might be necessary. Such clarification might come here in section 11, or perhaps in section 2 in the form of a definition of "presumption."

THE EVIDENCE SHOWS CLEARLY AND CONVINCINGLY BOTH

a. THAT THE OMISSION WAS NOT THE PRODUCT OF AN ERRONEOUS BELIEF OF THE TESTATOR, AND
b. THAT AT THE TIME OF THE EXECUTION OF SUCH WILL THE TESTATOR INTENDED SUCH OMISSION.

Comment: The wording of this so-called "pretermitted child" or "pretermitted heir" provision is modeled, with several significant changes, from the draft in section 41 of the Model Probate Code.[117] In a discussion of these statutes in Part I of this article it was pointed out that, because of their reliance on the concept of the omission having been "intentional," many of them not only extend relief to cases of non-mistake[118] but also deny relief in certain cases of rather obvious mistake.[119] The present draft attempts to retain the existing extension to cases of non-mistake while eliminating the restrictions so that, at a minimum, the statute affords relief in all cases of obvious mistake. This desirable result is accomplished by exchanging the "unintentional" wording of the Model Probate Code to "product of erroneous belief" in the body of the provision, and then extending the presumption to cover cases of non-mistake by limiting rebuttal to those cases in which the omission was intentional as well as non-mistaken.

What the statute has done, in other words, is to bring pretermitted child legislation "into the fold" of relief from the effects of erroneous belief, where it rightly belongs in connection with the great majority of cases to which it is applied, while retaining extensions of relief to the occasional case of non-mistake reached by existing statutes. In so doing, the entire problem will eventually be seen to have been moved to a position from which it may be treated sensibly and consistently, without the arbitrary and often ludicrous results achieved in some instances under existing statutes.[120] The price paid for this improvement is the introduc-

[117] M.P.C. § 41, at 76-77. Actually, the "significant changes" mentioned in the comment render the Code version all but unrecognizable in its present form. Here in subsection (b)(1), for example, the spouse is given the benefit of the presumption of erroneous omission. Perhaps the greatest difference between the two statutes, however, is with respect to the manner in which they relate the presumption of unintentional erroneous omission to the remedy provided therefor. In § 41 of the Model Probate Code, both the presumption and the remedy are combined in a single provision. Unless it appears that the omission was intentional the child "shall receive . . . [an intestate] share of the estate . . . ." In contrast to the Code and the many statutes which adopt the same approach in this respect, the present Act separates out the provision which establishes a rebuttable presumption of erroneous omission from the provision which supplies a remedy where the presumption goes unrebutted.

[118] See p. 410, Part I, supra.

[119] See p. 411, Part I, supra.

[120] See p. 412, note 308, Part I, supra, and accompanying text. It might also be added that to some extent § 41 of the Model Probate Code attempts to avoid what a comment thereto describes as these "obviously unfair" results. See M.P.C. § 41(a) and Comment, at 76-77.

tion into the statutory scheme at this point of an element which admittedly does not fit quite naturally into the "erroneous belief" mold—*i.e.* the requirement under subsection (a)(1)b of this section 11 that, in order to rebut the presumption of erroneous belief, the testator must be found to have intended the omission at execution.

It should be noted, also, that there is in this subsection a deliberate break with the "materially affected" terminology of previous sections of the Act including subsection (b) of section 3[121] to which this provision expressly refers. It is believed that the "product of an erroneous belief" language of this subsection properly limits the question of would-be intent remaining to be answered by the court under subsection (b) of section 10—there should be a strong implication under such circumstances that the testator would have left something to the omitted child —and yet it leaves open the narrower question of exactly what the testator would have intended on the facts of a particular case. It may be noted that to the extent that the presumption herein created does decide the further question of "what the testator would have intended," there will have occurred a "carry over" from the findings under subsection (a) of section 10 to those under subsection (b) of the sort earlier described in a comment to subsection (b) of section 10.[122]

(2) WHENEVER A DISPOSITIVE PROVISION IN A WILL IS RENDERED INOPERATIVE AT THE TESTATOR'S DEATH BY A SUBSTANTIVE LIMITATION UPON THE TESTATOR'S POWER OF TESTAMENTARY DISPOSITION (INCLUDING, BUT NOT LIMITED TO, LIMITATIONS UPON CHARITABLE BEQUESTS AND DEVISES), IT SHALL BE PRESUMED FOR PURPOSES OF THE FINDINGS UNDER SUBSECTION (a) OF THIS SECTION 11 THAT THE EXECUTION OF BOTH THE DISPOSITIVE PROVISION AND ANY EXPRESS PROVISION OF REVOCATION CONTAINED IN THE SAME LAST WILL WERE MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR APPEARING IMPLIEDLY IN SUCH WILL WITHIN THE MEANING OF SUBSECTION (d) OF SECTION 3 AND RELATING TO THE VALIDITY OF THE DISPOSITIVE PROVISION RENDERED INOPERATIVE THEREIN; PROVIDED, HOWEVER, THAT THE FOREGOING PRESUMPTION OF ERRONEOUS BELIEF SHALL APPLY WITH RESPECT TO AN EXPRESS PROVISION OF REVOCATION ONLY TO THE EXTENT THAT SUCH PROVISION REVOKES A PRIOR DISPOSITIVE PROVISION SUBSTANTIALLY SIMILAR TO THE DISPOSITIVE PROVISION RENDERED INOPERATIVE IN THE REVOKING WILL; AND PROVIDED FURTHER, HOWEVER, THAT THIS SUBSECTION (b)(2) OF SECTION 11 SHALL NOT APPLY WITH RESPECT TO DISPOSITIVE PROVISIONS

[121] See pp. 478-79, Part II, supra.
[122] See pp. 494-97, Part II, supra.

WHICH ARE RENDERED INOPERATIVE BECAUSE OF LAPSE, UNCERTAINTY, LACK OF CAPACITY, UNDUE INFLUENCE, OR INSUFFICIENCY OF FORMALITIES OF EXECUTION.

Comment: In large measure this provision supplies the statutory basis in presumption for the common law doctrine of dependent relative revocation by subsequent instrument, discussed in Part I of this article.[123] Strictly speaking, it would not be necessary to include this provision in the statute in order to achieve the common law results under this Act since the testator's belief concerning the validity of the alternative disposition contained in the revoking will could always be said to have appeared impliedly in the revoking instrument[124] and, therefore, to have satisfied the requirement for relief under subsection (d) of section 3.[125] This subsection (a)(2) of section 11 does, however, tend to draw attention to the particular type of fact pattern involved in those cases and may, to that extent, aid the court in adopting the new Act to the familiar patterns of traditional case law.

This provision does more than draw attention to certain fact patterns, however, insofar as it extends relief to cases which do not involve erroneous belief. Like subsection (a)(1) of this section 11, this subsection (a)(2) creates a presumption of erroneous belief even where the events causing the failure of the provision occurred after execution, as in the case of a substantive limitation upon gifts to charity executed within a certain period prior to death. Unlike subsection (a)(1) of this section 11, however, this subsection (a)(2) accomplishes the extension not by limiting rebuttal to sources unrelated to erroneous belief, but by eliminating rebuttal entirely, except in relation to the required finding by the requirement in connection with the revocation clause that the prior disposition revoked by the will must have been "substantially similar" to the provision substituted for it in the dispositive portion of such will. The purpose of this extension of relief under the Act to cases of non-mistake is to preserve a similar extension presently being made in a few jurisdictions under the doctrine of dependent relative revocation discussed in Part I.[126]

The exception of cases of lapse from the operation of the provision is intended to leave that special area of the law to the separate treatment it has independently received by statute and developing case law.[127] The

[123] See pp. 331, 334-36, Part I, supra.
[124] See p. 334, note 64, Part I, supra, and accompanying text.
[125] See pp. 480-81, Part II, supra.
[126] See cases cited in notes 74 and 81, pp. 336-37, Part I, supra.
[127] See generally Atkinson § 140; 6 Bowe-Parker §§ 50.1-50.20. It should be pointed out in the present context that the concern here is mainly centered around preventing the Act from becoming embroiled in attempts to grant relief from the effects of lapse upon the dispositive provisions of the revoking instrument. It

advantage to be gained by bringing those cases into the statute would be to permit a more flexible approach to the underlying question of "what the testator would have intended." This advantage does not appear to be great enough in these particular cases to warrant upsetting existing statutory and decisional development. It should be pointed out, however, that with respect to other problems of a similar nature this provision could work tremendous change and development at the hands of imaginative lawyers and judges. The entire problem of curing defects in instruments brought about due to the operation of the common law Rule Against Perpetuities, for example, might be brought within the provisions of the present statute for treatment. In such a case, a court disposed to extend the operation of the statute would, in accordance with the presumption here created, find the provision which is violative of the Rule to have been materially affected by an erroneous belief of the testator, and proceed to reform it so as to cure the violation in a manner coming closest to what the testator would have intended in the absence of such erroneous belief.[128]

(3) WHENEVER THE COURT FINDS AN AMBIGUITY IN CONNECTION WITH THE DESCRIPTIVE PORTIONS OF THE WILL, IT SHALL BE PRESUMED THAT SUCH AMBIGUITY WAS PRODUCED BY AN ERRONEOUS BELIEF OF THE TESTATOR CONCERNING THE ADEQUACY OF THE DESCRIPTION IN QUESTION.

Comment: In light of the definition of ambiguity in subsection (b) of section 2,[129] with its reliance upon a divergence between actuality and what the testator "appears from the wording of the will to have intended," this subsection (a)(3) of section 11 could probably be dispensed with. The presumption here is not rebuttable because in any event the court will not be able to give effect to the provision affected thereby unless it is able to resolve the ambiguity by resort to extrinsic evidence.

FOR PURPOSES OF MAKING THE FINDING OF AMBIGUITY REQUIRED IN SUBSECTION (a)(5) OF SECTION 10 IT SHALL BE PRESUMED, UNLESS SHOWN TO THE CONTRARY, THAT THE TESTATOR INTENDED BY THE PRO-

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might be possible to reword this subsection (a)(2) of section 11 so as to prevent the application of the presumption in such a way as to accomplish that objective and still to leave the court free to apply the presumption to the revocation clause in order occasionally to grant relief on a "quasi-dependent relative revocation" basis in cases where the anti-lapse statute for some reason did not apply. See pp. 335-36, Part I, supra.

[128] For recent cases supporting reformation under a non-statutory cy-pres doctrine see In re Foster's Estate, 190 Kan. 498, 376 P.2d 784, 98 ALR 2d 795 (1962); Carter v. Berry, 243 Miss. 356, 140 S.2d 843 (1962). See generally Leach, Perpetuities: Cy Pres on the March, 17 Vand. L. Rev. 1381 (1964).

[129] See p. 473, Part II, supra.

VISIONS OF HIS WILL TO BENEFIT ONLY PERSONS WITH WHOM HE WAS ACQUAINTED PERSONALLY AND THAT HE INTENDED TO DISPOSE ONLY OF PROPERTY IN CONNECTION WITH WHICH HE HAD AT HIS DEATH A POWER OF DISPOSITION.

Comment: Of all the provisions of this tentative statutory draft this would certainly appear to come closest to stating the obvious. One should be able to assume, or at least hope, that the courts would apply this sort of presumption whether or not it was contained expressly in the statute. The presumption of intent is here so "minimal" in nature that it would surely be made in any and all events. Recent decisions would indicate that the courts are willing to go at least this far "on their own."[130] This subsection (a)(3) of section 11 is included in this draft, therefore, more for purposes of indicating the sort of possibilities for extension to which the basic format lends itself than for purposes of breaking new ground. If the uncertainties deliberately built into the phrase "acquainted personally" appear in balance to create more problems potentially than the subsection cures—which in the latter case will be minimal—then the provision may very well be deleted without any serious effects.

(b) FOR PURPOSES OF MAKING THE FINDINGS REQUIRED IN SUBSECTION (b) OF SECTION 10 RELATING TO WHAT THE TESTATOR WOULD HAVE INTENDED IN THE ABSENCE OF AN ERRONEOUS BELIEF FOUND TO HAVE MATERIALLY AFFECTED THE WILL, THE COURT SHALL, EXCEPT WITH RESPECT TO A FINDING OF ERRONEOUS BELIEF BASED UPON THE GROUND CONTAINED IN SUBSECTION (e) OF SECTION 3 AND SUBJECT TO THE PROVISIONS OF SUBSECTIONS (c) AND (d) OF THIS SECTION 11, RELY UPON THE FOLLOWING PRESUMPTIONS OF THE TESTATOR'S INTENT:

Comment: Once again it should be noted that the presumptions established hereunder are expressly limited in their application to the findings required to be made in subsection (b) of section 10. The reasons for this limitation were discussed in a comment to that earlier subsection.[131] As was earlier pointed out, there will be cases in which these presumptions concernnig the testator's would-be intent will either be unnecessary, the finding of "material effect" under subsection (a) of section 10[132] having established with sufficient particularity what the testator would have done in the absence of erroneous belief; or inapplicable, the proof of the testator's would-be intent having sufficiently re-

[130] See pp. 360-63, Part I, supra.
[131] See pp. 494-97, Part II, supra.
[132] See pp. 492-94, Part II, supra.

butted them;[133] or insufficient, their generality not having been sufficiently supplemented by evidence of the surrounding circumstances.

The exception to the operation of this subsection (b) of section 11 made with respect to findings in connection with subsection (e) of section 3[134] is necessitated by the unique character of the fact patterns described in that earlier subsection. By their nature ambiguities should either be resolvable by extrinsic evidence or cause the provision affected thereby to fail. Existing law with its reliance upon extrinsic proof[135] would appear to be perfectly adequate to the task of handling such cases without resort to statutorily created presumptions of intention.

(1) FOR PURPOSES OF DETERMINING WHAT THE TESTATOR WOULD HAVE INTENDED IN RELATION TO THE ADJUSTMENT OF RIGHTS AND INTERESTS UNDER A MATERIALLY AFFECTED PROVISION OF THE WILL, OTHER THAN AN EXPRESS REVOCATION CLAUSE, BETWEEN PERSONS WHO ARE MEMBERS OF THE CLASS CONSISTING OF THE TESTATOR'S SPOUSE AND ISSUE, ON THE ONE HAND, AND PERSONS WHO ARE NOT MEMBERS OF SUCH CLASS, ON THE OTHER, UNLESS SHOWN CLEARLY AND CONVINCINGLY TO THE CONTRARY IT SHALL BE PRESUMED THAT THE TESTATOR WOULD HAVE INTENDED GENERALLY TO BENEFIT THE MEMBERS OF SUCH CLASS TO THE EXCLUSION OF SUCH NON-MEMBERS;

Comment: It should be noted at the outset that persons who are not members of the special class described above may withstand attack by family class members to the extent that provisions in the will for the benefit of such persons are found not to have been materially affected by the erroneous belief in the first place. It must be noted once again that operation of this subsection (b)(1) of section 11 is expressly premised on the provision in question in the will having been found to have been materially affected by the erroneous belief. In the absence of a preliminary finding under subsection (a) of section 10[136] that a particular provision has been materially affected by an erroneous belief, this subsection can have no application whatever to the provision for the benefit of such non-family beneficiary. It should also be noted that no weight whatsoever is given to the fact that the erroneous belief of the testator may have been produced by the fraudulent misrepresentations of another person—even a person who may have benefitted thereby. The

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[133] Once again, it should be emphasized that when these statutory presumptions are rebutted they should have no further application or relevance in that particular context. See note 80, Part II, supra.

[134] See pp. 481-82, Part II, supra.

[135] See notes 196, 198, p. 375, Part I, supra.

[136] See pp. 492-94, Part II, supra.

objective of the Act is not to punish wrongdoers, but rather to permit reformation of the will in appropriate cases in order to carry out what it may be shown or presumed that the testator would have intended in the absence of erroneous belief.[137] It is believed that the presumptions established in this section 11 will better serve to achieve this objective without the confusion that would be introduced by attempting expressly to weigh the nature of a particular legatee's wrongdoing in the balance.

Where a provision for the benefit of a third person is found by the court to have been materially affected, this subsection (b)(1) of section 11 attempts to circumvent the one difficulty which most often would frustrate attempts without it to determine what the testator would have intended—*i.e.* the difficulty of determining the testator's would-be intent in cases where the dispute is between close family members and non-family members. The balance struck here is admittedly arbitrary in the sense that it creates a general presumption to operate in all cases, subject, of course, to rebuttal by specific proof. It will not suffice in every instance to support sensible reformation of the will. Despite these inherent shortcomings, it is believed that a great many cases in which an erroneous belief is found to have materially affected the provision of the will in question the presumption created herein will help to achieve an end result more favorable than intestacy.

