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SUPERWILL TO THE RESCUE? HOW WASHINGTON'S STATUTE FALLS SHORT OF BEING A HERO IN THE FIELD OF TRUST AND PROBATE LAW

Cynthia J. Artura

Abstract: During the 1998 session, the Washington legislature added a provision to Title 11 of the Revised Code of Washington that allows for testamentary disposition of certain nonprobate assets. Although Washington's superwill provision is a pioneer in the field of probate and trust law, it is too limited in its scope to achieve fully its stated purpose. One of the statute's stated purposes is to enhance the testator's control over the disposition of nonprobate property. However, the provision limits the definition of "nonprobate asset" to include only joint tenant bank accounts with right of survivorship and revocable living trusts. This Comment argues that Washington took a bold step in the right direction by adopting its superwill statute, but cut that step short by failing to draft the provision to include all revocable nonprobate assets. This Comment proposes that the legislature expand the scope of the statute by redefining the term "nonprobate asset" to include all traditional revocable nonprobate devices. By permitting testamentary disposition of all revocable nonprobate devices, the state will provide a tool whereby the testator can better effectuate his or her intent.

In 1998, Washington took a bold step in the field of probate law by enacting a statute that allows for the testamentary disposition of certain nonprobate assets.¹ Commentators refer to such a statute as a "superwill" provision because it enhances an individual's ability to dispose of his² nonprobate property without subjecting it to the probate process. Washington's superwill provision enables a person to alter, pursuant to his will, the beneficiary designation of revocable living trusts and of joint tenancy bank accounts with right of survivorship.³ While the Washington legislature took a step in the right direction by adopting a superwill provision, the statute is troublesome because its definition of nonprobate asset excludes certain devices, such as life insurance policies and retirement plans, from its scope. To achieve its intended purpose—to effectuate the testator's intent—the legislature should amend the statute by broadening the definition of nonprobate asset to include all nontestamentary revocable devices.

1. See Wash. Rev. Code ch. 11.11 (1998). Nonprobate assets are also referred to as will substitutes, which are defined as "[d]ocuments which purportedly accomplish what a will is designed to accomplish, e.g. trusts, life insurance, joint ownership of property." *Black's Law Dictionary* 1601 (6th ed. 1990).

2. For clarity's sake, this Comment will use "he," rather than "he or she," for the singular tense.

3. See Wash. Rev. Code ch. 11.11.

Part I of this Comment describes the emergence of the superwill in the realm of trust and probate law. Part II explains Washington's superwill provision and its legislative history. Part III illustrates the necessity of Washington's superwill statute. However, it also outlines problems with the state's superwill statute and proposes changes that the legislature should make to cure its defects. This Comment concludes that the Washington legislature should broaden the scope of the statute to permit testamentary disposition of all generally accepted revocable nonprobate assets.

I. EMERGENCE OF THE SUPERWILL IN TRUST AND PROBATE LAW

The superwill provision is an important tool in the field of estate planning because it allows people the option of disposing of their property either by making testamentary dispositions by wills or by using nontestamentary devices known as will substitutes.⁴ The underlying purpose of trust and probate law is to effectuate the testator's intent,⁵ and the superwill debate centers on whether an individual, pursuant to that purpose, can alter a will substitute in his will. The American Bar Association considered, but ultimately rejected, a model uniform superwill provision that would allow an individual to alter the disposition of nonprobate assets in his will.⁶ Before discussing the superwill provision, and more particularly the scope of Washington's statute, it is useful first to understand the difference between probate and nonprobate property.⁷ Section A explains the difference between testamentary and nontestamentary dispositions of property. Section B explains the concept of a superwill and how it has emerged to facilitate the disposition of nonprobate assets.

4. See Mark L. Kaufmann, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill*, 1988 U. Ill. L. Rev. 1019, 1019-20 (1988). For a list of will substitutes, see *infra* note 31.

5. See Debra Lynch Dubovich, Note, *The Blockbuster Will: Effectuating the Testator's Intent to Change Will Substitute Beneficiaries*, 21 Val. U. L. Rev. 719, 738 (1987) ("Effectuating a testator's clearly manifested intent is a guiding principal frequently cited by courts and reflected in the spirit of the Uniform Probate Code."). Blockbuster will is another name for superwill.

6. See Kaufmann, *supra* note 3, at 1021 (discussing American Bar Association's consideration of uniform superwill provision).

7. Probate property refers to property that passes pursuant to the decedent's will or by intestacy. See Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 36 (5th ed. 1995). Nonprobate property is nontestamentary in nature, and the decedent disposes of it pursuant to a will substitute. See *id.*

A. *The Roles of Probate and Nonprobate Property in the Emergence of the Superwill Provision*

1. *Testamentary Disposition*

A testator may effect a testamentary disposition by making a will.⁸ The essential characteristic of a will is that, even though an individual executes it during his lifetime, it has no legal force or operative effect until the testator's death.⁹ A court will uphold the validity of a will only if it deals with one or more of the following: (1) the testator's property, whether real or personal and whether whole or in part, of which he has the power to dispose; (2) the appointment by the testator of an executor to dispose of property at the testator's death in accordance with the terms of the law and will; and/or (3) the appointment, upon the testator's death, of a guardian for the testator's minor children.¹⁰

To ensure that the testator's will reflects his intent, the law imposes requirements with respect to the testator's mental capacity for creating a valid will.¹¹ Before a court will declare a document a valid will, the court must determine that the document expresses the testator's intention and that the testator had the capacity to execute the document.¹² It is not

8. See Kaufmann, *supra* note 4, at 1019.

9. See 1 William J. Bowe & Douglas H. Parker, *Page on the Law of Wills* § 1.2, at 3 (1960) [hereinafter *Page on Wills*].