PROVIDED, HOWEVER, THAT WHENEVER THE NON-MEMBER OF SUCH CLASS IS A PERSON BENEFITTED BY A PROVISION OF THE WILL OTHER THAN AN EXPRESS REVOCATION CLAUSE FOUND UNDER SUBSECTION (a) OF SECTION 10 TO HAVE BEEN MATERIALLY AFFECTED BY A PARTICULAR ERRONEOUS BELIEF OF THE TESTATOR, AND SUCH NON-MEMBER BENEFICIARY UNDER THE WILL IS A PERSON FOUND BY THE COURT TO COME WITHIN THE DEFINITION IN SECTION 2 OF A "SPECIAL OBJECT OF THE TESTATOR'S BOUNTY," IT SHALL BE PRESUMED, UNLESS SHOWN CLEARLY AND CONVINCINGLY TO THE CONTRARY, THAT THE TESTATOR WOULD HAVE INTENDED TO BENEFIT SUCH NON-MEMBER BENEFICIARY IN AN AMOUNT NOT TO EXCEED THE LEAST OF THE FOLLOWING AMOUNTS:

a. THE AMOUNT PROVIDED FOR THE BENEFIT OF SUCH PERSON IN THE WILL;
b. EQUAL TREATMENT WITH PERSONS IN THE CLASS OF WHICH PETITIONER IS A MEMBER;
c. ONE-THIRD OF THE AMOUNT BY WHICH THE NET TESTAMENTARY ESTATE EXCEEDS $25,000.

Comment: The purpose of this exception to the presumption in

[137] See section 1, "Purpose of Act," p. 472, Part II, supra. For a discussion of the "wrongdoer" rationale in support of the common law leniency towards proving and remedying fraud, see pp. 387, 388, Part I, supra.

favor of family members is to support some middle ground between the "all or nothing" extremes of the general rule.[138] The definition in section 2 of "special object of the testator's bounty"[139] is sufficiently-broad to permit the courts to apply the concept flexibly in light of the facts of a particular case. It is important to recognize that the concept of the "special object" is here employed as a purely defensive measure, permitting one who is made a beneficiary by the testator to retain, to some extent at least, what has been given him in the will. It will not in any way support attack against the terms of the will by one in such a position.

The same objections to this exception could be raised as were earlier raised in connection with the general rule itself, in favor of the testator's family. It is arbitrary—even more so in some respects than the general rule—and it will not suffice in every instance to reach workable results. Nevertheless, the presumptions appear to comport with what most testators would have preferred in lieu of the extremes of no-relief or intestacy, and should in the long run achieve more acceptable results. The Anglo-American system has never gone so far as to permit one not a family member to share in the intestate estate however clearly proof of the surrounding circumstances would indicate that the testator treated such a person as a member of his family.[140] The exception herein created to the general presumption under this subsection (b)(1) of section 11 operates in the present context of erroneous beliefs of the testator affecting the will to permit such a third person to take in conformance with what will be described in a later discussion as an intestate statute of the testator's making.[141] It is the presence of the gift in favor of the "special object" which supports the exception here being made. The end result will be a blend of two important ingredients: what the testator *did* intend, though in error; and a presumption of what he *would have* intended in the absence of erroneous belief.

(2) FOR PURPOSES OF DETERMINING WHAT THE TESTATOR WOULD HAVE INTENDED IN RELATION TO THE ADJUSTMENT OF RIGHTS AND INTERESTS UNDER A MATERIALLY AFFECTED PROVISION OF THE WILL, OTHER THAN AN EXPRESS REVOCATION CLAUSE, AMONG PERSONS WHO ARE MEMBERS OF THE CLASS CONSISTING OF THE TESTATOR'S SPOUSE AND ISSUE, UNLESS SHOWN CLEARLY AND CONVINCINGLY TO THE CONTRARY IT SHALL BE PRESUMED THAT THE TESTATOR WOULD HAVE INTENDED GENERALLY TO TREAT

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138 See pp. 516-19, Part II, infra.
139 See subsection (k) of section 2, p. 475, Part II, supra.
140 See generally Atkinson § 5, at 32-34; 1 Bowe-Parker § 1.4, 7 Bowe-Parker § 63.1.
141 See p. 518, Part II, supra.

HIS SPOUSE TO THE SHARE OF HIS NET TESTAMENTARY ESTATE THAT SUCH SPOUSE WOULD HAVE RECEIVED HAD THE TESTATOR DIED INTESTATE OWNING THE PROPERTY CONTAINED IN SUCH TESTAMENTARY ESTATE; AND THAT THE TESTATOR WOULD HAVE INTENDED GENERALLY TO TREAT EQUALLY THOSE OF HIS ISSUE WHO WERE EQUAL IN DEGREE OF RELATION TO THE TESTATOR AT HIS DEATH.

Comment: Once again, the attempt is being made statutorily to supply guidelines for the reformation of portions of the will found to have been materially affected where proof of what the testator would have intended in the absence of erroneous belief is insufficient, in and of itself, to support such a remedy. The primary source of these presumptions dealing with intra-family arrangements is to be found in the pattern of distribution under the applicable intestate statute,[142] with the important exception that the presumption with respect to issue is one merely of equality of treatment, and not a full intestate share.[143] Of course, there is no reason to expect that the presumptions herein created will suffice in every case to allow the court to reform the will sensibly or intelligently. There may be instances where, for example, the intent to treat children other than equally clearly appears from the will and circumstances surrounding it. How far these rebuttable presumptions should be allowed to stand in the face of such contrary indications will be left to the courts to determine. The important point is that in many cases these presumptions will suffice to permit the court to exercise the power of reformation where proof of would-be intent would otherwise be inadequate. It should be noted that since the testamentary estate, as defined in subsection (1) of section 2,[144] is a broader concept than merely the portion of the estate actually passing under the will, that the spouse here may receive more than his or her intestate share of the property disposed of by will.

(c) WHENEVER, IN APPLYING THE PRESUMPTIONS ESTABLISHED IN SUBSECTIONS (a) AND (b) OF THIS SECTION 11, THE PROVISIONS OF THE WILL FOUND TO HAVE BEEN MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR CONFER BENEFITS BY MEANS OTHER

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142 P. 345, note 100, Part I, supra.

143 Of course, in light of the presumption in subsection (b)(1) in favor of the testator's family over non-family members, this may well amount to an intestate share in an appropriate case. The type of fact pattern toward which this presumption of equality is primarily directed, however, is one in which one or more of the testator's children are omitted under circumstances which suggest that notwithstanding such omission having been unintentional, the testator did not intend to give any of his children a full intestate share. To permit the omitted child to receive an intestate share seems unfair, and this provision is aimed at avoiding that result. Cf. S.C. Code Ann. §§ 19-235-19-236 (1962); M.P.C. § 41, pp. 76-77.

144 See pp. 475-76, Part II, supra.

THAN AN OUTRIGHT GIFT, INCLUDING BUT NOT LIMITED TO A DISCRETIONARY POWER OR TRUST PROVISION, OR BOTH, IT SHALL FURTHER BE PRESUMED, UNLESS SHOWN CLEARLY AND CONVINCINGLY TO THE CONTRARY, THAT THE TESTATOR WOULD HAVE PREFERRED GENERALLY TO BENEFIT AN OTHERWISE SUCCESSFUL PETITIONER UNDER THIS ACT BY THE SAME MEANS USED IN THE PROVISIONS FOUND TO HAVE BEEN AFFECTED; AND THAT IN THE CASE OF A DISCRETIONARY POWER THUS FOUND TO HAVE BEEN AFFECTED, IT SHALL BE PRESUMED, UNLESS SHOWN CLEARLY AND CONVINCINGLY TO THE CONTRARY, THAT THE TESTATOR WOULD HAVE PREFERRED TO INCLUDE THE OTHERWISE SUCCESSFUL PETITIONER AS AN OBJECT OF SUCH POWER EQUALLY WITH THOSE MADE OBJECTS OF SUCH POWER BY THE TESTATOR IN SUCH PROVISION.

Comment: This subsection (c) of section 11 is not intended to override the general presumptions in subsection (b) of section 11 preferring class members to the exclusion of non-class members. Rather, it is intended to replace any provision outright for the benefit of the petitioner which would otherwise be made by the court upon application of the general presumptions contained in those earlier subsections. This subsection permits the court to retain that which is worthwhile in a given instrument, such as a more sophisticated form of taking benefits under the will, while reforming the will in order to include the same sort of provisions for persons erroneously omitted. The presumption here is that where benefits are conferred under the will by the use of a discretionary power the testator, had he not been in error, would have made further provision for the petitioner by means of the same type of power. Of course, where special circumstances suggest a valid reason for limiting the use of the discretionary power technique to those already named in the provision found to have been affected, the presumption herein established will have been rebutted.

There is a point deserving of mention regarding the potential interaction between this subsection (c) of section 11 and subsection (d), which follows. Subsection (d), which is not expressly made applicable to the circumstances calling for the application of the presumption established in this subsection (c), describes a fact pattern which is becoming more and more widely employed by lawyers as an estate planning vehicle: the use within the will of a reference to a non-testamentary scheme of disposition—typically a revocable inter vivos trust—as a means of disposing of property under the will.[145] These so-called

[145] See, e.g., Farr, An Estate Planner's Handbook 113, 116-21, 127-30, 480-82 (1966); Johnson, A Draftsman's Book for Wills and Trust Agreements § 306 (1961). For Statutes expressly authorizing references in a will to revocable inter vivos trusts, see p. 510, note 150, Part II, supra.

"pour-over" situations deserve some special treatment in the present context, in light of the presumption underlying subsection (d) of this section 11 that the testator would have intended under such circumstances that the successful petitioner enjoy a share of the testamentary estate measured with reference to the disposition of the property outside the testamentary estate. Where discretionary powers are created both without the will, inter vivos, and within the will, by reference, it might be possible for the trustee to prejudice the successful petitioner by exercising the power created in the will in conformance with this subsection (c) of section 11 in favor of the non-petitioners and leaving the inter vivos power, in which the petitioner does not share, intact for the non-petitioners. In such a case of pour-over to a discretionary trust, therefore, a court reforming the will in conformance with the presumption created in this subsection (c) of section 11 might, in light of the policy underlying subsection (d) of this section 11 and in connection with the power of appointment thus created for the successful petitioner in the will, include the following provision:

> Provided, however, that the discretionary power herein created shall be exercisable by the Trustee for the sole benefit of [the petitioner] so long as there remains property in [the inter vivos trust referred to by the will] that is subject to the discretionary power created outside the will and which may, by the exercise of such power created outside the will, pass to persons other than [the petitioner] who are objects of both the power created without, and this power created by reference within, this will.

Of course, to the extent that the terms of the trust, interpreted in light of existing law, would prevent a discriminatory exercise of such a power to the detriment of the petitioner,[146] such a clause would be unnecessary in order to accomplish the presumed intent of the testator.

(d) WHENEVER THE WILL FOUND TO HAVE BEEN MATERIALLY AFFECTED IN WHOLE OR PART BY AN ERRONEOUS BELIEF OF THE TESTATOR MAKES A REFERENCE TO A NON-TESTAMENTARY SCHEME OF DISPOSITION OF PROPERTY WHICH IS NOT A PART OF THE TESTAMENTARY ESTATE OF THE TESTATOR IN ORDER TO MAKE A SIMILAR DISPOSITION IN SUCH WILL OF PROPERTY INCLUDED IN THE TESTAMENTARY ESTATE, FOR THE LIMITED PURPOSE OF APPLYING THE PRESUMPTIONS OF INTENT ESTABLISHED IN SUBSECTION (b)(2) OF THIS SECTION 11 THE COURT SHALL TAKE INTO ACCOUNT THE DISPOSITION THUS REFERRED TO IN THE WILL; PROVIDED HOWEVER THAT THE PROVISION IN THIS

[146] This depends, in turn, upon the extent to which a beneficiary may question the trustee's exercise of discretionary power of appointment.

SUBSECTION (d) OF SECTION 11 SHALL NOT IN ANY WAY BE INTERPRETED AS EXTENDING RELIEF BEYOND THE LIMITS ESTABLISHED IN SECTION 12 OF THIS ACT.

Comment: Most of the fact patterns to which this subsection (d) applies will be ones involving a reference in the residuary clause of the will to a revocable inter vivos trust for purposes of "pouring over" and otherwise disposing of property by the will.[147] While such a reference in and of itself clearly does not make the property contained in such inter vivos trust part of the "testamentary estate" as that term is defined in section 2,[148] it is felt that in applying the presumptions of the testator's intent with respect to his family, contained in subsection (b)(2) of this section 11, the court should take into account the disposition of property made inter vivos. The concept of "equality among issue equal in degree," for example, should not be allowed to be undermined in cases of pour-over in which a substantial portion of the testator's wealth passes by means of the inter vivos trust. The equality referred to in subsection (b)(2) of this section 11 should, in other words, be an overall equality to the greatest extent possible.[149] In allowing the court in this subsection (d) of section 11 to look outside the testamentary estate, therefore, the underlying policy of the earlier subsection (b)(2) of this section 11 is upheld. The caveat with which this subsection ends is a reiteration of the important point that this Act is concerned solely with reforming wills materially affected by erroneous beliefs, and only in so far as those beliefs have affected disposition of the testamentary estate. Attacks upon inter vivos arrangements not drawn into the "testamentary estate" will have to be made under existing law separately from this Act.

A final comment is relevant concerning the possible effect of this subsection (d) upon the question of whether the property "poured over" and disposed of by reference in the will is to be added to the inter vivos trust, administered as a separate though substantially identical testamentary trust, or whatever. It might be thought that once the court reforms the will (but not the trust) in this situation it has somehow prevented the later treatment of the trusts as one. Suffice it to say

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147 See note 105, p. 493, Part II, supra.

148 See subsection (1) of section 2, pp. 475-76, Part II, supra.

149 The best analogy to the overall equality which this subsection (d) of section 11 is designed to achieve is the equality of treatment which the statutory doctrine of advancements seeks to achieve with respect to intestate estates. See generally Atkinson § 126; 6 Bowe-Parker ch. 55. See also Wright, the Doctrine of Advancements, 63 W. Va. L. Rev. 229 (1961). Both the advancement statutes and this subsection (d) of section 11 attempt to achieve this equality by means of adjusting the disposition of property within the jurisdiction of the court—i.e. the intestate or testamentary estate—so as to reflect and take account of dispositions which are not within the jurisdiction of the court—i.e. inter vivos gifts outright or in trust.

that no such result should necessarily follow from the provisions of this Act, for the decision to "treat the two trusts as one," whether reached by statute[150] or otherwise,[151] is based upon considerations of policy separate from, and independent of, the granting of relief under this Act. There is no reason whatever why the decision in a given jurisdiction to treat as inter vivos the trust created by reference in the will should not apply equally well in the present context. Although the two gifts in trust may differ in certain respects due to the reformation by the court of the terms of the gift made in the will, they may be considered together for purposes of escaping the continuing jurisdiction of the probate court, investment management by the trustee, and the like.