10. See *id.* § 5.3, at 163–66.

11. See Roger W. Andersen, *Understanding Trusts and Estates* § 7, at 31 (1994). For a testator to meet the capacity requirement to execute a will, the testator must be "of sound mind." *Id.* at 33. The two instances in which a testator is not of sound mind are when the testator is suffering from a mental deficiency and when he is operating under an insane delusion. See *id.* Mental deficiency refers to the general capacity to make a will, and the court will declare the entire will invalid unless the testator meets the court's requirement to:

- (1) Know the nature and extent of his or her property
- (2) Know which persons would be expected to take the property
- (3) Understand the basics of the plan for disposing of the property; and
- (4) Understand how the above elements interrelate.

Id. (Internal footnote omitted). In contrast, an insane delusion is "a false belief for which there is no reasonable foundation." *Id.* at 34 (internal quotation omitted). Rather than invalidating the whole will, a court will invalidate only those provisions of the will that were a product of the insane delusion. See *id.*

12. See *id.* at 32–34. A court will focus both on the execution of the will and the meaning of the words used in the will to determine the testator's intent. See *id.* Showing that the testator had testamentary intent is rarely a problem when a lawyer has drafted the will, but it may become an issue when a will is homemade. See *id.*

uncommon for an individual to contest a will on the grounds that the testator lacked the requisite mental capacity or that the testator executed the will in response to undue influence or fraud.¹³ If the contesting party shows undue influence, the court will strike out only the tainted provisions of the will.¹⁴ The court will throw out the entire will only if it determines that the testator produced the will entirely as a result of undue influence or that the acquired gift is so central to the estate plan that it collapses without it.¹⁵ If the court concludes that the testator executed the will as a result of fraud, it will deny probate of the will and may impose a constructive trust to make the injured party whole.¹⁶

In addition to imposing requirements as to the testator's mental capacity, every state imposes statutorily mandated rules for executing a will, known as Statutes of Wills.¹⁷ First, every state now requires that, except under narrowly defined circumstances, a will must be in writing.¹⁸ As long as the will is in print, the law is reasonably flexible with respect to the medium with which it is written and the material on which it is

13. *See id.* at 34–37.

14. *See id.* at 36.

15. *See id.*

16. *See id.* at 36–37. Courts created the constructive trust as an equitable device to prevent unjust enrichment. *See id.* at 37. Under a constructive trust, the court requires the titleholder of property to convey the property to another because he wrongfully acquired or retained it. *See Black's Law Dictionary* 314 (6th ed. 1990).

17. *See Andersen, supra* note 11, at 43. The Uniform Probate Code provides that a will must be:

(1) in writing;

(2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

(3) signed by at least two individuals, each of whom signed within a reasonable time after he [or she] witnessed either the signing of the will . . . or in the testator's acknowledgement of that signature or acknowledgement of the will.

Uniform Probate Code § 2-502 (1990) (alteration in original). Washington enacted a Statute of Wills that imposes the same requirements as the Uniform Probate Code. *See Wash. Rev. Code* § 11.12.020 (1998).

18. *See* Uniform Probate Code § 2-502 (1990); *Wash. Rev. Code* § 11.12.020 ("Every will shall be in writing."); Thomas E. Atkinson, *Law of Wills* § 63, at 294 (2d ed. 1953). The exceptions are for nuncupative and military testaments. *See id.* A nuncupative will is "[a]n oral will declared or dictated by the testator in his last sickness before a sufficient number of witnesses, and afterwards reduced to writing." *Black's Law Dictionary* 1069 (6th ed. 1990). A military testament is defined as "a nuncupative will, that is one made by word of mouth, by which a soldier may dispose of his goods, pay, and other personal chattels, without the forms and solemnities which the law requires in other cases." *Id.* at 1474. *See, e.g., Wash. Rev. Code* § 11.12.025 (permitting military testaments).

written.¹⁹ A will may be in any language and need not be in a language the testator understood, provided that he understood the contents of the will.²⁰ Second, a will must be signed by the testator.²¹ However, courts are liberal in determining what is a sufficient signature.²² Most states will even allow someone else to sign on behalf of the testator.²³ Finally, two competent and disinterested individuals must witness and sign the will while in the testator's presence.²⁴

States require testators to comply with Statutes of Wills for four principal reasons.²⁵ First, by requiring a level of ceremony, Statutes of Wills serve a ritual, or cautionary, function by impressing upon the testator the significance of his statements. This permits the court to determine that the testator intended the court to give such statements legal effect.²⁶ Second, it serves an evidentiary function by preserving evidence so that the court can be confident it has reliable information regarding the testator's intent.²⁷ Third, these formalities serve a protective function by safeguarding the testator, at the time of executing the will, from undue influence and fraud.²⁸ Finally, the Statutes of Wills serve a channeling function by requiring a testator to use similar forms,

19. See Atkinson, *supra* note 18, at 294–95 (“[A] will may be typewritten, or written with pencil, or partly in ink and partly in pencil, or partly printed on a legal blank. A lower court decision to the effect that a will written on a slate is invalid has been disapproved.”) (footnotes omitted).

20. See *id.* at 296.

21. See *id.* at 297.

22. See *id.* (“A will must be signed by the testator, but he need not write his full or correct name, and even a mark or stamp is sufficient if that was the complete act with which the testator intended to authenticate the instrument.”).

23. See Andersen, *supra* note 11, at 47. See also, e.g., Wash. Rev. Code § 11.12.020 (1998). (“Every will shall be . . . signed by the testator or by some other person under the testator's direction in the testator's presence.”).

24. See Andersen, *supra* note 11, at 47–50. The courts have struggled with what the term “presence” means, and they generally follow either a “line-of-sight” test or, more commonly, a “conscious presence” test. *Id.* at 47–48. Under the line of sight test, the testator must be able to see the witness while the witness is signing the will. See *id.* at 48. Under the conscious presence test, “[i]f [the witnesses] are so near at hand that they are within the range of any of [the testator's] senses, so that he knows what is going on, the requirement has been met.” *Id.* at 47–48 (footnote omitted) (second and third alterations in original).

25. See Dukeminier & Johanson, *supra* note 7, at 205–07; see also Andersen, *supra* note 11, at 44.

26. See Dukeminier & Johanson, *supra* note 7, at 205–07.

27. See *id.*

28. See *id.*

features, and procedures which provides him with greater assurance that the court will carry out his wishes.²⁹

2. *Nontestamentary Disposition*

An alternative to disposition of one's assets by will is disposition of property through the use of will substitutes.³⁰ Will substitutes are "documents which purportedly accomplish what a will is designed to accomplish,"³¹ which is to declare how an individual intends to dispose of his property when he dies.³² Until fairly recently, courts did not validate will substitutes because the law permitted property to pass upon the testator's death only by intestate succession or by a validly executed will.³³ Presently, every state recognizes the inherent validity of will substitutes as a means to dispose of assets at death.³⁴ While there are many different types of will substitutes, they all share a common legal

29. *See id.*

30. The use of will substitutes allows a decedent to achieve a nontestamentary disposition of his estate. *See Kaufmann, supra* note 4, at 1019.

31. *Black's Law Dictionary* 1601 (6th ed. 1990). A substantially complete list of will substitutes is as follows:

(1) joint tenancies either in real or personal property, (2) tenancies by the entireties, (3) homestead rights and exemptions, (4) partnership survivorship agreements, (5) joint bank accounts with provisions for survivorship, (6) government savings bonds payable to alternative payees, (7) government savings bonds payable to a named person and upon his death to a named survivor, (8) bank account trusts, commonly known as Totten trusts after the first case that gave them recognition, (9) regular inter vivos trusts with powers, including that of revocation, reserved, (10) deeds creating future interests, such as an executory interest to take effect at the grantor's death or creating a remainder in the grantee with a life estate reserved in the grantor, (11) deeds unconditionally delivered to an escrow to be delivered to the grantee at the grantor's death, (12) promissory notes, given for consideration, payable at or after the maker's death, (13) life insurance contracts, (14) life insurance trusts, (15) annuity contracts and retirement programs with survivorship provisions, (16) gifts causa mortis, (17) gifts absolute, particularly those made in contemplation of death but with death not made a condition, (18) contracts of all kinds and of infinite variety in which the obligation owed by one party is not due until his death or the death of the other party, including leases, releases, employment contracts, retirement programs of all types, third party beneficiary contracts, contracts to make wills, and the like.

Page on Wills, supra note 9, § 6.1, at 219.

32. *See Black's Law Dictionary* 1598 (6th ed. 1990).

33. *See Dubovich, supra* note 5, at 721. Intestacy is defined as "the state or condition of dying without having made a valid will, or without having disposed by will of a part of his property." *Black's Law Dictionary* 821 (6th ed. 1990).

34. *See Dubovich, supra* note 5, at 721.

characteristic—the assets disposed of by a will substitute do not become part of the testator's probate estate.³⁵

Will substitutes benefit both testators and beneficiaries.³⁶ Will substitutes simplify the disposition of testators' estates by allowing testators to avoid the formalities of will execution required by the Statutes of Wills.³⁷ Will substitutes also enable beneficiaries to avoid the delays and costs of probate and protect the assets from creditor claims.³⁸ Finally, the use of will substitutes avoids delays in beneficiaries' receipt of title and possession of the property.³⁹ While the disposition of probate assets can entail a complicated process taking up to one year, beneficiaries generally receive nonprobate property shortly after the decedent's death.⁴⁰

The five most commonly used will substitutes are revocable living trusts, joint tenancies, life insurance policies, pension and employee benefit plans, and multiple party bank accounts.⁴¹ First, revocable living trusts are the most flexible will substitutes because a donor has the ability to draft the dispositive and administrative provisions according to his wishes.⁴² While granting the trustee legal title to the property, the trustor generally retains the right to the income of the trust for life as well as the

35. See Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 Temp. L. Rev. 277, 278 (1989). When assets are part of a testator's probate estate, they must go through the process of probate, which is a

[c]ourt procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally refer to the legal process wherein the estate of a decedent is administered. Generally, the probate process involves collecting the decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs.

Black's Law Dictionary 1202 (6th ed. 1990); see also John H. Langbein, *The Nonprobative Revolution and Future of Law of Succession*, 97 Harv. L. Rev. 1108, 1117 (1984) ("Probate performs three essential functions: (1) making property owned at death marketable again (title clearing); (2) paying off the decedent's debts (creditor protection); and (3) implementing the decedent's donative intent respecting the property that remains once the claims of creditors have been discharged (distribution)."); Dukeminier & Johanson, *supra* note 7, at 41 (citing same three functions that probate serves).