SECTION 12. RELIEF FROM THE EFFECTS OF ERRONEOUS BELIEFS FOUND TO HAVE AFFECTED THE WILL; WHENEVER THE COURT DETERMINES IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT THAT THE EXECUTION OR REVOCATION, OR BOTH, OF A WILL IN WHOLE OR PART HAS BEEN MATERIALLY AFFECTED BY AN ERRONEOUS BELIEF OF THE TESTATOR DESCRIBED IN SECTION 3, THE COURT SHALL ENTER A DECREE REFORMING THOSE PORTIONS OF THE WILL FOUND TO HAVE BEEN MATERIALLY AFFECTED BY SUCH ERRONEOUS BELIEF IN ORDER THAT THE WILL MAY DISPOSE OF THE TESTAMENTARY ESTATE OF THE TESTATOR IN CONFORMANCE WITH THE FINDINGS UNDER SUBSECTION (b) OF SECTION 10 OF WHAT THE TESTATOR WOULD HAVE INTENDED IN THE ABSENCE OF SUCH ERRONEOUS BELIEF. THE POWER OF REFORMATION ESTABLISHED HEREUNDER SHALL INCLUDE WITHOUT LIMITATION THE POWER TO ADD OR SUBTRACT LANGUAGE TO OR FROM THE WILL OR OTHERWISE TO ALTER AND REFORM LANGUAGE IN THE WILL IN ORDER TO CONFORM IT TO WHAT THE TESTATOR WOULD HAVE INTENDED IN THE ABSENCE OF THE ERRONEOUS BELIEF FOUND BY THE COURT TO HAVE MATERIALLY AFFECTED SUCH WILL. PROVIDED, HOWEVER, THAT THE POWER OF REFORMATION SHALL NOT INCLUDE THE ADDITION OR DELETION BY THE COURT TO OR FROM THE WILL OR ANY OTHER INSTRUMENT OR SCHEME OF DISPOSITION OF ANY PROVISION PURPORTING IN ANY WAY WHATSOEVER TO DISPOSE OF PROPERTY NOT OTHERWISE INCLUDED IN THE TESTAMENTARY ESTATE OF THE TESTATOR. AND PROVIDED

[150] E.g., Conn. Gen. Stat. § 45-173a (Supp. 1966); Del. Code Ann. tit. 12, § 111 (Supp. 1966); Ill. Rev. Stat. ch. 3, § 194(a) (1959); Me. Rev. Stat. Ann. tit. 18, § 7 (1963); Mass. Gen. Laws Ann. ch. 203, § 3B (Supp. 1966); Miss. Code Ann. § 661.5 (Supp. 1964); N.H. Rev. Stat. Ann. § 563-A (Supp. 1965); N.C. Gen. Stat. § 31-47 (1966); Pa. Stat. Ann. tit. 20, § 180.14a (Purdon, Supp. 1966); R.I. Gen. Laws 1956, §§ 33-6-33 (Supp. 1966); Va. Code Ann. 1950, 64-71.1 (Supp. 1966); Wis. Stat. Ann. § 231.205 (1957); Wyo. Comp. Stat. § 2-53 (1957). Cf. Ore. Rev. Stat. § 114.070 (1957).

[151] See generally 1 Scott, Trusts § 54.3, pp. 382-84 (2d ed. 1956).

FURTHER THAT RELIEF BASED SOLELY UPON THE GROUND ESTABLISHED IN SUBSECTION (c) OF SECTION 3 SHALL BE LIMITED TO A DECREE DENYING EFFECT TO THE PHYSICAL ACT WHICH WOULD OTHERWISE HAVE REVOKED THE WILL IN WHOLE OR PART. WHENEVER, WITH RESPECT TO EACH SEPARATE GROUND FOR RELIEF ASSERTED, THE COURT DETERMINES UNDER SUBSECTION (a) OF SECTION 10 THAT THE WILL WAS NOT MATERIALLY AFFECTED BY THE ALLEGED ERRONEOUS BELIEF OF THE TESTATOR OR WHENEVER THE FINDINGS UNDER SUBSECTION (b) OF SECTION 10 OF WHAT THE TESTATOR WOULD HAVE INTENDED ARE INSUFFICIENT TO SUPPORT REFORMATION OF THE WILL, THE COURT SHALL ENTER A DECREE REFUSING REFORMATION UNDER THIS SECTION 12 AND, WHERE RELEVANT, DENYING EFFECT TO THOSE PORTIONS OF THE WILL FOUND TO HAVE BEEN MATERIALLY AFFECTED BY THE ALLEGED ERRONEOUS BELIEF OF THE TESTATOR.

Comment: The power of reformation given the court in this section 12, toward which all of the previous sections and commentary have pointed, represents the single most conspicuous break with existing law contained in this Act—or anywhere else in the Law of Wills, for that matter. The traditional refusal of courts literally to reform or alter the content and meaning of wills, discussed extensively in Part I of this article,[152] is here expressly overturned by statutory mandate. The important question of whether or not, in the final analysis, the power of reformation here given the court is justifiable in principle will be the subject of some considerable attention in the discussions to follow.[153] It will suffice for the present purposes of explanation to suggest that this power of reformation *is* justifiable in light of limitations upon such power carefully developed throughout this Act. This section 12 by no means authorizes an indiscriminate application of the cy pres concept, but establishes instead a power exercisable only in statutorily defined circumstances and largely in accordance with statutorily created presumptions.

The first of the provisos in this section 12 echoes and reiterates a point made earlier in a comment to subsection (d) of section 11[154] that the relief under this Act is to be strictly limited to reforming wills. The second, relating to the ground for relief established in subsection (c) of section 3,[155] is a limitation made necessary by the inherent informality of physical act revocation. As was explained in an earlier comment to

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[152] See, e.g., p. 340, note 85, Part I, supra and accompanying text. See also pp. 378, 390-95, Part I, supra.
[153] See pp. 516-19, 532-43, Part II, infra.
[154] See pp. 508-10, Part II, supra.
[155] See pp. 479-80, Part II, supra.

subsection (c) of section 3, the act of cancellation, obliteration or the like by which a will may be revoked physically is simply too informal and subject to abuses to serve as a springboard in and of itself for any more general or sweeping reformation of the will provision in question based upon an inquiry into what the testator would have intended in the absence of erroneous belief. It will be noted, however, that the restriction in this section 12 is itself limited to relief "based *solely* upon the ground established in subsection (c) of section 3." Where the physical act revocation in question is found to have been affected by the fraudulent misrepresentation of another, relief would also be based upon the ground established in subsection (a) of section 3[156] and the restriction here established would not obtain. In general, the approach adopted under this Act is one codifying, rather than modifying or extending, the approach under existing law to these cases of physical act revocation caused by an erroneous belief of testator.

The provision calling for the denial of relief whenever the findings under section 10 do not justify reforming the will deserves some comment insofar as it suggests two rather different bases for such denial: on the one hand, the court may find under subsection (a) of section 10[157] that an alleged erroneous belief of the testator either did not exist or did not materially affect the will; or on the other hand, the court's findings under subsection (b) of section 10[158] concerning the testator's would-be intent may be insufficient to support a reformation of the portion of the will found to have been affected.

It is the second of these bases for denying relief, rather than the first, which may require further clarification. It reflects the underlying assumption that it is possible in a given case that the court could find an erroneous belief to have materially affected the will in a certain general way and yet be unable to determine, even with the aid of the presumptions thereafter established in subsection (b) of section 11,[159] what the testator would have intended with respect to the provisions of the will affected by such erroneous belief. That such a circumstance might arise is made clear by observing that the presumptions of intent established in subsection (b) of section 11 do not even purport to cover instances where the dispute over the will is between or among persons none of whom are members of the class consisting of the testator's spouse and issue. Such a case might arise where relief is sought upon any one of the grounds established in subsections (a), (c), (d) or (e) of section 3. The proof might show—aided by the presumptions established in sub-

[156] See p. 478, Part II, supra.
[157] See pp. 492-94, Part II, supra.
[158] See pp. 494-97, Part II, supra.
[159] See pp. 502-04, Part II, supra.

section (a) of section 11[160]—that a given provision of the will had been materially affected by an erroneous belief of the testator, and yet fail to indicate with sufficient particularity to support reformation what the testator would have done in the absence of such erroneous belief. The final provision of this section 12 reflects the belief that under the circumstances just described it is better that the court deny effect to the provision found to have been materially affected by the erroneous belief of the testator, producing an end result very much like that achieved under existing law where erroneous belief is permitted to be shown as a ground for challenging the will.

An interesting question may be raised in the present context concerning whether the presumptions established in subsection (b) of section 11[161] will suffice to support a decree of reformation in every case in which the dispute *does* involve members of the special class of the testator's spouse and issue. Except for the obvious cases arising under subsection (e) of section 3[162] to which the presumptions do not even purport to apply, will there be instances in which the court, having found a provision of the will to have been materially affected, will be unable to determine "what the testator would have intended?"

The answer to the foregoing question depends, in turn, upon the answer given to the further question of whether in such a case the presumptions established in subsection (b) of section 11[163] are to be rebuttable by a showing which would itself be insufficient to support a specific finding of the testator's would-be intent. In light of the fact that a finding of materiality will already have been made under subsection (a) of section 10,[164] it does not seem likely that a court would permit rebuttal of the presumptions in subsection (b) of section 11 by anything short of specific proof of intent. The only situation in which this unlikely circumstance might arise would be one involving the presumption of equality of treatment of issue under subsection (b)(2) of section 11.[165] It might be possible in such a case for the presumption of erroneous omission under subsection (a)(1) of section 11[166] to go unrebutted and yet for the surrounding facts clearly to show that the testator would not have intended equality—thereby rebutting the presumption of equality in subsection (b)(2) of section 11—under circumstances where what he *would* have intended is unclear. However, the end result in such a case—denial of effect to those provisions of the will

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160 See pp. 497-502, Part II, supra.
161 See pp. 502-04, Part II, supra.
162 See pp. 481-82, Part II, supra.
163 See pp. 502-04, Part II, supra.
164 See pp. 492-94, Part II, supra.
165 See pp. 505-06, Part II, supra.
166 See pp. 497-99, Part II, supra.

found to have been affected by an erroneous belief—would itself achieve a result so clearly contrary to the testator's intent that no court would be likely to reach it. Instead, either the finding of materiality under subsection (a) of section 10[167] would from the beginning be "adjusted" so as to deny relief on that basis; or the court would determine upon some share or other for the child in light of the general presumption and surrounding circumstances, thereby retaining those portions of the will which are "worth saving."[168]

SECTION 13. EFFECT UPON PROCEEDINGS UNDER THIS ACT OF A DECREE DENYING A WILL IN WHOLE OR PART UPON OTHER GROUNDS. **WHENEVER QUESTIONS CONCERNING THE ALLOWANCE OF THE WILL IN WHOLE OR PART ARE PROPERLY BEFORE THE COURT BASED UPON GROUNDS OTHER THAN THOSE ESTABLISHED IN SECTION 3 OF THIS ACT AT THE SAME TIME THAT A PETITION FOR RELIEF UNDER THIS ACT IS PROPERLY BEFORE THE COURT, THE COURT MAY IN ITS DISCRETION CONSIDER ANY OR ALL OF SUCH QUESTIONS TOGETHER, IN A SINGLE PROCEEDING;**

Comment: It is obvious that in many, if not most, cases in which relief is sought under this Act the petitioner will include grounds for relief other than those established in section 3.[169] Because in many instances the same basic fact patterns will be relied upon to support all of these claims, the court must be given discretion to consider all such matters in a single proceeding. It should be noted that whenever a jury sits as the finder of fact in connection with any non-Act grounds of contest the court may, under subsection (a) of section 9,[170] obtain an advisory verdict on questions of fact raised under the Act.

PROVIDED, HOWEVER, THAT WHENEVER A DECREE IS ENTERED DENYING PROBATE OF THE WILL IN WHOLE OR PART BASED UPON GROUNDS OTHER THAN THOSE ESTABLISHED IN SECTION 3 OF THIS ACT, WITH RESPECT TO THE PROVISIONS INCLUDED IN SUCH DECREE, THE PETITION FOR RELIEF UNDER THIS ACT SHALL ABATE UNTIL SUCH TIME AS SUCH DECREE, OR A REVERSAL OR OTHER MODIFICATION THEREOF, BECOMES FINAL, AT WHICH TIME THE PETITION FOR RELIEF UNDER THIS ACT

(a) SHALL REVIVE, TO THE EXTENT TO WHICH THE DECREE HAS BEEN REVERSED OR MODIFIED IN SUCH A MANNER AS TO PERMIT THE COURT UPON A PROPER SHOWING UNDER THIS ACT TO GIVE EFFECT TO WHAT THE TESTATOR, HAVING SUFFICIENT CAPACITY AND

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167 For a development of this point see pp. 492-94, Part II, supra.
168 See pp. 492-94, Part II, supra.
169 See p. 389, note 237, Part I, supra.
170 See pp. 489-90, Part II, supra.

NOT UNDULY INFLUENCED OR COERCED BY ANOTHER AT THE TIME OF EXECUTION OF THE WILL WOULD HAVE INTENDED IN THE ABSENCE OF ERRONEOUS BELIEF; OR THE PETITION

(b) SHALL BE DISMISSED, TO THE EXTENT THAT THE DECREE ESTABLISHES THAT, AT THE TIME OF EXECUTION OF THE PROVISIONS OF THE WILL IN QUESTION, THE TESTATOR LACKED CAPACITY, WAS UNDULY INFLUENCED OR COERCED BY ANOTHER, OR WAS OTHERWISE INCAPABLE OF GIVING LEGAL EFFECT TO HIS INTENT WITH RESPECT TO THE PROVISIONS OF THE WILL IN QUESTION.

Comment: The entire concept of reforming a will under this Act to give effect to what a testator would have wanted presupposes that the testator had, at the time of execution in question, the necessary capacity and freedom from coercion to support giving effect ultimately to that would-be intent. The "other grounds" referred to in this section 13, therefore, take logical precedence over those grounds for relief established in section 3.[171] The provision for revival of the petition under subsection (a) of this section 13 would permit a court, having heard evidence supporting all grounds of contest, to proceed where appropriate to grant a remedy under this Act where a decree denying probate to the relevant portions of the will had been reversed upon appeal.

SECTION 14. APPLICATION OF ACT. **THE PROVISIONS OF THIS ACT APPLY TO PROCEEDINGS IN CONNECTION WITH ANY WILL EXECUTED BY A TESTATOR WHOSE DEATH OCCURS AFTER THE EFFECTIVE DATE OF THIS ACT.**

Comment: Under this provision there will be a period of transition during which proceedings that might otherwise have been brought under the Act will continue to be brought under prior existing law. Assuming that it would be desirable to shorten this transitional period as much as possible, and in light of the fact that under the present wording of section 14 this period will be considerably longer in connection with proceedings in the nature of will constructions than in connection with proceedings in the nature of will contests, it might be advisable to limit the provision in this section 14 to the latter type of proceeding and to permit the Act to be applied to the former type irrespective of when the testator's death occurs. Because the question of the timing of its application is believed to be tangential to the main thrust of the statute, however, this somewhat simpler mode of application has been adopted for the purposes of this tentative draft. In any event, there should be no constitutional barrier to applying the Act in this manner

[171] See pp. 476-482, Part II, supra.

to cases where the testator has died after the effective date of the Act.[172]

SECTION 15. REPEAL; EFFECT UPON PRE-EXISTING LAW.
(a) THE FOLLOWING STATUTES ARE REPEALED:
(THE EXISTING PRETERMITTED HEIR STATUTE WITH RESPECT TO PETITIONS FOR THE ALLOWANCE OF WILLS FILED BEFORE THE EFFECTIVE DATE OF THIS ACT).

Comment: In light of the fact that relief under the Act will not be available in cases where the petition for probate was filed before the effective date of this Act, rights under existing pretermitted heir statutes must be preserved in such cases.

(b) IN CONNECTION WITH ALL PROCEEDINGS TO WHICH THIS ACT APPLIES:
(1) OBJECTIONS TO THE ALLOWANCE OF A WILL BASED UPON FRAUD, INNOCENT MISREPRESENTATION, MISTAKE OR ANY OTHER FORM OF ERRONEOUS BELIEF OF THE TESTATOR ALLEGED TO HAVE MATERIALLY AFFECTED THE WILL MAY BE ASSERTED ONLY IN CONFORMANCE WITH THE PROVISIONS OF THIS ACT; AND
(2) TO THE EXTENT TO WHICH PETITIONS FOR THE CONSTRUCTION OF WILLS ARE BASED UPON ALLEGED AMBIGUITIES IN DESCRIPTIVE LANGUAGE OR OTHERWISE INVOLVE ALLEGATIONS OF ERRONEOUS BELIEF OF A TYPE FOR WHICH, UPON A PROPER SHOWING, RELIEF MIGHT BE GRANTED UNDER THIS ACT, SUCH PETITIONS FOR CONSTRUCTION SHALL BE TREATED AS PETITIONS FOR RELIEF UNDER THIS ACT AND MAY BE ASSERTED ONLY IN CONFORMANCE WITH THE PROVISIONS OF THIS ACT.

Comment: The purpose of this subsection (b) of section 15 is to suggest the manner in which the Act will supplant existing nonstatutory law in this area. Essentially, the rule herein established is as follows: if a particular claim might be brought under the Act, it must be brought under the Act.