36. See Kaufmann, *supra* note 4, at 1020; *Page on Wills*, *supra* note 9, § 6.1, at 217.

37. See Kaufmann, *supra* note 4, at 1020; see also *supra* notes 17–24 and accompanying text.

38. See Kaufmann, *supra* note 4, at 1020 n.8.

39. See *Page on Wills*, *supra* note 9, § 6.1, at 217.

40. See *id.*

41. See Kwall & Aiello, *supra* note 35, at 282.

42. See Dukeminier & Johanson, *supra* note 7, at 344.

power to amend, alter, or revoke the trust in accordance with its terms.⁴³ A second common type of nonprobate asset is a joint tenancy.⁴⁴ Joint tenancies allow two or more individuals to own an undivided equal interest in property.⁴⁵ When one joint tenant dies, his property interests pass immediately to the remaining joint tenants in equal shares.⁴⁶ Third, life insurance policies are contracts that entitle designated beneficiaries to receive specified sums upon the insured's death.⁴⁷ Life insurance policy beneficiary designations, like wills, are revocable.⁴⁸ However, contract law, rather than the law of wills, governs because life insurance policies are nontestamentary transfers.⁴⁹ When the insured dies, the insurance company pays the policy's assets to the designated beneficiary.⁵⁰ A fourth type of will substitute that circumvents the Statutes of Wills includes pension and employee benefit plans.⁵¹ Finally, people commonly use multiple-party bank accounts, which transfer ownership of funds from the depositor to the beneficiaries upon the depositor's death.⁵²

43. See Kwall & Aiello, *supra* note 35, at 283. See also, e.g., *Farkas v. Williams*, 125 N.E.2d 600, 604 (Ill. 1955) ("[R]etention by the settlor of the power to revoke, even when coupled with the reservation of a life interest in the trust property, does not render the trust inoperative for want of execution as a will.").

44. See Kwall & Aiello, *supra* note 35, at 282.

45. See Joseph William Singer, *Property Law* 709 (2d ed. 1997).

46. See *id.* In some jurisdictions, a benefit of this form of property ownership is that creditors cannot seize a joint tenant's share after he has died because his share vanishes upon death. See Dukeminier & Johanson, *supra* note 7, at 340. In Washington, however, the law does not shield joint tenancy property from creditors' claims. See Wash. Rev. Code § 11.18.200 (1995).

47. See *Black's Law Dictionary* 805 (6th ed 1990).

48. See Kwall & Aiello, *supra* note 35, at 282.

49. See Andersen, *supra* note 11, at 119.

50. See *id.*

51. See Kwall & Aiello, *supra* note 35, at 282.

52. See *id.* These accounts take one of three forms: (1) joint bank accounts, (2) Totten trusts, and (3) Payable On Death (P.O.D.) accounts. See *id.* at 286. A joint account is "[a]n account (e.g. bank or brokerage account) in two or more names." *Black's Law Dictionary* 837 (6th ed. 1990). A Totten trust is a "[d]evice used to pass property in a bank account after depositor's death to designated person through vehicle of trust rather than through process of probate." *Id.* at 1513. A P.O.D. account is "an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees." *Id.* at 1155.

B. *Superwill Statute*

Because the law recognizes both testamentary and nontestamentary dispositions, commentators and legislators have sought to provide increased flexibility to testators in the disposition of nonprobate property.⁵³ The American Bar Association (ABA) considered, but ultimately rejected, a proposed model uniform superwill provision.⁵⁴ In addition, many jurisdictions have contemplated enacting superwill statutes to provide that flexibility, but only Washington has adopted such a provision.⁵⁵

The superwill permits a testator to “change the conditions and provisions of will substitutes through the use of a testamentary instrument.”⁵⁶ Rather than requiring the testator to follow the established procedures for changing the terms of a will substitute,⁵⁷ the superwill statute permits a testator to make those changes in his will.⁵⁸ The superwill statute simplifies the disposition of an estate by permitting a testator to dispose of both probate and nonprobate assets through one instrument.⁵⁹

The superwill statute provides a means for resolving some of the problems that ensue from the use of nonprobate devices and, thus, helps to effectuate the testator's intent.⁶⁰ Many individuals who use will substitutes fail to realize that the requirements for altering the terms of a will substitute differ from those for altering a will.⁶¹ They believe that they can use their wills to alter the terms of their will substitutes, when in reality, probate courts do not have jurisdiction over nonprobate transfers.⁶² Unfortunately, testators often cannot correct those mistakes

53. See Kwall & Aiello, *supra* note 35, at 277.

54. See Kaufmann, *supra* note 4, at 1021–22.

55. See *id.*

56. *Id.*

57. An individual must adhere to the instructions in the will substitute for making a valid change to the will substitute's terms. See *infra* note 63.