III. In Defense of the Suggested Statutory Scheme

A. *What the Act Accomplishes: The Middle Road Between Extremes*

The concepts of "testamentary error" and "erroneous beliefs affecting testamentary acts" upon which the Act is based represent to this writer an exciting and heretofore untapped potential for giving effect to the testator's intentions in light of sensible assumptions of what most reasonable persons would have intended under similar circumstances. Under existing law, the only grounds for questioning a duly executed

[172] See generally 1 Bowe-Parker § 3.10.

will are, practically speaking, those of lack of capacity, fraud and undue influence, which are almost always combined for purposes of contesting probate.[173] Whenever an abnormal or unreasonable will is attacked on these combined grounds, the finder of fact is faced ultimately with an "all or nothing" type of decision. Either the will or a portion thereof is thrown out completely, or it is given effect in exactly the same form in which it was executed by the testator. In no event may the court retain a will provision once it is established that the testator lacked capacity or freedom of decision with respect to its execution.

There can be no doubt, of course, that the finder of fact may apply these traditional grounds flexibly and "creatively," with an eye to what it feels to be the sensible or fair result in a particular case.[174] Whatever the practical use to which they are put in such cases, however, the fact remains that the theoretical basis for these doctrines will permit nothing short of a "yes" or "no" answer to the ultimate question of whether or not the will is to be given effect.[175] Although the will as it stands at his death may not conform to what the testator would have intended in the absence of the debilitating circumstances, the intestacy which results from rejecting such a will may itself come no closer to the testator's would-be intent. Because the intestate succession statute imposes a single scheme of distribution upon all estates, small or large, simple or complex, it is only reasonable to assume that in many of these cases "what the testator would have intended" is actually defeated more often than it is upheld.

In contrast to the all-or-nothing approach just described, testamentary error as a ground for attacking or questioning a will supplies the theoretical basis in the testator's capacity and freedom of decision which supports a modification of the testator's will instead of a simple acceptance or rejection of the instrument in question. Assuming that adequate safeguards are imposed as prerequisites to showing erroneous beliefs to have affected the will, it is now at least theoretically possible to pursue a middle course between the extremes of "yes" and "no." The finder of fact is no longer forced to "let the chips fall where they may" upon denial of the will in whole or part. On the contrary, whatever is

[173] For an interesting analysis of these grounds for contest and the relationship between them see Green, Fraud, Undue Influence and Mental Incompetancy, 43 Colum. L. Rev. 176 (1943).

[174] See generally Atkinson § 36, at 139-40; 1 Bowe-Parker § 3.11, at 91-92. For a discussion of the role of "the sensible and sympathetic jury" in helping to overcome the injustice to the family brought about by an overly strict adherence to the concept of testamentary freedom see Laube, The Right of a Testator to Pauperize His Helpless Dependents, 13 Cornell L.Q. 559, 572-75 (1928).

[175] This is not to suggest, of course, that a will may not be held to be partially invalid in the unusual case where the undue influence, fraud, or insane delusion has affected only a portion of the instrument. See generally Atkinson § 61; 1 Bowe-Parker §§ 14.5, 14.8, 15.12.

found of the expression of intent in the will which is unaffected by error may be retained and, more importantly, those portions found to have been affected may be reformed in order to achieve a pattern of disposition which is tailored much more closely to what the testator probably would have intended.

To be sure, a single set of statutory presumptions of what "normal" or "reasonable" persons would have intended will be applied by the court in every case, and to this extent there will remain echoes of the approach previously taken. However, to the extent that these presumptions of would-be intent are to be applied in light of the provisions of the will and proof of surrounding circumstances, they will lose in their application the raw edge of arbitrariness which the traditional reliance upon the intestate statute inevitably retains. To some extent, in other words, the mixture under the Act of individual fact patterns and general statutory presumptions permits the testator, in a case involving testamentary error, to write his own intestate succession statute. The serious question of the sufficiency of the safeguards under the Act will be dealt with in a later discussion. The important point for present purposes of exposition is that the statute does provide, for the first time, a middle road—a source of compromise—that will most often be preferable to either extreme of upholding or rejecting the will as it stands at the testator's death.

It is interesting to note in the present context that the concept of the middle road advanced in the foregoing analysis may be phrased equally well in terms of the manner in which the statute attempts to bridge what was earlier described as the "unadjudicability gap" presented by the polycentricity of questions of would-be intent.[176] Traditionally, the rules governing fraud and mistake in probate have maintained their necessary unicentricity by imposing an all-or-nothing approach to the question of the nature of the relief to be made available from the effects of proven error. Once an erroneous belief is shown to have materially affected the execution of a will, the portions of the will affected thereby are simply rejected in favor of whatever alternative scheme of disposition happens to apply—in most instances, the intestate succession statute. In contrast to existing law, the Act attempts to open up questions of what the testator would have intended in order to support reformation in certain cases. In doing so, the potentially unadjudicable nature of these questions must be overcome by means of presumptions and other restrictions aimed at reducing their polycentricity to within tolerable limits. From this perspective, therefore, the middle road may be seen to be supported by a statutory bridge constructed to overcome inherent limitations upon

[176] See pp. 467-68, Part II, supra.

the adjudicative process which would otherwise frustrate attempts by courts to apply a more liberal approach to the problem of granting relief from the effects of mistake and fraud upon wills.

B. *How the Act Will Affect Both Approach and Outcome in Representative Cases*

The fact patterns in the hypothetical cases which follow are, to some extent, over-simplified in order to permit an efficient comparison between how decisions are being reached under existing law and how they would most probably be reached under the proposed statute. They are not designed to challenge the efficacy of the statute in its application to real cases, but rather to explain its application in a more general sort of way. It is to be assumed in each instance that only the grounds for relief actually discussed are available to the petitioner on the facts of each case.

(1) The Omitted Child

Basic Fact Pattern: *T*, the testator, leaves a will in which his entire estate is given in trust for the benefit of his wife, *W*, for her life with a limited power in *W* to invade principal. The remaining corpus at *W*'s death passes in trust equally for the benefit of *T*'s children, *A* and *B*, for their lives with a remainder over at the death of each child to such child's surviving issue. *C*, a child of *T* born after the execution of the will, seeks relief as an unintentionally omitted child.

Probable Approach Under Existing Law: Assuming no grounds for defeating the will on the basis of lack of capacity, fraud or undue influence, *C* must seek relief under the applicable pretermitted child statute.[177] Under the typical statutory scheme, upon a showing of unintentional omission *C* would receive an intestate share of *T*'s estate—in this case a fraction on the order of one-sixth[178] to two-ninths[179]—free of any trust provision in the will and free of the exercise of the power given in the will to *W*. If successful, *C* would in this instance receive a share of the estate worth more, and probably very much more, than the shares going to *A* and *B* under the terms of the will.

Probable Approach Under Proposed Act: *C* would undoubtedly assert his rights under the "pretermitted heir" sections of the Act, relying upon the ground for relief established in subsection (b) of section 3[180] and the presumption of erroneous belief contained in subsection

[177] See pp. 409-13, Part I, supra.
[178] Assuming the spouse's intestate share to be one-half, with the rest going equally to the children.
[179] Assuming the spouse's intestate share to be one-third, with the rest going equally to the children.
[180] See pp. 478-79, Part II, supra.

(a)(1) of section 11.[181] Although *T* in this case may not have been laboring under a mistaken belief materially affecting the will at the time of execution, the presumption in favor of the omitted child would in all likelihood go unrebutted unless the omission of *C* was clearly intentional—*i.e.* unless *A* and *B* are able to show that at the time of execution *T* intended to leave *C* nothing. To this point, of course, the approach under the Act is not much different from that taken under existing statutes. However, it is with respect to the relief to be granted that the new Act works an important—and, it is believed, desirable—departure from existing law. Instead of an intestate share going to *C* free of trust, *C* and his issue will almost certainly be "written into the will" by the court as beneficiaries of an equal share of the remainder upon the same terms as *A* and *B*. Because it is unlikely that the court would under subsection (a) of section 10[182] find the presumed erroneous belief to have materially affected the gift in trust to *W*, that portion of the will would most probably remain unchanged.

Variations Upon the Basic Fact Pattern: There are so many limitations upon the relief made available under existing pretermitted child statutes[183] that it would be impossible to cover all of them here. Suffice it to say that most of these limitations will have been eliminated by the new Act. For example, were *C* to have been living at the time of execution of the will and were the testator to have left him a token amount in the will, or were the testator to have used a standard clause aimed at preventing application of the pretermitted child legislation, *C* would almost certainly be foreclosed on the face of most pretermitted child statutes from arguing an unintentional or mistaken omission. Under the new Act, however, *C* would at least be able to assert and argue the ground contained in subsection (b) of section 3[184] notwithstanding anything *T* might do in the will short of leaving *C* enough of a share so as to prevent the preliminary conclusion that the disposition of his estate was "unnatural."[185] The presumption in subsection (b)(2) of section 11[186] might be rendered unavailable in such a case, but *C* would still be allowed to argue for relief on the facts.

Had the residuary clause of *T*'s will merely "poured over" into an inter vivos trust on the same terms as the will in the earlier fact pattern, relief under the new Act would be a bit more complicated. Section 12 makes it clear that the court's power of reformation extends only to the

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181 See pp. 497-99, Part II, supra.
182 See pp. 492-94, Part II, supra.
183 See a discussion of these limitations pp. 412-13, Part I, supra.
184 See pp. 478-79, Part II, supra.
185 See subsection (m) of section 2, p. 476, Part II, supra.
186 See pp. 505-06, Part II, supra.

will and does not include any power to alter or change any of the terms of the inter vivos trust.[187] In order to carry out what *T* would very probably have intended in the absence of the presumed erroneous belief—*i.e.* that *C* receive an equal share with *A* and *B* of the overall trust estate at *W*'s death—a clause will have to be inserted into the will including *C* as a beneficiary with respect to that portion of the trust property added by the will in such a way as to give *C* an equal share at *W*'s death of the combined inter vivos and testamentary trust property.[188]

(2) The Omitted Family

Basic Fact Pattern: *T*, the testator, leaves a will in which his entire estate is given to his sister, *S*, with whom he had lived as a recluse and semi-invalid for the last five years of his life. *T*'s wife, *W*, from whom *T* had been informally separated for about ten years, and *T*'s two grown children, *A* and *B*, seek to share in *T*'s estate. *T*'s relationship with his wife and children, while not openly hostile, had become somewhat distant since his separation from *W*. There is some evidence that *T* believed, at the time of the execution of his will, that *W* had "turned his children against him."

Probable Approach Under Existing Law: *W* will probably have a "forced share" in *T*'s estate;[189] and *A* and *B* may, depending upon the wording of the will, surrounding circumstances and the applicable statute, have rights as pretermitted children.[190] *W*, *A* and *B* may also attack the will on the grounds of lack of capacity, fraud and undue influence.[191] If they succeed, *S* will receive no part of *T*'s estate. Assuming the will to have been executed during the period of *T*'s living with *S*, there is a good chance that the trier of fact—especially a jury, if the surrounding circumstances are favorable to *W*, *A* and *B*—will throw the will out on one ground or another. In any event, as between *S*, on the one hand, and the family as a group, on the other, the court will ultimately face a "yes" or "no" decision of the sort described in an earlier discussion. There is simply no basis whatever in existing law upon which it will be possible for all four persons to share gratuitously in the estate.

Probable Approach Under Proposed Act: The proposed statute should have no effect upon the availability to *W* of a forced share in *T*'s estate, or upon the availability to *W*, *A* and *B* of the twin grounds for

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187 See pp. 510-14, Part II, supra.

188 This is the type of situation at which subsection (d) of section 11, pp. 508-10, Part II, supra.

189 See generally Atkinson § 33; 1 Bowe-Parker § 3.13. For a collection of monographs on the subject see MacDonald, Fraud on the Widows Share (1960).

190 See pp. 409-13, Part I, supra.

191 See p. 500, note 125, Part II, supra.

contest of lack of capacity or undue influence. The main impact of the Act will be to make available to *W*, *A* and *B* the ground for relief established in subsection (b) of section 3.[192] Because of the strong presumption in their favor in subsection (a)(1) of section 11,[193] *S* will bear the burden of showing the omission of provision for *T*'s family both to have been intended by him and not to have been the product of an erroneous belief. Of these two elements in *S*'s defense, the more difficult will probably be the second, especially in light of the showing of *T*'s "misunderstanding" of his family's attitude toward him.

In the absence of any more specific proof, the same general elements in the surrounding circumstances which would, under existing law, induce the finder of fact to find for *W*, *A* and *B* on the grounds of lack of capacity and undue influence will probably induce the court to find for *W*, *A* and *B* under the new Act. The important break with the approach under existing law, however, is the difference in the relief which the court now may grant once it finds the will to have been affected by an erroneous belief. For the first time it will be possible to reach a result which *T*, had he been able at the time of execution more adequately to formulate and express his intent, would most probably have preferred over either extreme of the court's accepting or denying completely the will as it stands—*i.e.* to permit *W*, *A*, *B* and *S* to share equitably in his estate. If *S* can bring herself within the definition of a "special object of the testator's bounty" under section 2[194] of the Act, she will most probably be allowed to share in the estate in conformance with the presumption of the testator's would-be intent established in subsection (b)(2) of section 11.[195] Although the grounds for relief under the Act are expressly subordinated in section 13 to a disallowance of the will based upon *T*'s lack of capacity or the undue influence of *S* upon him,[196] it is submitted that the strong appeal to good sense of the "middle road" remedy under the Act would probably induce the finder of fact to prefer the statutory remedy over a total rejection of the will under the more traditional approach at common law.

Variations Upon the Basic Fact Pattern: Whenever the person benefitted in the will to the exclusion of the family is less clearly able to bring himself within the statutory definition of a "special object of the testator's bounty," the approach towards granting relief under the Act is more likely to be the same as under existing law. Either the court will find the will to have been materially affected by an erroneous belief of the testator, and remove *S* completely; or it will find no such

192 See pp. 478-79, Part II, supra.
193 See pp. 497-99, Part II, supra.
194 See subsection (k) of section 2, p. 475, Part II, supra.
195 See pp. 505-06, Part II, supra.
196 See pp. 514-15, Part II, supra.

erroneous belief or material effect, and refuse to reform the will. Of course, were *S* able in the former instance to prove in sufficient detail what *T* would have intended to leave to her had he not been affected by an erroneous belief, in reforming the will under section 12[197] the court would permit *S* to retain that portion of *T*'s estate. However, this will probably be a burden which a legatee would rarely carry in the absence of the presumption under subsection (b)(2) of section 11.[198]

One interesting variation upon this basic fact pattern is worthy of comment, if only to suggest the type of question of interpretation that may arise under the Act. In the unlikely case in which a testator omits provision for his family and leaves his estate to *X* "because my dear friend and intended beneficiary, *Y*, is dead," could *Y*—alive and asserting rights under the Act—argue that he should be named sole legatee on the ground established in subsection (d) of section 3[199] and then be permitted to raise the defense of being a "special object of the testator's bounty" for the purpose of considering a petition by *T*'s family for relief upon the ground established in subsection (b) of section 3?[200] May *Y*, in other words, invoke the remedial provisions of the Act in order to gain the favorable position of one "benefitted by a provision in the will found to have been materially affected" within the statutory language of subsection (b)(1) of section 11?[201]

(3) The Attempted Increase of a Legacy By Cancellation and Interlineation

Basic Fact Pattern: *T*, the testator, leaves a will in which a legacy of one thousand dollars is given to a friend, *F*. After the execution of the will, *T* had attempted informally to increase the amount passing to *F* by crossing out the "$1,000" and writing above it "$1,500." *F* seeks to share in *T*'s estate, the residuary legatee in the will arguing that the original legacy of one thousand dollars was revoked by cancellation.