58. See Kwall & Aiello, *supra* note 35, at 277; Kaufmann, *supra* note 4, at 1020.

59. See Kwall & Aiello, *supra* note 35, at 277; Kaufmann, *supra* note 4, at 1020.

60. See Kaufmann, *supra* note 4, at 1020.

61. See *id.* at 1021.

62. See Andersen, *supra* note 11, at 123.

because no one discovers them prior to the testators' deaths and the submission of their wills for probate.⁶³

The case of *Cook v. Equitable Life Assurance Society of the United States*⁶⁴ illustrates this point. Mr. Cook, the testator, attempted to change the beneficiary designation on his life insurance policy through a holographic will.⁶⁵ Refusing to honor Mr. Cook's clearly expressed intent, the Indiana Court of Appeals upheld the trial court's decision to grant summary judgment in favor of Cook's ex-wife, the named beneficiary of the policy.⁶⁶ Although the insured wanted the proceeds from the policy to go to his new wife and son,⁶⁷ the court refused to carry out his intent because he failed to comply with the policy's terms for changing the beneficiary.⁶⁸

In cases like *Cook*, in which the testator attempts to change the beneficiary designation of his life insurance policy but fails to comply with the terms of the policy, many courts resort to the doctrine of substantial compliance to effectuate the testator's intent.⁶⁹ For example, in *Rice v. Life Insurance Co. of North America*,⁷⁰ the Washington Court of Appeals stated that when an insured attempts to change his beneficiary designation, but fails to follow the required procedure, a court of equity will give effect to his intentions if he has substantially complied with the terms of the policy regarding the change.⁷¹ The court stated that "[s]ubstantial compliance with the terms of the policy means that the insured has not only manifested an intent to change beneficiaries, but has done everything which was reasonably possible to make that change."⁷²

63. See, e.g., *Cook v. Equitable Life Assurance Soc'y of the United States*, 428 N.E.2d 110 (Ind. Ct. App. 1981) (stating that attempt to change beneficiary of life insurance contract by will and in disregard of methods prescribed under contract shall be unsuccessful).

64. *Id.*

65. See *id.* at 112; *Dukeminier & Johanson*, *supra* note 7, at 248 ("A holographic will is a will written by the testator's hand and signed by the testator; attesting witnesses are not required.").

66. See *Cook*, 428 N.E.2d at 110.

67. See *id.* at 112.

68. See *id.* at 111. The provision in the policy stated that the owner could change the beneficiary "by written notice to the Society, but any such change shall be effective only if it is endorsed on this policy by the Society." *Id.*; see also Uniform Probate Code § 6-101 (1990) (providing that if contract permits owner to change beneficiary by will, owner may do so, but is silent on power to change beneficiary by will if not granted in policy).

69. See *Dubovich*, *supra* note 5, at 739.

70. 25 Wash. App. 479, 609 P.2d 1387 (1980).

71. See *id.* at 482, 609 P.2d at 1389.

72. *Id.* (internal quotations omitted).

The *Cook* court, also relying on the doctrine of substantial compliance, noted that it would have recognized Cook's attempt to change the beneficiary of the life insurance policy if he had substantially complied with the terms of the policy in making that change.⁷³ The court did not recognize Cook's attempt to change the beneficiary of his life insurance policy based on its determination that Cook did not do everything reasonably possible to effect the change according to the terms of the policy.⁷⁴ Cook did nothing, other than execute a holographic will, to change the beneficiary despite the fact that he had ample time and opportunity to notify the insurance company of the change during the fourteen years after his divorce.⁷⁵ Having determined that Cook had not substantially complied with the terms of the policy, the court refused to effectuate his intent as reflected in his will.⁷⁶

Despite the inequities in cases like *Cook*, superwills are not universally accepted as valid tools for altering the disposition of nonprobate assets.⁷⁷ With the exception of Washington, states have been reluctant to enact superwill statutes.⁷⁸ The ABA considered the adoption of a uniform superwill provision that would allow testators to control the disposition and revocation of nonprobate assets pursuant to their wills, but ultimately rejected the proposal.⁷⁹ Some commentators oppose the superwill on the theory that a testator should be able to use a will only to dispose of those assets that he owns at death.⁸⁰ It is argued that a device disposing of nonprobate assets is nontestamentary in nature, and thus, passes a present interest to the beneficiary.⁸¹ This is unlike a will, which passes no interest to the beneficiary until the testator's death.⁸² It is further argued that to the extent the testator, during his life, has passed a present interest in a nonprobate asset to the recipient, the testator no longer owns that interest and cannot dispose of it in a subsequently executed will.⁸³

73. See *Cook*, 428 N.E.2d at 115.

74. See *id.*

75. See *id.* at 116.

76. See *id.*

77. See Kaufmann, *supra* note 4, at 1021.

78. See *id.*; see also Wash. Rev. Code ch. 11.11 (1998).

79. See Kaufmann, *supra* note 4, at 1021.

80. See Kwall & Aiello, *supra* note 35, at 289.

81. See *id.*

82. See *supra* note 9 and accompanying text.

83. See Kwall & Aiello, *supra* note 35, at 289.

*Farkas v. Williams*⁸⁴ held that a transfer is testamentary and can only be made pursuant to a will unless it passes a present interest.⁸⁵ In *Farkas*, the court had to consider whether the beneficiary acquired a present interest in certain trusts before the court could determine if the trusts were valid.⁸⁶ If the court determined that the beneficiary acquired no present interest, the transfer would be testamentary and valid only if made pursuant to a will.⁸⁷ The court held that the beneficiary of four revocable living trust instruments acquired an interest in the subject matter of the trusts upon their creation.⁸⁸ Although the court noted that the trusts would be testamentary if the grantor passed no interest to the beneficiary before dying, it concluded that the grantor gave the beneficiary a present inter vivos interest in the trust property.⁸⁹ While the court conceded that it was difficult to name the beneficiary's present interest, it reasoned that putting a label on the interest was not necessary as long as the beneficiary acquired it upon the creation of the trusts.⁹⁰ The court determined that "[t]he declaration of trust immediately creates an equitable interest in the beneficiaries, . . . although the interest may be divested by the exercise of the power of revocation."⁹¹ The court further concluded that the grantor's power of revocation "shows a vested interest, subject to divestment, and not the lack of any interest at all."⁹²

While *Farkas* reflects the view of many courts and legislatures, some commentators have argued that to the extent a nonprobate device is revocable, it has no practical difference from a will.⁹³ They have argued that it is not logical to emphasize the distinction between testamentary and nontestamentary transfers because such a distinction relies on the fiction that nonprobate assets create a present interest in the recipient despite the fact that the grantor may exercise his power to revoke the transfer at any time.⁹⁴ They disagree with the view that the grantor's retained power to revoke renders the beneficiary's interest vested, subject

84. 125 N.E.2d 600 (Ill. 1955).