Probable Approach Under Existing Law: Although the court will not give effect to the unexecuted attempt by *T* to increase the amount of legacy by five hundred dollars,[202] under the doctrine of dependent relative revocation it will permit the original gift of one thousand dollars to *F* to remain unrevoked and in effect.[203]

Probable Approach Under Proposed Act: Both the approach and the outcome should be the same under the Act as before. *F* will seek

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197 See pp. 510-14, Part II, supra.
198 See pp. 505-06, Part II, supra.
199 See pp. 480-81, Part II, supra.
200 See pp. 478-79, Part II, supra.
201 See pp. 502-04, Part II, supra.
202 See generally Atkinson § 96, at 499; 2 Bowe-Parker §§ 22.2, 22.3.
203 See pp. 332-34, Part I, supra.

relief from the effects of *T*'s erroneous belief concerning the effectiveness of the attempted increase in the legacy on the ground established in subsection (c) of section 3.[204] The court will be limited under section 12[205] to denying effect to the act of cancellation and may not, in the absence of some other statutory ground for relief, give effect to the attempted increase by interlineation which in no way appears upon the legal face of the will. If the new Act works any change in existing law in these cases, it is to be found in its promotion of a flexible, case-by-case approach rooted in what the testator would have intended, in place of the wooden, inflexible and often "automatic" application of the dependent relative revocation doctrine which some courts might otherwise tend to adopt in deciding these cases.[206]

(4) The Re-executed Gift to Charity Which Fails to Take Effect

Basic Fact Pattern: *T*, the testator, leaves a will in which a legacy to charity fails because the will was executed within a statutory period of thirty days before *T*'s death. The will contains a clause "revoking all prior wills," which operates to revoke completely a prior will executed two years before *T*'s death in which an identical charitable gift was made on the same terms. The charitable legatee in question seeks to obtain the gifts re-executed in *T*'s second will.

Probable Approach Under Existing Law: Although a few courts will permit the charity to take under the doctrine of dependent relative revocation;[207] and although it is possible that the same result in favor of the charitable legatee might be reached by a liberal interpretation or amendment of the limiting statute;[208] the relief here sought by the charitable legatee from the combined effect of the statute and the revocation clause will very probably be denied on the ground that *T* was not clearly mistaken in any way at the time of execution—he simply did not survive long enough for the substituted gifts to take effect.[209]

Probable Approach Under the Proposed Act: The charitable legatee will seek relief upon the ground established in subsection (d) of section 3. Subsection (a)(2) of section 11[210] establishes a presumption of erroneous belief affecting both the charitable gift and the clause of revocation in the will. The gift in the prior will is certainly "substan-

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204 See pp. 479-80, Part II, supra.
205 See pp. 510-14, Part II, supra.
206 See p. 333, note 62, Part I, supra. As pointed out there, however, most courts apply the dependent relative revocation doctrine on a case-by-case basis.
207 See, e.g., Linkens v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950); Estate of Herbert, 131 Cal. App. 2d 666, 281 P.2d 57 (Dist. Ct. App. 1955); Estate of Kaufman, 25 Cal. 2d 854, 155 P.2d 831 (1945).
208 See, e.g., Baum Estate, 418 Pa. 404, 211 A.2d 521 (1965); McGuigen Estate, 388 Pa. 475, 131 A.2d 124 (1957); Pa. Stat. Ann. tit. 20, § 180.7(1) (1950).
209 See p. 335, notes 66 and 68, Part I, supra, and accompanying text.
210 See pp. 499-501, Part II, supra.

tially similar" to the one rendered inoperative in the subsequent will—in fact, identical—and the court would certainly be justified, if not required, to reform the will so as specifically to except the prior gift to charity from the operation of the general clause of revocation. It will be noted that even though, strictly speaking, *T* may not have been mistaken at the time of execution of the revoking instrument, under the terms of subsection (a)(2) of section 11 the presumption of erroneous belief is irrebuttable once the preliminary determination of substantial similarity is made by the court.

Variations Upon the Basic Fact Pattern: If *T* had changed the name of the charitable legatee in the subsequent instrument, or if he had reduced the amount of the legacy, a more difficult question under the new Act would be posed in relation to the "substantially similar" language of subsection (a)(2) of section 11. The question was considered earlier of whether, in making the finding of substantial similarity and in turn material effect upon the will, the court will leave open the question of what the testator would have intended in the absence of such erroneous belief.[211] The point to be emphasized here is that in any event it is extremely unlikely that the court will adopt a wooden approach of the "no relief whenever the testator changes the legatee or reduces the legacy" variety.

A more interesting question would be raised in connection with this basic fact pattern by causing the charitable gift in *T*'s subsequent will to fail because it exceeds in amount a statutory limit placed upon testamentary gifts to charity. Assuming for purposes of analysis that the limiting statute itself does not permit effect to be given to that portion of the gift within the statutory limits, would the court be justified under this new Act in reforming the dispositive language of the will so as to reduce the legacy to within the statutory limits? Noting that the restriction in section 12 upon relief in certain cases of revocation is there limited to situations involving physical act revocations,[212] it would appear that a court could reform the dispositive provision in the subsequent will in the manner suggested, eliminating the necessity of invoking the dependent relative revocation doctrine or reforming in any way the general clause of revocation.

(5) Where a Husband and Wife Inadvertently Execute One Another's Wills

Basic Fact Pattern: *T*, the testator, and his wife, *W*, prepared wills which are in large measure reciprocal and which create identical trusts for *T* and *W* and their family, though neither *T* nor *W* intended the

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[211] See pp. 494-97, 512-14, Part II, supra. Compare comment to subsection (a)(2) of section 10, p. 493, supra.

[212] See pp. 510-14, Part II, supra.

other to be bound contractually in any way. At the time of formal execution, however, the instruments became confused with the result that *T* signed and executed *W*'s will, and *W* signed and executed *T*'s will. At *T*'s death, *W* seeks to have the instrument which *T* signed (and in which *T* himself is named as primary beneficiary) admitted as her husband's will, along with appropriate amendments in order to conform it to what *T* clearly intended to be the disposition of his estate.

Probable Approach Under Existing Law: No relief is presently available from the effects of *T*'s mistake in the expression of his testamentary intent.[213] Since it appears from the face of the will that *T* executed the wrong instrument, it will be denied probate. *T*'s estate will pass and be distributed under the applicable intestate statute.

Probable Approach Under the New Act: This is one of the clearest instances in which the proposed statute will provide relief from the effects of *T*'s erroneous belief concerning the identity of the instrument executed as his last will. Although potentially questions could be raised based on almost every ground for relief established in section 3, the ground which appears most appropriate is the one established in subsection (d) of section 3[214]—*i.e.* that *T*'s erroneous belief concerning the identity and contents of the instrument executed as his will appears clearly, if only impliedly, on the face thereof. It is not the ground for granting relief under the Act which is unique, however, but the nature of the relief itself. For the first time, courts will be free to reform the instrument executed by *T* in order to conform it to what *T* clearly would have intended. The source of proof in this case—the instrument erroneously executed by *W* but originally prepared as *T*'s will—is so clear as to render resort to presumptions of would-be intent unnecessary.

Variations Upon the Basic Fact Pattern: What would be the approach under both existing law and the new Act in a case where *T*'s will, executed separately and appearing on its face to be perfectly normal and natural, is attacked by *W* or some other person on the basis that it was in fact merely a draft of the instrument intended by *T* to be executed, which had somehow gotten confused with the "real" will at the time of execution? It must be understood that the approach to such a case under existing law—*i.e.* the denial of relief based upon such a ground and the allowance of the will as it stands at *T*'s death[215]—is in no way altered by this new Act. Unless some statutory ground for relief

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[213] See p. 369, note 178, Part I, supra, and accompanying text.

[214] See pp. 480-81, Part II, supra.

[215] See pp. 326 and 358, notes 36 and 136 respectively, Part I, supra and accompanying text. For a discussion rejecting the suggestion that courts are "always" willing to resort to extrinsic evidence where a question is raised in the present context concerning the identity of the instrument, see p. 359, notes 137-39, Part I, supra, and accompanying text.

is clearly established, reformation will not be available. Here, in the absence of an allegation of misrepresentation or any indication of an erroneous belief upon the face of the will, extrinsic evidence of mistake will be excluded and relief under the Act will be denied.

(6) Reliance by the Testator Upon a Prior Inter Vivos Gift Erroneously Believed to Have Been Made

Basic Fact Pattern: *T*, the testator, leaves a will in which he recites that because he was previously deeded certain farm property described in the will to his son, *A*, he therefore makes no special provision for *A* in that regard and instead leaves the residue of his estate to his children *A*, *B*, *C* and *D* in equal shares. In fact, the deed referred to by *T* in the will failed to pass title to *A* because it had not adequately been delivered by *T* to *A* during *T*'s life. *A*, with whom *T* had operated the farm for several years prior to *T*'s death, claims the farm to have been devised to him in *T*'s will.

Probable Approach Under Existing Law: Under the approach presently taken to this type of mistake in the inducement, the farm will pass to *T*'s four children equally as part of the residue of his estate.[216] The court will not imply an intent on the part of *T* to devise the farm to *A* under the terms of the will.

Probable Approach Under New Act: On the facts as summarily given above, *A* will probably be allowed to prove, in support of his claim for relief on the ground established in subsection (d) of section 3,[217] *T*'s intent to give *A* the farm and *T*'s erroneous belief concerning the legal effectiveness of the undelivered deed to accomplish that intent. It is important to note in this regard that *A*'s difficulty will not be, at least technically, to rebut the presumption of equal treatment established in subsection (b)(2) of section 11,[218] but rather initially to support a finding under subsection (a)(4) of section 10[219] (in connection with which the presumption in subsection (b)(2) of section 11 does not apply) that *T*'s erroneous belief materially affected the execution of the will. Because the will itself reflects the equality-of-treatment principle, *A*'s task will be one of showing clearly and convincingly, both from the statement in the will and proof of surrounding circumstances, that *T* erroneously believed the deed to have been effective and that such an erroneous belief materially affected the execution of his will. Once a finding to this effect is made in *A*'s favor under subsection (a)(4) of

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[216] See p. 342, note 92, Part I, supra, and accompanying text. However, in a few instances courts have granted relief from the effects of this type of erroneous belief. See p. 343, note 93, Part I, supra.

[217] See pp. 480-81, Part II, supra.

[218] See pp. 505-06, Part II, supra.

[219] See pp. 493-94, Part II, supra.

section 10, the further finding under subsection (b) of section 10[220] of what *T* would have done will pose no additional difficulties, for the presumption of equal treatment established in subsection (b)(2) of section 11 will already have been rebutted. *A*'s difficulty, in other words, is in "rebutting" the dispositive provision in the will rather than the presumption under subsection (b)(2) of section 11. In light of the peculiar nature of *T*'s erroneous belief, in order to support a preliminary finding that it materially affected the execution of *T*'s will *A* must show that *T* would have left the farm to *A* had he not been mistaken.

Variations Upon the Basic Fact Pattern: As the statements in the will of collateral facts relating to the disposition of the testator's estate become more and more general in succeeding cases arising under the Act, it will become more and more difficult to make the findings under subsection (a)(4) of section 10 required in order to grant relief upon the grounds established in subsection (d) of section 3. For example, were *T* merely to have recited that in light of "certain arrangements" made elsewhere by him he saw no reason why his remaining estate should not be divided equally among his children, *A* would undoubtedly encounter difficulties in trying to convince the court that *T*'s erroneous belief concerning a particular inter vivos deed "clearly appeared in the will."[221]

(7) Misdescription of a Legatee

Basic Fact Pattern: *T*, the testator, leaves a will in which a gift is made to "John J. Jones, of 405 East Main Street." In fact, *T* was not acquainted with the person described in the will but had known, intimately and for many years, a John M. Jones, who lived at an altogether different address. John M. Jones, *T*'s long-time friend, seeks to establish himself as the person whom *T* intended to refer to in the provision in question.

Probable Approach Under Existing Law: Although no indication appears in the express wording of the will to indicate that *T* had anyone other than John J. Jones in mind in connection with the gift in his will, it is believed that most courts today would probably find an ambiguity or "equivocation"[222] in the description of the legatee and would permit extrinsic evidence of *T*'s intent in this regard.[223] Concluding that *T* must have intended to refer to John M. Jones, *T*'s friend, the language would be construed—though not reformed—to accomplish this end.

Probable Approach Under the New Act: The Act works two basic changes in the court's approach to the type of fact pattern described

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220 See pp. 494-97, Part II, supra.
221 See subsection (d) of section 3, pp. 480-81, Part II, supra.
222 See p. 375, note 198, Part I, supra.
223 See pp. 361-63, Part I, supra.

above. First, subsection (a)(3) of section 11[224] insures the preliminary finding of ambiguity necessary in order to grant relief both under the Act and under prior law by establishing a presumption that *T* intended by means of the description in question to refer to someone with whom he was well acquainted; and second, with respect to the relief made available, section 12[225] allows the court for the first time to accomplish directly, by reformation, what it has hitherto accomplished only indirectly, by construction. Under the Act, the description in this case would be reformed by the court so as to conform literally to what the proof has shown *T* would have intended in the absence of mistake in the expression.

Variations Upon the Basic Fact Pattern: The really interesting question, of course, is how far the courts will go in finding an ambiguity in connection with a description in the will. In the fact pattern just described, had both persons named "John Jones" been reasonably well acquainted with *T*, presumably the precise description in the will would prevail notwithstanding John M. Jones' arguments to the contrary. Where the line is to be drawn under the act in cases falling in between the two extremes will be left to the courts. In any event, were *T* to leave his estate "to my friends," the Act would not support reformation unless the court were able to bring the description "friends" within the definition of "ambiguity" in section 2.[226] In light of the requirement in subsection (b) of section 2 that the description be definite enough "to permit a decision to be made whether any given person . . . is in fact a member of the class of referents to which such language applies," it is doubtful that a gift to "my friends" would qualify as an "ambiguity."

(8) Failure to Provide For An Important Contingency

Basic Fact Pattern: *T*, the testator, leaves a will in which his entire estate is given to his wife, *W*, if she survives him, "and if we should die under circumstances which make it impossible to determine the order of our deaths, then it shall be presumed that I survived *W* and my estate shall pass to my beloved alma mater, Upstate University." Both *T* and *W* were injured in the same automobile accident. *W* predeceased *H* by several weeks, after which *T* died leaving as his sole intestate heir *C*, a first cousin whom *T* had met only occasionally during his life.

Probable Approach Under Existing Law: *T* will almost certainly be held to have died intestate, in spite of strenuous efforts on the part of Upstate University to establish some ambiguity or other which might be the subject of a liberal construction of *T*'s intent.[227] The fact of the

[224] See pp. 501-02, Part II, supra.
[225] See pp. 510-14, Part II, supra.
[226] See subsection (b) of section 2, p. 473, Part II, supra.
[227] See p. 404, note 284, Part I, supra, and accompanying text.

matter is that *T's* will simply overlooks the obvious, and no matter how clearly "what *T* would have intended" may appear from the will, most courts would be unable to find anything in that language to "construe" in a way to reach the right result.

Probable Approach Under the New Act: This is one of the more difficult fact patterns in which to predict the change which the statute would bring, since there is no provision in the Act explicitly dealing with instances of "gross oversight." Relief would come, if at all, on the ground established in subsection (d) of section 3[228]—*i.e.* that an erroneous belief of *T* appears in the will. Upstate University would argue that *T*'s belief that he had adequately covered obvious contingencies does appear in the will, at least impliedly, and that its effect upon execution is obvious. The really important source for a change in approach which the statute may supply, however, is the availability of reformation of the will to conform it to *T*'s would-be intent. Even though *T* may not, strictly speaking, have been mistaken concerning the content or meaning of the will, the availability of the reformational relief under the Act might induce the court to make a finding of erroneous belief of the sort described earlier. Under existing law, not only must the court be willing in such a case to "stretch a point" in order to find the testator to have been mistaken, but it must also be able to point to language in the will which may be "construed" so as to dispose of the estate in the way the testator must have intended. Any impetus towards the court finding an "ambiguity" or other indication of mistake will have been eliminated, for even if the court were willing to find the testator to have been mistaken it might nevertheless be impossible under existing law to grant a remedy. In contrast, the elimination under the Act of the additional necessity of finding a positive dispositional basis for construction in the language of the will, may have a liberalizing effect upon the court's willingness in the first place to find the will to have been affected by an erroneous belief of the testator. Free to reform, rather than merely to construe, the will, the courts may begin to see their way clear to a greater willingness to find mistakes in the expression under subsection (d) of section 3.

Variations Upon the Basic Fact Pattern: One of the factual elements which supports relief in the case just described is the harshness of the result (at least from the point of view of *T*'s probable intent) reached under the intestate succession statute. Were this sort of oversight to occur with respect to a preresiduary bequest, with the alternative to relief under the Act being a disposition of the property under *T*'s residuary clause, the petitioner's position would almost certainly be weakened. Just where the court might draw the line in these cases of

[228] See pp. 480-81, Part II, supra.

probable oversight is difficult to predict. Suffice it to say that as the probability of a mistake in the expression diminishes along the spectrum ranging from certainty to mere possibility, the basis for finding an erroneous belief to have appeared in the will is correspondingly reduced.

(9) Misrepresentation Affecting the Will

Basic Fact Pattern: *T*, the testator, leaves a simple will in which his entire estate is given to *A*, one of two brothers of *T* who are also his intestate heirs. *T*'s other brother, *B*, appears in the proceeding for the allowance of the will, alleging that *A* knowingly misrepresented certain facts to *T* which induced *T* to omit provision in his will in favor of *B*. The evidence which *B* presents shows *T* to have been a wealthy bachelor who lived with his brother *A* for some time prior to his death. Although it was generally understood that *T* would leave the bulk of his estate to *A*, who had very little property of his own, *B*'s evidence clearly shows that *T* had intended to leave his valuable interest in a family business corporation to *B*, with whom *T* had dealt as an informal partner for many years. At the time of execution of the will, *A* had knowingly misrepresented to *T* that no special provision need be made with respect to the business interest, explaining that *B* would succeed automatically to it by operation of law upon *T*'s death. In fact, this interest is disposed of by the residuary clause in *T*'s will for the benefit of *A*.

Probable Approach Under Existing Law: This particular fact pattern is chosen to illustrate the chief limitation placed by existing law upon the granting of relief from the effects of fraudulent misrepresentation. Although evidence of the fraud will be admitted quite freely in the proceeding questioning the admittance of the will,[229] the court is severely limited in granting relief once the fraudulent misrepresentation has been proven. Either the court will deny the will entirely under these circumstances, or admit it to probate without restriction or limitation.[230] Equity may in a later proceeding impose a constructive trust upon *A* to convey the property in question to *B*,[231] but this will often necessitate *B*'s instituting a separate action with the attendant duplication of arguments, testimony and the like.

Probable Approach Under the New Act: Evidence is freely admissible in support of a claim based upon the ground for relief established in subsection (a) of section 3.[232] The main difference in approach under the Act will be in regard to the nature of the relief available. Where *B* is able to show what *T* would have done in the absence of erroneous

[229] See pp. 385-86, notes 225-27, Part I, supra, and accompanying text.
[230] See p. 391, note 242, Part I, supra, and accompanying text. See also pp. 385-86, notes 225-27, Part I, supra.
[231] See p. 391, note 243, Part I, supra, and accompanying text.
[232] See p. 478, Part II, supra.

belief—*i.e.* that he would have left the stock to *B*—the court will reform the will by inserting a clause to that effect in the instrument.

Variations Upon the Basic Fact Pattern: Were the misrepresentation in this type of case innocently made, perhaps by some third person intermediary, under existing law no relief would be granted however clearly it might be proved. Under the express wording of subsection (a) of section 3, however, the innocence or guilt with which the misrepresentation is made is completely irrelevant. So long as it can be shown clearly and convincingly that an erroneous belief of the testator has materially affected the execution of the will; that such erroneous belief was the product of a misrepresentation made to the testator by some other person; and that the testator would have intended a different and ascertainable scheme of disposition; relief will be granted.

The interesting cases, both under existing law and the proposed statute, are those in which the alleged misrepresentations are more general in nature and less directly connected with the disposition of the estate under the will. For example, the evidence may indicate that the testator's wife and sole legatee told him on several occasions that his grown son by a former marriage was "irresponsible," and "no good." Whatever the relevance of such statements in helping to make out a case of undue influence on the wife's part, it is difficult to see how, in and of themselves, they support a finding of erroneous belief of the sort referred to in subsection (a) of section 3. The son might, however, succeed upon the separate ground for relief established in subsection (b) of section 3—*i.e.* that an erroneous belief of the testator has produced an unnatural disposition of his estate.[233]

C. *Meeting Anticipated Objections to the Act*

In the discussions which follow, an attempt will be made to anticipate, and then to meet, the major objections in principle which might be raised in opposition to the proposed statutory draft. Strong emphasis must be placed on the phrase, "in principle," for it is recognized that in many of its details the present draft reflects the imperfections characteristic of a tentative effort. As stated earlier, my purpose in presenting the statute in this tentative form is to "break the ice" with respect to the treatment traditionally afforded mistake and fraud in the law of wills, and to move the basic approach adopted by the Act out into the free and open channels of discourse. The objections about to be considered, therefore will correspondingly be limited to those basic objections in principle which, if they were not overcome, would justify abandonment of the project here undertaken. The sequence in which these po-

[233] See pp. 478-79, Part II, supra.

tential objections are considered is not meant to suggest a particular order of importance. Instead, it seems to be the most comfortable sequence in which to treat them, one which helps to reduce to a minimum the overlap and repetition which must inevitably accompany both the statements of the objections themselves and the arguments made in rebuttal.[234]

Objection #1: The Act is Violative of the Policies Underlying the Statute of Wills. The attack here is aimed at the answer given by the Act to the basic policy question of "How much is too much?" raised at the very outset of this Part II. To the degree that the traditional balance between protection and relief is upset by the statute, it is argued, the change from the pattern of existing law is a dangerous and unwelcome departure. To permit this type of extrinsic attack upon duly executed instruments is to open wide the door to the abuses which the Statute of Wills was meant to prevent. It is not that the legislature *could* not fundamentally alter the approach dictated by the strict requirements of the Statute of Wills, but that it *should* not do so with respect to venerated rules of such long standing.

In answering the foregoing objection it may, of course, be asked just what are these "policies underlying the Statute of Wills" to which this objection points with such prideful veneration and of which, allegedly, the Act is so rudely violative. To suggest that we are in any way dealing with absolutes in this context is patently absurd; the problem presented of balancing competing considerations of policy must be seen to be one of degree. Although there has been some intelligent thought given to the basic question of what it is that the Statute of Wills is supposed to accomplish,[235] this writer has long suspected that in the end these "underlying policies" are best understood as the rather elusive end-products of a unique historical development.[236] However, this sort of counter-attack avoids an objection which may easily be overcome merely by facing it.

Returning to an earlier stated premise,[237] it may be assumed for purposes of analysis that the Statute of Wills reflects the belief that it is appropriate to create a presumption of validity in favor of formally executed instruments, rebuttable only in certain limited circumstances. Without delving too deeply into *why* formal execution should give rise

[234] One objection, of course, might be that there is no need for the type of "advancement" in the law which the Act tries to achieve. Suffice it to say that prior discussions both in Part I and in this Part II have covered this particular point adequately. For purposes of the discussions which follow, therefore, it will be assumed that the underlying need for reform is present.

[235] See, e.g., Gulliver & Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1 (1941).

[236] Cf. p. 395, note 257, Part I, supra, and accompanying text.

[237] See pp. 470-71, Part II, supra.

to this presumption, it may further be presumed in connection with an alleged erroneous belief materially affecting the will that rebuttal from extrinsic sources ought to be permitted whenever there is some indication on the face of the will itself that such an erroneous belief probably did occur, or whenever the extrinsic source of rebuttal—the evidence relied upon to prove the erroneous belief—by its nature is not subject to the abuses which formal execution is intended to prevent. Accepting the foregoing summary to be a fair statement of the criteria by which to judge the bases for reforming wills under the Act, it is submitted that, far from violating the traditional policies underlying the Statute of Wills, the Act may be described more accurately as carrying those policies to their logical conclusion.

No fewer than four of the five separate grounds for relief established in section 3 require some indication in the will itself of the existence of an erroneous belief on the part of the testator;[238] and the fifth—the ground for relief established in subsection (a) of section 3[239]—requires proof of the occurrence of a phenomenon which has traditionally been considered objective enough to supply the sort of protections necessary to allow it to be shown by extrinsic evidence. Moreover, the burden of clear and convincing evidence placed upon the petitioner in subsection (a) of section 9,[240] if conscientiously applied by the court into whose charge the making of findings is expressly placed by the Act, should significantly reduce the dangers from extrinsic evidence which otherwise might arguably exist.

And finally, in response to the assertion that the Act is violative of the policies underlying the Statute of Wills because it creates a power of reformation in the courts, it need only be said that such an objection is either grossly hypocritical or unmindful of the relevant provisions of the statute, or both. In the first place, it is nothing short of nonsense to insist that courts will never, under present law, reform a will in the sense of adding meaning not otherwise contained therein. Whenever a court reads a will "as though it contained" certain words or clauses which it does not actually contain, it is "reforming" the will in the only intelligent sense of the latter term.[241] To permit a court to accomplish directly under the Act what it has not hesitated to accomplish indirectly in appropriate cases should raise the eyebrows of none but the hypocritical.

Admittedly the proposed statutory draft authorizes reformation of wills in many cases where, under existing law, no relief would be avail-

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238 E.g., subsections (a)-(e) of section 3, pp. 478-82, Part II, supra.
239 See p. 478, Part II, supra.
240 See pp. 489-90, Part II, supra.
241 Cf. p. 378, note 206, Part I, supra, and accompanying text.

able via construction of the testator's intent. However, to advance this statutory element as a basis for objecting to the Act on the ground that it violates the policies of the Statute of Wills is to overlook the important role played by presumptions in the newly proposed scheme. It will be remembered from an earlier discussion[242] that the limitations upon the courts' granting similar relief under existing law, assuming policy objections to the admission of extrinsic evidence of erroneous belief to have been met, were the product of the inherent complexity and open-endedness—the polycentricity—of questions of would-be intent. Simply stated, the adjudicative process employed by the courts is ill-suited to the task of determining "what the testator would have wanted" on the facts of particular cases. Far from denying this position taken by the courts, however, the Act recognizes its legitimacy and attempts to overcome the difficulties presented by it. The presumptions of intent established in subsection (b) of section 11[243] should serve sufficiently to narrow the remaining questions of fact concerning would-be intent to permit the court to reform wills found to have been materially affected by erroneous beliefs. In short, the statute supplies what the courts on their own have been unable to supply—a set of workable, consistent guidelines to what the testator would have intended in the absence of such erroneous beliefs. If anything, the Act might more legitimately be criticized for being too conservative in this particular regard rather than too liberal. It might be suggested, for example, that a more general cy pres power be given the courts in order to reform wills in cases of likely error. The reasons for limiting the power of reformation in the present statutory draft will be developed later.[244]

Objection #2: The Act is Unreasonably Destructive of Testamentary Freedom. The attitude reflected by this objection is that a testator, by careful attention to drafting, should be able to prevent the application to his will of presumptions of mistaken belief materially affecting execution. To be sure, questions may always be raised concerning the possibility of undue influence, fraud, or the mental incapacity of the testator to make testamentary disposition of his estate, notwithstanding anything he may say in his will to the contrary. However, at least with respect to alleged mistakes in the inducement affecting the execution of his will the testator should be able to avoid the subjection to scrutiny of his dispositive scheme after his death. Existing pretermitted child statutes, it would be argued, reflect this valid position inasmuch as their application is almost everywhere premised upon the non-occurrence in the will of language explaining the omission of the testator's child. To the extent

242 See pp. 468-69, Part II, supra.
243 See pp. 502-04, Part II, supra.
244 See pp. 542-43, Part II, infra.

that the new Act permits an inadequately provided-for child to assert the existence of a mistake affecting the will notwithstanding an attempted explanation by the testator in the instrument itself, it represents an unwarranted and socially undesirable intrusion upon the sanctity of testamentary freedom.

In attempting adequately to rebut such an objection it must first be admitted that the Act does represent an extension—a deliberate extension—of the type of relief presently being granted under so-called pretermitted child statutes. Rebuttal of the foregoing objection will consist, therefore, in establishing the reasons in principle which justify this extension. One such reason concerns what may be described as the phenomenon of the inadvertent avoidance by the testator of otherwise desirable statutory relief. Under existing law, often a testator may avoid the statutory presumption of mistake merely by stating in his will that the omission of provision for one or more of his children is intended and deliberate. The tendency for these clauses to appear "automatically" in wills, especially those prepared from forms,[245] suggests that in a certain percentage of such cases the testator may not have actually preferred at his death to omit provision for the child in question, and that the statutory relief itself has inadvertently been avoided. Under these circumstances the new Act would achieve a more desirable result by permitting the unprovided-for child to overcome even the most patent and unambiguous declaration of intentional omission.

Of course, the extension of relief in the cases just described must not be made at the sacrifice of unjustifiably overriding the intent of the testator in the majority of such cases in which the testator would have preferred at his death to omit provision for his child in conformance with the clause to that effect in the will. What are the reasons in principle which justify a presumption of erroneous belief notwithstanding a valid statement of the testator's intent to the contrary? The answer to this important question comes with an awareness that the Act reflects —in a way which existing pretermitted heir statutes do not—the belief that social policy should place some pressure upon a testator to make what could be described in statutory terms as a "natural" disposition of his estate. Up until the present time, of course, it has never been recognized in this country that the moral duty to provide for children should be made a legal duty,[246] nor does the Act adopt any such extreme posi-

[245] See, e.g., Farr, An Estate Planner's Handbook 355 (1966); Johnson, A Draftsman's Handbook for Wills and Trust Agreements 290 (1961).

[246] See generally Atkinson § 36, at 139; 1 Bowe-Parker § 3.13. See also Note, Wills—Statutes Limiting Testamentary Rights, 1954 Wis. L. Rev. 342; Note, The Right to Dispose of Property by Will, 37 Marq. L. Rev. 92 (1953); Laube, The Right of a Testator to Pauperize His Helpless Dependents, 13 Cornell L.Q. 559 (1928).

tion in this regard. Short of giving to the testator's children a "legal forced share" in their parent's estate, however, the Act creates a strong presumption that an "unnatural" disposition must have been the product of error. The pressure to provide for one's children which this presumption creates, if not the duty, may be appreciated by comparing the Act with the more traditional statutory approach.

Under existing pretermitted child statutes, with their emphasis upon what the testator "intended," whenever the testator intends for whatever reasons to make an unnatural—and socially atypical—disposition of his estate, the testator is apt to state in his will deliberately false reasons for omitting his children in order to lessen or eliminate the social or moral castigation which his decision might otherwise generate at his death. Under existing statutes, relief in favor of his children may be prevented by the inclusion in the will, for example, of a simple though completely untrue statement that their omission is intentional "because they have been provided for elsewhere." Under the proposed Act, however, the employment in this manner of untrue though socially acceptable reasons for omitting one or all of his children will expose the will to attack upon the ground established in subsection (d) of section 3[247] —*i.e.* that the omission has been produced by an erroneous belief appearing expressly in the will. Therefore, if the testator is pressured by the "unnatural disposition" section of the Act to supply any reason for omitting provision for a child it will be to supply the true reason. If the truth happens to be socially unacceptable to the testator, then he can avoid the entire problem simply by making a socially acceptable—a natural—disposition of his estate.

To summarize the position taken by the Act in this regard, a testator may no longer breach his social and moral duties to his children and escape by means of a standard clause inserted in the will; socially atypical behavior of this sort will have become more difficult. If the testator wants to secure the disinheritance of his family from their claims under the new Act, he must be willing to do so openly and above board. If the pressure this places upon the testator to avoid unnatural dispositions be adjudged an encroachment upon traditional concepts of testamentary freedom, then it is patently justifiable.

Objection #3: The Act Will Induce Litigation and Cause Delay in the Probate Process. The objection here raised is based upon the assumption that the proposed statute, creating as it does new grounds for questioning the admittance to probate of testamentary instruments, will produce litigation and delay which would not have occurred under existing law. It may be argued, moreover, that this tendency will be accen-

[247] See pp. 480-81, Part II, supra.

tuated to the extent that the Act encourages the free admission of evidence in connection with those grounds for relief. In light of what might fairly be described as an increasing awareness and general concern over questions of unnecessary delay and expense in the probate process,[248] the statute might at first appear to be especially open to criticism on the ground here advanced.

By way of rebuttal of the foregoing argument it should be recognized that this objection must be taken to be aimed primarily at those portions of the Act which create new grounds for relief where none before existed —*i.e.* chiefly the advancement of relief by statute in cases of innocent misrepresentation[249] and erroneous belief producing unnatural disposition of the testator's estate.[250] To the extent to which the statute merely reaffirms and codifies existing grounds and techniques for questioning the admission and ultimate application of a will, it contributes nothing particularly new in the form of delay- or litigation-producing elements. The question ultimately to be answered, therefore, is this: will the creation of these new grounds for relief in the statute significantly increase litigation in connection with the admission of wills to probate?