85. *See id.*

86. *See id.* at 602-03.

87. *See id.*

88. *See id.* at 603.

89. *See id.*

90. *See id.*

91. *Id.* at 605 (internal quotations omitted).

92. *Id.* at 608.

93. *See, e.g., Kwall & Aiello, supra* note 35, at 289.

94. *See id.*

to divestment.⁹⁵ Instead, these commentators advance the theory that revocable nonprobate dispositions create no more of a present interest in their intended beneficiaries than do expectancies under wills, because they are subject to being eliminated if the creator exercises his retained power to revoke.⁹⁶

II. WASHINGTON'S SUPERWILL STATUTE

A. *Explanation of Washington's Superwill Provision*

During its 1998 session, the Washington legislature passed the Testamentary Disposition of Nonprobate Assets Act.⁹⁷ The legislature intended this statute to serve the following three purposes:

- (1) Enhance and facilitate the power of testators to control the disposition of assets that pass outside their wills;
- (2) Provide simple procedures for resolution of disputes regarding entitlement to such assets; and
- (3) Protect any financial institution or other third party having possession of or control over such an asset transferring it to a beneficiary duly designated by the testator, unless the third party has been provided notice of a testamentary disposition as required in this chapter.⁹⁸

The superwill provision allows an individual to alter the disposition of his nonprobate assets pursuant to his will. Thus, he must comply with Washington's Statute of Wills just as if he were disposing of probate property under his will.⁹⁹ The superwill statute facilitates disposition of

95. *See id.* at 290.

96. *See id.* at 290; Langbein, *supra* note 35, at 1128 (stating that it is only form of words that distinguishes beneficiary's interest under will from beneficiary's interest under will substitute).

97. 1998 Wash. Laws 292 (codified at Wash. Rev. Code ch. 11.11 (1998)).

98. Wash. Rev. Code § 11.11.003 (explaining purposes of superwill provision). The drafters stated that the primary goals of the statute are to enable testators to integrate their estate plans more easily, to permit the modification of beneficiary designations and other nonprobate asset arrangements through a will, and to provide protection to third parties who control the assets after the owner's death. The procedures for providing notice to such third parties are intended to be simple enough to avoid those disputes or, in the alternative, to expedite their resolution. *See* Comments to Testamentary Disposition of Nonprobate Assets Provisions § 11.11.020 (unpublished) (on file with author).

99. *See* Dubovich, *supra* note 5, at 738.

nonprobate assets by enabling a testator to alter the beneficiary designation of joint tenant bank accounts with right of a survivorship pursuant to his will.¹⁰⁰ While enhancing a testator's power to dispose of his nonprobate assets, the statute protects financial institutions by limiting their liability when they disburse the nonprobate assets pursuant to the terms of the testator's will rather than the terms of the will substitute.¹⁰¹

Although the superwill provision permits testators to dispose of their "nonprobate" assets through their wills,¹⁰² the legislature defined "nonprobate asset" narrowly.¹⁰³ For purposes of the superwill statute, the legislature incorporated the definition of nonprobate asset as set out in RCW § 11.02.005(15), which defines a nonprobate asset as an interest in real property that passes under a joint tenancy with right of survivorship, a conveyance that passes upon the death of the owner, property passing under a community property agreement, an individual retirement account or bond, a revocable living trust, or a joint tenant bank account with right of survivorship.¹⁰⁴ However, the legislature excluded the following from the definition of nonprobate asset in the superwill provision:

- (i) A right or interest in real property passing under a joint tenancy with right of survivorship;
- (ii) A deed or conveyance for which possession has been postponed until the death of the owner;
- (iii) A right or interest passing under a community property agreement; and

100. See Wash. Rev. Code § 11.11.010(7)(a).

101. See Wash. Rev. Code § 11.11.040.

102. See Wash. Rev. Code § 11.11.020 (allowing disposition of nonprobate assets under will).

103. See Wash. Rev. Code § 11.11.010(7)(a).

104. Wash. Rev. Code § 11.02.005(15) states:

Nonprobate asset means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will. Nonprobate asset includes, but is not limited to, a right or interest passing under a joint tenancy with right of survivorship, joint bank account with right of survivorship, payable on death or trust bank account, transfer on death security or security account, deed or conveyance if possession has been postponed until the death of the person, trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death, community property agreement, individual retirement account or bond, or note or other contract the payment or performance of which is affected by the death of the person.