Several factors combine to require a negative answer to the foregoing question. In the first place, a careful reading of the statute will reveal that these new grounds for relief are carefully circumscribed by limitations relating to who may assert them and when they may be asserted. Only those persons who would otherwise have standing under existing law to contest the allowance of the will to probate may assert either of these grounds,[251] and then only within the time period ordinarily allowed for such contests.[252] It is submitted that any person who would be motivated to assert these grounds for relief under the Act would in any event have asserted the traditional grounds for contest of lack of capacity, undue influence and fraud. Will contests tend to assume a "package deal" format, and the factors which induce them have much more to do with the nature of the will itself than with surrounding circumstances. The idea of a would-be contestant being moved to assert one of these statutory grounds for relief under circumstances where he would not have asserted any others is so contrary to the realities of will contest litigation as to be untenable.

If the statute will not, in and of itself, induce the contest of wills, what will be its effect upon the litigation in which it becomes involved? There

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[248] Only recently, a book blasting the probate process and the legal profession, and offering its readers "do it yourself" forms with which to plan their own estates and avoid probate, enjoyed the better part of a year on the national best-seller lists. Dacey, How To Avoid Probate! (1966).

[249] See subsection (a) of section 3, p. 478, Part II, supra.

[250] See subsection (b) of section 3, p. 478, Part II, supra.

[251] See subsection (a) of section 4, p. 482, Part II, supra.

[252] See subsection (a) of section 6, p. 485, Part II, supra.

is simply no basis whatever for arguing that the Act will tend to increase the delay involved in such proceedings. Petitions in the nature of will contests under the Act must be raised early in the proceedings;[253] there is no right to jury trial in connection with these grounds for relief;[254] and the burden upon the petitioner of proving his case by clear and convincing evidence should permit summary treatment of weak or spurious claims.[255] All of these limitations are designed to eliminate unnecessary delays in raising questions under the Act. Far from increasing the time it will take to resolve issues presented in these cases, the new statute may even help to shorten the overall period, including the delays accompanying a high incident of reversal on appeal, at least insofar as the finder of fact will no longer be compelled to make spurious findings of incapacity or undue influence in order to reach socially acceptable results in hard cases.[256]

Objection #4: The Act Is Too Complicated To Be Applied Effectively in the Probate Process and Over-estimates the Resources of the Courts. Here it would be argued that the statutory approach earlier presented might very well be useful if the judges into whose hands would fall its implementation were universally endowed with the creative genius which the Act seems to assume them to possess; but in fact they are too busy and human—and often incompetent—even to begin to handle adequately the difficulties and complexities which would accompany the task of reforming testamentary instruments under the proposed statutory scheme.

In attempting to answer this most serious objection to the proposed statutory scheme it is important to recognize that the objection is based upon an assessment of both the difficulties presented by the Act and the competency and willingness of the courts adequately to meet those difficulties. With respect to the competency of the courts before whom questions under the Act would be brought, it was acknowledged at the very outset of this Part II that this statute is designed to be implemented by a court which normally exercises a more or less general equity jurisdiction in connection with probate matters, and is admittedly ill-suited to treatment by a court limited to handling only the simplest and most routine matters in connection with the probate of wills. Were it to be argued that the courts which handle will contests and the like in a particular jurisdiction are of the latter type or that the courts were

253 Id.
254 See subsection (a) of section 9, p. 489, Part II, supra.
255 See subsection (b) of section 9, p. 490, Part II, supra.
256 If it be argued that in some cases under the Act findings of erroneous beliefs are going to be "spurious" in the sense that the testator was not in error (see comment to subsection (a)(1) of section 11, pp. 497-99, Part II, supra), it may be replied that at least these findings are clearly supported by statutory presumptions of testamentary error.

otherwise incompetent to handle matters pertaining to complex wills litigation, and therefore that the Act is inappropriate, I can only answer that the courts themselves should be upgraded rather than the Act rejected on such a ground.

It is the assessment of the difficulties presented by the Act, rather than the assessment of the abilities of the courts, which raises questions of interest and concern in the present context. Just how difficult would this statute be for reasonably competent courts to interpret and apply in actual cases, and how would those difficulties affect the results reached? In seeking an answer to this question it must be recognized that there are two very different sorts of "difficulties" which must be considered both individually and in their relation to one another. On the one hand, the statute may be "difficult" in the sense that it is too complicated and presents insurmountable problems of the courts understanding and inter-relating various sections; and on the other, the statute may be "difficult" in the sense that it relies too greatly upon the creative exercise by the court of inadequately defined or undefined discretionary powers. On the one hand the Act contains too many provisions to be comprehensible; on the other, it contains too few provisions to guide the court towards reaching the intended results.[257] Is the proposed Act too difficult in either, or both, of these senses?

It is submitted that the balance struck by the Act between "too much" and "too little" in the way of statutory provisions and guidelines is both proper and workable, and that the statute is not unreasonably "difficult" in either sense of that term. With respect to the question of the Act's comprehensibility, it will be observed that the kinds of judgment which the court is called upon to make under the statute are basically three in number. First, is the petitioner asserting a ground for relief established in one or more of the provisions of section 3? Second, has the petitioner sustained the burden of proving clearly and convincingly that the will was materially affected by an erroneous belief of the testator? And finally, has the petitioner sustained the burden of showing what the testator would have intended in the absence of the erroneous belief?

Inevitably, the most difficult tasks in making these judgments will be those of assessing the weight and materiality of the evidence, on the one hand, and applying the statutory presumptions of erroneous belief and would-be intent, on the other. It is believed that the limitations in section 3 upon the types of erroneous belief which may be asserted as grounds for relief, along with the burden placed in section 9 upon the petitioner to prove his case clearly and convincingly, will sufficiently

257 To some extent, of course, these two types of difficulties will tend to be mutually exclusive.

reduce the truly difficult questions of proof under the Act to a workable minimum. Moreover, the presumptions under subsection (a) of section 11 concerning the existence of erroneous beliefs should be familiar enough to the courts to permit their relatively straight-forward application. Admittedly, the presumptions of would-be intent in subsections (b) through (d) of section 11 introduce much that is new in the statute, especially the defensive concept of "special object of the testator's bounty" in subsection (b)(1). However, the structure of the Act is designed to make clear the interrelationships between and among the presumptions in section 11 and the findings required in section 10, and should render comprehensible the newer portions of the Act.

Significantly, these very sections which raise questions of the potential difficulties-in-comprehensibility of the statute also reduce the difficulties-in-implementation to a tolerable level, for without them the Act would be rendered unworkable in the hands of even the most competent and forcefully creative courts. In the terminology employed earlier to explain the inherent limitations upon court-made change in this area of the law,[258] the polycentricity of questions of "what the testator would have intended" would place their resolution beyond the limits of the adjudicative process. Without the presumptions of erroneous belief and would-be intent established in section 11, even the most able and willing courts would find themselves floundering in attempting meaningfully to reform wills on any significant scale. It should be recognized, of course, that the Act does not—and cannot—eliminate entirely the element of polycentricity characteristic of these cases. No suggestion is being made that the Act as it now stands, even with the presumptions in question, will not require some degree of imaginative involvement on the part of courts called upon to apply it. The important point is that the Act does reduce the polycentricity to limits within which it is possible to conclude that the Act would not be rendered unworkable were such involvement not to be forthcoming on the part of the courts. Aimed as it is primarily at supplying relief in what may be described as the "clear cases," the statute should not prove unmanageable even should it receive the most narrowly restrictive of judicial interpretations. It is hoped that the courts will, in time, develop new approaches to questions of mistake and fraud under the Act. Even without such development, however, the present statutory draft should work a substantial change for the better over existing law. Simply stated, the statute has in and of itself sufficient integrity adequately to function in the hands of all but the most unimaginative and unwilling courts.

Objection #5: The Act Will Tend to Rigidify the Law in This Area

[258] See pp. 468-69, Part II, supra.

and Will Retard Future Growth and Development. This basis for objecting to the Act focuses upon one characteristic of the relationship between statutory and judge-made law—*i.e.* that whenever a statute unequivocally determines the outlines and substance of a body of law, the courts are to that extent restricted in their further attempts to extend or otherwise modify the rules adequately to meet unforeseen contingencies. The codification and reform under the Act of the rules governing mistake and fraud in wills, it is argued, will have been accomplished only at the price of effectively insulating those rules from further development by the courts. If any legislative enactment is required in this context, it should take the form of a generally worded "ice-breaker" aimed at freeing the courts to use their discretion in working out an approach to the problem of reforming testamentary instruments.

Several points may be made in response to the foregoing objection. In the first place, it wrongly implies that substantially similar results could and would be achieved by the courts themselves unaided by any special statute. The reasons in principle for discarding such a contention are developed in an earlier discussion.[259] It may be added here that in fact the courts have shown no tendency or willingness to cure the law in this area of the shortcomings at which the statute aims,[260] and there is no reason to believe that a significant shift in judicial approach would be forthcoming in the foreseeable future.

Moreover, the suggestion that a general statutory "ice-breaker" would suffice to accomplish the purposes of the present draft compounds the error inasmuch as it wrongly implies that the significant reason for the failure or refusal of the courts to achieve desired reforms is to be found in the concept of stare decisis. The truth of the matter is, of course, that the courts have not moved in the direction of reforming wills due mainly to the fact that they would not be able adequately to cope with the inherently open-ended problems such a move would present. Any statute which simply gave to the courts a general cy pres power without sufficient guidelines would soon have the courts floundering over questions unresolvable by means of the adjudicative process. More importantly, such an open-ended and unrestricted statute would be vulnerable to attack upon each and every ground for objection hereinbefore considered, for it will be remembered from those earlier discussions that it was the limitations built into the proposed Act which rendered such objections inapposite. A general cy pres statute would, in short, be as unjustifiable in principle as it would be unworkable in practice.

Of course, there can be little question that the codification and reform worked by the proposed Act will, in some areas, reduce the scope of

[259] See pp. 465-66, Part II, supra.
[260] See pp. 413-17, Part I, supra.

the courts' power subsequently to work changes in their approach. In connection with the ground for relief established in subsection (c) of section 3, for example, the explicit statutory restrictions upon the nature of the relief available will undoubtedly tend to inhibit extensions of relief in the future. It is precisely in such a context, however, that meaningful development in the absence of such restrictions would be least likely to occur and, if it did, most clearly unsupportable in principle.[261] Similarly, the presumptions of would-be intent in subsections (b)(1) and (b)(2), of section 11[262] are rather restrictive because they are required to be restrictive.

The greatest error made by such an objection, however, is its suggestion that the statute will not support case-law development by the courts. In the great majority of instances where the act establishes a rule it does so in a manner designed to permit and encourage the future development of a sensible body of law by the courts. There is no reason whatever for believing that with respect to the concepts of unnatural disposition, innocent misrepresentation, or ambiguity in description that the courts will be restricted or inhibited in any way. A good example of the bias of the Act in favor of encouraging continuing growth in the decisional process may be seen in the establishment of the ground for relief contained in subsection (d) of section 3[263]—that an erroneous belief materially affecting the will appears expressly or impliedly in the will. Far from rigidifying the courts' approach to these cases, this subsection should, in time, provide limitless opportunities for extension and development. Especially in light of the presumption of erroneous belief created in subsection (a)(2) of section 11,[264] it should be possible for willing courts not only to advance the doctrine of "dependent relative revocation by subsequent instrument"[265] as a technique for granting relief, but also to establish original approaches to new and only remotely related problems of erroneous beliefs in the execution of wills.[266]

Conclusion

Starting with the premise that the approach traditionally employed by courts and legislatures in relieving wills from the effects of mistake and fraud has been unduly restrictive, the inquiry in this Part II has been to determine whether and to what extent a basic shift in approach is possible which might eliminate unnecessary restrictions. A tentative

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261 See p. 511, note 155, Part II, supra.
262 See pp. 502-06, Part II, supra.
263 See pp. 480-81, Part II, supra.
264 See pp. 499-501, Part II, supra.
265 See pp. 334-39, Part I, supra.
266 See p. 501, note 128, Part II, supra, and accompanying text.

statutory draft has been advanced which authorizes the judicial reformation of wills in certain cases. The central problem is best described as one of bridging the "unadjudicability gap" between proof of general would-be intent, on the one hand, and a formulation of that intent specific enough to be the basis for reformation of the will, on the other. It is submitted that the statute advanced above adequately accomplishes the necessary bridging function and is worthy of serious consideration as the starting point for meaningful and comprehensive reform in this area. The present draft is ambitious not only with respect to its approach but with respect to its coverage as well—perhaps overly so. I do not suggest that the particular wording of this draft should or will survive further deliberation and analysis. More than anything else, it is hoped that the concepts embodied in Part II will serve to "break the ice" with respect to the restrictions which have traditionally accompanied the development of rules governing mistake and fraud in wills. If this much has been accomplished, I shall deem the effort to have been worthwhile.

APPENDIX

FIRST DRAFT OF A STATUTE TO PROVIDE FOR THE REFORMATION OF WILLS IN CERTAIN CASES OF TESTAMENTARY ERROR

Section 1. Purpose of Act. The purposes of this act are to provide a flexible remedy of reformation in certain cases of erroneous belief affecting the execution and revocation of wills, and to give effect as far as possible in such cases to what it may be shown or presumed that the testator would have intended in the absence of erroneous belief; and it is the legislative intent that this act be liberally construed so as to effectuate these purposes.

Section 2. Definitions and use of terms. When used in this Act:

(a) "Adversely affected" person includes any person with an interest in the testamentary estate of the testator, whether as heir, legatee or devisee, would-be legatee or devisee, or in some other capacity, which interest may have been eliminated, abridged or in any way diminished by an erroneous belief of the testator alleged in conformance with the provisions of this act to have materially affected the testator's will.

(b) "Ambiguity" denotes the phenomenon whereby descriptive language in a will may be applied with substantially equal facility to a greater number of persons, objects or other referents than the testator appears from the wording of the will to have intended and in which:

(1) The class of referents to which such descriptive language may be applied is not unreasonably large; and

(2) The descriptive language is sufficiently definite to permit a decision to be made concerning whether any given person, object or other alleged referent is a member of the class of referents to which such language may be applied.

(c) "Children" includes adopted children, but does not include grandchildren or more remote descendants, nor illegitimate children.

(d) "Devisee" denotes a person entitled to real or personal property under a will.

(e) "Erroneous belief" includes beliefs relating to the existence, nonexistence or legal effect of facts extrinsic to the will as well as beliefs relating to the form, meaning or legal effect of the will itself.

(f) "Erroneous belief of the testator" includes erroneous beliefs of persons other than the testator to the extent to which the testator relies upon such beliefs in performing an act of execution or revocation of his will.

(g) "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent upon his death intestate.

(h) "Issue" of the testator includes all lawful lineal descendants of the testator in every degree including persons adopted by lawful lineal descendants of the testator.

(i) "Legatee" denotes a person entitled to personal property under a will.

(j) "Person" includes natural persons and corporations.

(k) "Special object of the testator's bounty" includes persons with whom the testator had a close personal relationship and to whom or for whose benefit, because of that relationship, it may be concluded that the testator would have intended some portion of his testamentary estate to pass by will at his death notwithstanding an erroneous belief of the testator which may be found to have materially affected a provision in the testator's will for the benefit of such person.

(l) "Testamentary estate" of the testator includes all of the real and personal property with respect to which the testator had at his death a power of testamentary disposition and which either:

(1) passes, subject to administration and the rights of creditors if any, in accordance with either the intestate succession statutes applicable at the testator's death or a provision in the testator's will; or

(2) is referred to in a provision in the testator's will which specifically attempts to dispose of such property.

(m) "Unnatural disposition" refers to a disposition of the testamentary estate of a testator leaving a spouse or issue, or both, surviving which is substantially dissimilar to the disposition which would have been made for the benefit of the testator's spouse or issue, or both, had the testator died intestate owning the property contained in such testamentary estate.

(n) "Will" includes codicil: it also includes a testamentary instrument which merely appoints an executor and a testamentary instrument which merely revokes or revives another will.

(o) The singular number includes the plural: and the plural number includes the singular.

(p) The masculine gender includes the feminine and neuter.

Section 3. Grounds for relief. Upon or after the filing of a petition for the probate of an instrument as the last will of a testator, any person who qualifies under Section 4 of this Act (or the court in the circumstances set forth in Section 5) may, within the time limits established in Section 6, petition the court for relief under this Act upon one or more of the following grounds:

(a) That the execution or revocation, or both, of the will in whole or part has been materially affected by an erroneous belief of the testator produced by a misrepresentation made to the testator by some other person, whether such misrepresentation was made fraudulently, innocently, or otherwise; or,

(b) That the execution or revocation, or both, of the will in whole or part has been materially affected by an erroneous belief of the testator in such a manner as to produce an unnatural disposition of the testamentary estate of the testator; or,

(c) That the revocation by physical act of the will in whole or part has been produced by an erroneous belief of the testator; or,

(d) That the execution of the will in whole or part has been materially affected by an erroneous belief of the testator, which erroneous belief clearly appears, together with an indication of its effect upon the will, expressly or impliedly in the will when read in light of surrounding circumstances; or,

(e) That the execution of the will in whole or part has been materially affected by an erroneous belief of the testator in such a manner as to produce an ambiguity in connection with the descriptive portions of the will alleged to have been affected by such erroneous belief.

Section 4. Persons who may assert various grounds for relief. Any person surviving the testator and adversely affected by an alleged erroneous belief of the testator, or the successor in interest of such adversely affected person, may petition for relief under this Act from the material effects of such erroneous belief upon the execution or revocation, or both, of the testator's will, provided, however, that

(a) Only those adversely affected persons surviving the testator who are heirs

of the testator or who are devisees or legatees under a prior will of the testator, or the successors in interest of such adversely affected persons, may assert the ground for relief established in subsection (a) of Section 3; and

(b) Only such of the testator's surviving spouse or issue, or both, who are heirs of the testator and who are adversely affected, or their successors in interest, may assert the ground for relief established in subsection (b) of Section 3.

Section 5. Certain questions which may be considered by the court on its own motion. Whenever the court in its discretion determines that a question of fact or law in connection with the grounds for relief established in subsections (d) or (e), or both, of Section 3 should be resolved prior to the assertion by the persons adversely affected of the grounds contained in those subsections, the court may, after causing such notice to be given as the court in its discretion determines to be necessary, consider such question on its own motion.

Section 6. Time limits upon the assertion of various grounds for relief. Except upon a showing that would support a revocation of the decree, if any, the date of which in each instance may serve to measure the following time limits:

(a) No relief shall be granted upon the grounds established in subsections (a), (b) or (c) of Section 3 unless the petition asserting such grounds is filed by an adversely affected person or his successor in interest before the expiration of the period during which, under [existing law] such persons might have contested the admission of the will to probate; and

(b) No relief shall be granted upon the grounds established in subsections (d) or (e) of Section 3 unless the petition asserting such grounds is filed by an adversely affected person or his successor in interest prior to the entering of a decree of disposition relating to that portion of the testamentary estate affected by such petition for relief; provided that this subsection (b) of section 6 shall not be construed to affect the availability of a suit for construction of the will after the entering of a decree of distribution to the extent that such suit may be available under any statute, decision or rule of court other than this Act.

Section 7. Contents of petition for relief. Every petition for relief under this Act upon one or more of the grounds established in Section 3 shall be sworn to under oath by the petitioner or his attorney to the best of his knowledge and belief and shall contain, in addition to any requirements imposed by rule of court or by statute other than this Act, the name and address of the petitioner; a description of the relation, if any, between the petitioner and the testator; a statement of the particular grounds for relief asserted; a reference to the portions of the will affected by the erroneous beliefs of the testator; a description of the relief sought in connection with each separate ground asserted; a description of the evidence upon which the petitioner intends to rely in support of his claims for relief; and, in connection with every assertion of the ground for relief established in subsection (b) of Section 3, a statement of how and to what extent the disposition of the testator's testamentary estate is "Unnatural" within the meaning of that term as defined in Section 2 of this Act.

Section 8. Decree setting time and place for hearing; additional notice; discretion in the court to postpone consideration of certain questions. Upon the filing by an adversely affected person of a petition for relief under this Act the court shall, after such additional notice as the court in its discretion determines to be necessary, enter a decree setting a time and a place for a hearing to consider the merits of the issues properly raised thereby, provided further, however, that whenever grounds for relief established in subsections (d) or (e), or both, of Section 3 are asserted by petition at a time which the court in its discretion determines to be inappropriate, the court may enter a decree postponing indefinitely consideration of the questions raised by the assertion of any or all such grounds under subsection (d) and (e) of Section 3 until such time as the court determines to be appropriate within the time limitations established in subsection (b) of Section 6 for the filing of petitions under this Act. Questions postponed in accordance with the provisions of the preceding sentence of this Section 8 may be considered thereafter in the court's discretion upon motion of the court or some adversely affected person, with such additional notice at that time as the court in its discretion shall determine to be necessary.

Section 9. Hearing on the merits; procedure; jury trial; burden of proof; admis-

sibility of evidence. The hearing to consider the merits of a claim for relief under this Act shall in every particular be conducted in accordance with the rules applicable to such proceedings before the court, subject, however, to the following provisions:

(a) *Jury trial.* There shall be no right to trial by jury of the questions of fact raised by the assertion of the grounds for relief established under this Act; however, the court in its discretion may call a jury to decide any issues of fact, upon special issues framed or otherwise, but the verdict in such case shall be advisory only.

(b) *Burden of proof.* Except where presumptions established in Section 11 provide to the contrary, in connection with each claim for relief under this Act the burden shall be upon the petitioner to prove by clear and convincing evidence each and every allegation of fact upon which such claim for relief is based.

(c) *Admissibility of evidence.* Evidence otherwise admissible of every kind, including statements made by the testator to any other person, shall not be inadmissible due to the application of the policies underlying the statute of wills in connection with any question of fact raised by a claim for relief properly before the court in accordance with the provisions of this Act.

Section 10. Findings of fact concerning nature and effect of erroneous beliefs. At the conclusion of the evidence at the hearing on the merits of the claims for relief under this Act the court shall make the following specific findings of fact:

(a) With respect to each separate ground for relief properly before the court, the court shall find whether or not the erroneous belief alleged in the petition did in fact materially affect the execution or revocation, or both, of the will in whole or part including

(1) With respect to the ground for relief established in subsection (a) of Section 3, the nature and circumstances of the misrepresentation which produced such erroneous belief of the testator; and

(2) With respect to the ground for relief established in subsection (b) of Section 3, the manner in which such erroneous belief produced an unnatural disposition of the testamentary estate of the testator, including the facts, if any, upon which the presumption of erroneous belief established in subsection (a)(1) of Section 11 is being relied upon by the court in making such finding; and

(3) With respect to the ground for relief established in subsection (c) of Section 3, the manner in which such erroneous belief produced the revocation by physical act of the will in whole or part; and

(4) With respect to the ground for relief established in subsection (d) of Section 3, the manner in which such erroneous belief and the effect thereof appear, expressly or impliedly, in the will, including the facts, if any, upon which the presumption of erroneous belief established in subsection (a)(2) of Section 11 is being relied upon by the court in making such finding; and

(5) With respect to the ground for relief established in subsection (e) of Section 3, the nature of the ambiguity produced by such erroneous belief, including the extent, if any, to which the court is relying upon the presumptions established in subsection (a)(3) of Section 11.

(b) Whenever the court finds in accordance with the provisions of subsection (a) of this Section 10 that an erroneous belief of the testator of the type alleged in the petition did in fact materially affect the will in question, the court shall make a further finding with respect to the nature and extent of the effect of such erroneous belief upon the execution or revocation, or both, of the will in whole or part, including the extent, if any, to which the court is relying upon the presumptions established in subsections (b), (c) and (d) of Section 11, such further finding under this subsection (b) of Section 10 to consist of a conclusion concerning what the testator would have intended with respect to such execution of revocation, or both, in the absence of such erroneous belief.

Section 11. Presumptions which operate in certain cases. In making the findings of fact required under Section 10 the Court shall, where applicable, rely upon the following presumptions;

(a) For the purposes of making the findings relating to the existence and nature of erroneous beliefs required under subsection (a) of Section 10:

(1) whenever the testator's will fails to provide for his spouse or any of his children, whether such children are born or adopted before or after the

making of his last will, it shall be presumed that such omission was the product of an erroneous belief of the testator producing an unnatural disposition of his estate under subsection (b) of Section 3 unless the evidence shows clearly and convincingly both

a. That the omission was not the product of an erroneous belief of the testator, and
b. That at the time of the execution of such will the testator intended such omission.

(2) Whenever a dispositive provision in a will is rendered inoperative at the testator's death by a substantive limitation upon the testator's power of testamentary disposition (including, but not limited to, limitations upon charitable bequests and devisees), it shall be presumed for purposes of the findings under subsection (a) of this Section 11 that the execution of both the dispositive provision and any express provision of revocation contained in the same last will were materially affected by an erroneous belief of the testator appearing impliedly in such will within the meaning of subsection (d) of Section 3 and relating to the validity of the dispositive provision rendered inoperative therein; provided, however, that the foregoing presumption of erroneous belief shall apply with respect to an express provision of revocation only to the extent that such provision revokes a prior dispositive provision substantially similar to the dispositive provision rendered inoperative in the revoking will; and provided further, however, that this subsection (b)(2) of Section 11 shall not apply with respect to dispositive provisions which are rendered inoperative because of lapse, uncertainty lapse, lack of capacity, undue influence, or insufficiency of formalities of execution.

(3) Whenever the court finds an ambiguity in connection with the descriptive portions of the will, it shall be presumed that such ambiguity was produced by an erroneous belief of the testator concerning the adequacy of the description in question. For purposes of making the finding of ambiguity required in subsection (a)(5) of Section 10 it shall be presumed, unless shown to the contrary, that the testator intended by the provisions of his will to benefit only persons with whom he was acquainted personally and that he intended to dispose only of property in connection with which he had at his death a power of disposition.

(b) For purposes of making the findings required in subsection (b) of Section 10 relating to what the testator would have intended in the absence of an erroneous belief found to have materially affected the will, the court shall, except with respect to a finding of erroneous belief based upon the ground contained in subsection (e) of Section 3 and subject to the provisions of subsections (c) and (d) of this Section 11, rely upon the following presumptions of the testator's intent:

(1) for purposes of determining what the testator would have intended in relation to the adjustment of rights and interests under a materially affected provision of the will other than an express revocation clause between persons who are members of the class consisting of the testator's spouse and issue, on the one hand, and persons who are not members of such class, on the other, unless shown clearly and convincingly to the contrary it shall be presumed that the testator would have intended generally to benefit the members of such class to the exclusion of such non-members; provided, however, that whenever the non-member of such class is a person benefitted by a provision of the will other than an express revocation clause found under subsection (a) of Section 10 to have been materially affected by a particular erroneous belief of the testator, and such non-member beneficiary under the will is a person found by the court to come within the definition in Section 2 of a "special object of the testator's bounty," it shall be presumed, unless shown clearly and convincingly to the contrary, that the testator would have intended to benefit such non-member beneficiary in an amount not to exceed the least of the following amounts:

a. The amount provided for the benefit of such person in the will;
b. Equal treatment with persons in the class of which petitioner is a member;
c. One-third of the amount by which net testamentary estate exceeds $25,000.

(2) For purposes of determining what the testator would have intended in re-

lation to the adjustment of rights and interests under a materially affected provision of the will other than an express revocation clause among persons who are members of the class consisting of the testator's spouse and issue, unless shown clearly and convincingly to the contrary, it shall be presumed that the testator would have intended generally to treat his spouse to the share of his net testamentary estate that such spouse would have received had the testator died intestate owning the property contained in such testamentary estate; and that the testator would have intended generally to treat equally those of his issue who were equal in degree of relation to the testator at his death.

(c) Whenever, in applying the presumptions established in subsections (a) and (b) of this Section 11, the provisions of the will found to have been materially affected by an erroneous belief of the testator confer benefits by means other than an outright gift, including but not limited to a discretionary power or trust provision, or both, it shall further be presumed, unless shown clearly and convincingly to the contrary, that the testator would have preferred generally to benefit an otherwise successful petitioner under this Act by the same means used in the provisions found to have been affected; and in the case of a discretionary power thus found to have been affected, it shall be presumed, unless shown clearly and convincingly to the contrary, that the testator would have preferred to include the otherwise successful petitioner as an object of such power equally with those made objects of such power by the testator in such provision.

(d) Whenever the will found to have been materially affected in whole or part by an erroneous belief of the testator makes a reference to a non-testamentary scheme of disposition of property which is not a part of the testamentary estate of the testator in order to make a similar disposition in such will of property included in the testamentary estate, for the limited purpose of applying the presumptions of intent established in subsection (b)(2) of this Section 11 the court shall take into account the disposition thus referred to in the will; provided however that the provision in this subsection (d) of Section 11 shall not in any way be interpreted as extending relief beyond the limits established in Section 12 of this Act.

Section 12. Relief from the effects of erroneous beliefs found to have affected the will. Whenever the court determines in accordance with the provisions of this Act that the execution or revocation, or both, of a will in whole or part has been materially affected by an erroneous belief of the testator described in Section 3, the court shall enter a decree reforming those portions of the will found to have been materially affected by such erroneous belief in order that the will may dispose of the testamentary estate of the testator in conformance with the findings under subsection (b) of Section 10 of what the testator would have intended in the absence of such erroneous belief. The power of reformation established hereunder shall include without limitation the power to add or subtract language to or from the will or otherwise to alter and reform language in the will in order to conform it to what the testator would have intended in the absence of the erroneous belief found by the court to have materially affected such will. Provided, however, that the power of reformation shall not include the addition or deletion by the court to or from the will or any other instrument or scheme of disposition of any provision purporting in any way whatsoever to dispose of property not otherwise included in the testamentary estate of the testator. And provided further that, relief based solely upon the ground established in subsection (c) of Section 3 shall be limited to a decree denying effect to the physical act which would otherwise have revoked the will in whole or part. Whenever, with respect to each separate ground for relief asserted, the court determines under subsection (a) of Section 10 that the will was not materially affected by the alleged erroneous belief of the testator. Or whenever the findings under subsection (b) of Section 10 of what the testator would have intended are insufficient to support reformation of the will, the court shall enter a decree refusing reformation under this Section 12 and, where relevant, denying effect to those portions of the will found to have been materially affected by the alleged erroneous belief of the testator.

Section 13. Effect upon proceedings under this Act of a decree denying a will in whole or part upon other grounds. Whenever questions concerning the allowance of the will in whole or part are properly before the court based upon grounds other than those established in Section 3 of this Act at the same time that a peti-

tion for relief under this Act is properly before the court, the court may in its discretion consider any or all of such questions together, in a single proceeding; provided, however, that whenever a decree is entered denying probate of the will in whole or part based upon grounds other than those established in Section 3 of this Act, with respect to the provisions included in such decree, the petition for relief under this Act shall abate until such time as such decree, or a reversal or other modification thereof, becomes final, at which time the petition for relief under this Act

(a) Shall revive, to the extent to which the decree has been reversed or modified in such a manner as to permit the court upon a proper showing under this Act to give effect to what the testator, having sufficient capacity and not unduly influenced or coerced by another at the time of execution of the will would have intended in the absence of erroneous belief; or the petition

(b) Shall be dismissed, to the extent that the decree establishes that, at the time of execution of the provisions of the will in question, the testator lacked capacity, was unduly influenced or coerced by another, or was otherwise incapable of giving legal effect to his intent with respect to the provisions of the will in question.

Section 14. Application of Act. The provisions of this Act apply to proceedings in connection with any will executed by a testator whose death occurs after the effective date of this Act.

Section 15. Repeal; effect upon pre-existing law.

(a) The following statutes are repealed:
(1) (The existing pretermitted heir statute with respect to petitions for the allowance of wills filed before the effective date of this Act.)
(b) In connection with all proceedings to which this Act applies:
(1) Objections to the allowance of a will based upon fraud, innocent misrepresentation, mistake or any other form of erroneous belief of the testator alleged to have materially affected the will may be asserted only in conformance with the provisions of this Act; and
(2) To the extent to which petitions for the construction of wills are based upon alleged ambiguities in descriptive language or otherwise involve allegations of erroneous belief of a type for which, upon a proper showing, relief might be granted under this Act, such petitions for construction shall be treated as petitions for relief under this Act and may be asserted only in conformance with the provisions of this Act.