(iv) An individual retirement account or bond.¹⁰⁵

The statute does not apply to real property joint tenancies or to future interest deeds due to the drafters' concerns regarding real estate title records.¹⁰⁶ The drafters explain that the statute also excludes property interests passing under community property agreements because transfers under community property agreements supersede any disposition by will or will substitute.¹⁰⁷

B. *Positive Aspects of Washington's Superwill Statute*

The Washington legislature became a pioneer in the field of probate law by enacting the first superwill provision. Although some states permit testators to alter terms of nonprobate assets pursuant to a will, they do so based on already-established doctrines such as substantial compliance.¹⁰⁸ Rather than hide behind these existing doctrines to effectuate the testator's intent, Washington State chose to take the bold next step in the evolution of probate law by passing a superwill statute.¹⁰⁹

The superwill provision helps to effectuate the testator's intent, which is one of the fundamental purposes underlying probate law.¹¹⁰ While most jurisdictions prohibit an individual from changing the beneficiary designation of a joint tenant bank account with right of survivorship by executing a subsequent will,¹¹¹ Washington's superwill provision allows such a change.¹¹² In this respect, the superwill provision helps to "ensure that the testator's clearly manifested last wishes were fulfilled because,

105. Wash. Rev. Code § 11.11.010(7)(a).

106. See Comments to Testamentary Dispositions of Nonprobate Assets Provisions § 11.11.040 (unpublished) (on file with author).

107. See *id.*

108. See *supra* note 69 and accompanying text.

109. Wash. Rev. Code ch. 11.11.

110. See Dubovich, *supra* note 5.

If possible, a will should be interpreted according to its terms viewed in the light of the general circumstances surrounding the testator in order to effectuate his intention. . . . The rules of construction should be flexibly applied so as not to defeat such intention as may be manifested in the will, and in order to reach an equitable result in accordance with the policies of the law.

Atkinson, *supra* note 18, § 146, at 807. Even when the decedent dies intestate, the court will apply an intestacy statute that is intended to carry out the likely intent of the decedent. "The primary policy, of course, is to carry out the probable intent of the average intestate decedent." Dukeminier & Johanson, *supra* note 7, at 70.

111. See Dubovich, *supra* note 5, at 727.

112. See Wash. Rev. Code § 11.11.010.

by definition, a [superwill] is a more recent indication of a testator's final intent than the will substitute being amended."¹¹³ Because testators are often unfamiliar with the differences among the legal doctrines that accompany the various nonprobate devices they use to transfer wealth at death,¹¹⁴ they often attempt to alter the disposition of nonprobate assets pursuant to a will.¹¹⁵ In most states, such attempts are futile because the courts will not effectuate the testator's intent if he failed to comply fully with the state's Statute of Wills or the regulatory scheme of the will substitute.¹¹⁶ Washington's superwill provision eliminates this unfortunate result when a testator alters the disposition of assets in a joint tenant bank account with right of survivorship pursuant to his will.¹¹⁷

The superwill provision is a reliable means of effectuating the testator's intent.¹¹⁸ Under the superwill provision, a testator must comply with Washington's Statute of Wills just as if he were disposing of probate assets under a will.¹¹⁹ Because the testator must abide by Washington's Statute of Wills to use a superwill, there is sufficient protection against fraud, undue influence, and mental incapacity.¹²⁰

The superwill also provides a convenient method for changing the beneficiary of nonprobate property.¹²¹ Instead of changing each will substitute separately, a superwill provision permits a testator to execute one instrument to effect changes in the distribution of both probate and nonprobate assets.¹²² Certain will substitutes impose onerous requirements that must be met before the owner can effectively change any of

113. Dubovich, *supra* note 5, at 738.

114. See Andersen, *supra* note 11, at 123.

115. See, e.g., *In re Schaeck's Will*, 31 N.W.2d 614 (Wis. 1948) (stating that testator inappropriately tried to use will to change title to nonprobate assets).

116. See *supra* notes 17–24 and accompanying text.

117. See Wash. Rev. Code ch. 11.11.

118. See Dubovich, *supra* note 5, at 738.

119. See *id.* For a discussion of the Statute of Wills, see *supra* notes 17–24 and accompanying text.

120. See Dubovich, *supra* note 5, at 738.

121. See *id.* See also Kwall & Aiello, *supra* note 35, at 279, and *supra* notes 30–52 and accompanying text, for a discussion of will substitutes.

122. See Dubovich, *supra* note 35, at 279. Having a superwill provision would avoid a result like that in *Damon v. Northern Life Ins. Co.*, 23 Wash. App. 877, 880–81, 598 P.2d 780, 782 (1979). In *Damon*, the court stated: "Where a life insurance policy reserves the right in the insured to change the beneficiary, the change of beneficiary must be made in the manner and mode prescribed by the policy and any attempt to make such change by will for which no provision is made in the policy is ineffective." *Id.*

its terms.¹²³ Washington's superwill provision diminishes the inconvenience that such requirements impose, particularly when multiple will substitutes are altered. In addition, the superwill option is useful to a person on his deathbed who wants to change the beneficiary designation of a joint tenant bank account with right of survivorship, but is unable to follow the terms of the will substitute for making such a change.¹²⁴

Finally, the superwill is the next logical step in the evolution of the law governing estate planning.¹²⁵ Initially, courts viewed will substitutes as invalid transfers of property because they did not comply with Statutes of Wills.¹²⁶ Driven by the principle that the testator's intent should prevail, courts began to recognize these dispositions by applying existing doctrines and characterizing will substitutes as trusts, joint tenancies, and gifts.¹²⁷ Ultimately, courts stopped using these indirect methods to effectuate the transferor's intent and accepted the inherent validity of will substitutes.¹²⁸

The history of the superwill is following the same course as that of will substitutes.¹²⁹ Courts initially denied the validity of the superwill, and now many effectuate the testator's intent by utilizing doctrines such as substantial compliance.¹³⁰ While the use of these doctrines can achieve the same result as a superwill, the intended beneficiary is at the mercy of the court in each particular case.¹³¹ The next logical step is to create consistency and certainty in the law by validating the use of a superwill for the disposal of nonprobate assets.¹³² Rather than hide behind already-established doctrines to effect the result of a superwill, the Washington legislature has taken the next step by enacting a superwill statute.

123. See Dubovich, *supra* note 5, at 738.

124. See Andersen, *supra* note 11, at 124.

125. See Dubovich, *supra* note 5, at 739; Kaufmann, *supra* note 4, at 1023.

126. See *supra* note 33 and accompanying text.

127. See Dubovich, *supra* note 5, at 739; Kaufmann, *supra* note 4, at 1023.

128. See *supra* note 44 and accompanying text.

129. See Dubovich, *supra* note 5, at 739; Kaufmann, *supra* note 4, at 1023–24.

130. See Dubovich, *supra* note 5, at 739.

131. See *id.* at 740.

132. See *id.*

C. The Washington Legislature's Response to Critics' Concerns

In addition to promoting convenience, reliability, and consistent effectuation of the testator's intent, Washington's superwill statute also preserves the benefits of using will substitutes.¹³³ Although opponents of the superwill argue that the implementation of such a provision eliminates any advantages that will substitutes can provide, that argument is based on the false premise that superwills automatically subject all assets to the probate process.¹³⁴ In reality, a state can overcome this hurdle simply by maintaining the distinction between probate assets and will substitutes in the superwill statute itself.¹³⁵ Washington's superwill statute does this by providing that nonprobate assets distributed to testamentary beneficiaries pursuant to a superwill do not become part of the decedent's probate estate for any purpose other than validating the beneficiary designation under the superwill.¹³⁶ The drafters state that the will does not actually dispose of the nonprobate asset.¹³⁷ Rather, it modifies only the beneficiary designation or other nonprobate asset arrangement.¹³⁸

Washington's superwill statute also enhances testators' flexibility to dispose of their nonprobate assets without delaying the dispersal of those assets.¹³⁹ Opponents of the superwill incorrectly argue that a superwill provision will impede financial intermediaries that handle will substitutes by preventing quick payout.¹⁴⁰ This argument, like the argument that superwill provisions eliminate advantages of using will substitutes, is based on the flawed premise that the nonprobate assets distributed through the superwill become part of the probate estate.¹⁴¹ As the Washington legislature has illustrated in its superwill provision, a state legislature can defeat the premise of this argument by providing in its

133. See Wash. Rev. Code ch. 11.11 (1998).

134. See Dubovich, *supra* note 5, at 734; Kaufmann, *supra* note 4, at 1027-28.

135. See Dubovich, *supra* note 5, at 734; Kaufmann, *supra* note 4, at 1027-28.

136. See Wash. Rev. Code § 11.11.080.

137. See Comments to Testamentary Disposition of Nonprobate Assets Provisions § 11.11.100 (unpublished) (on file with author).

138. See *id.*

139. See Wash. Rev. Code ch. 11.11.

140. See Dubovich, *supra* note 5, at 735; Kaufmann, *supra* note 4, at 1028-29.

141. See Dubovich, *supra* note 5, at 735; Kaufmann, *supra* note 4, at 1028-29.

superwill statute that assets passing through a superwill do not become part of the probate estate.¹⁴²

By enacting a superwill statute that provides protection to financial institutions and other third-party holders of will substitutes,¹⁴³ the Washington legislature dispelled the concern that a superwill provision would expose financial intermediaries to potential liability.¹⁴⁴ The statute states that unless the financial institution holding the nonprobate asset has actual knowledge of a testamentary beneficiary's claim to the nonprobate asset, the financial institution can rely entirely upon the terms of the will substitute arrangement in effect on the date of the owner's death.¹⁴⁵ This means that if the financial institution is not aware of any testamentary beneficiary, it can rely on what the will substitute states and disburse the nonprobate assets accordingly, without checking to see if the owner had executed a superwill to change the beneficiary designation.¹⁴⁶

To provide additional security to financial institutions, the drafters of the statute also provided that the holder of the will substitute must receive written notice to have actual knowledge that there is a testamentary claim for the assets.¹⁴⁷ Unless the holder has actual knowledge, it can transfer the asset to the beneficiary named under the terms of the will substitute without the risk of incurring liability.¹⁴⁸ The transfer of the assets constitutes a complete release and discharge of the financial institution or third-party holder.¹⁴⁹ RCW 11.11.050 explains the notice requirements to which the testamentary beneficiary must adhere.¹⁵⁰ Subsection one requires the testamentary beneficiary to serve the financial institution or other third party holding the nonprobate property with written notice of his claim.¹⁵¹ The beneficiary must serve the notice personally or by certified mail, return receipt requested and

142. See Wash. Rev. Code § 11.11.080.

143. See Wash. Rev. Code § 11.11.040.

144. See Comments to Testamentary Disposition of Nonprobate Assets Provisions §§ 11.11.060–080 (unpublished) (on file with author).

145. See Wash. Rev. Code § 11.11.040.

146. See Wash. Rev. Code § 11.11.040.

147. See Comments to Testamentary Disposition of Nonprobate Assets Provisions § 11.11.070 (unpublished) (on file with author).

148. See *id.*

149. See *id.*

150. See Wash. Rev. Code § 11.11.050.

151. See Wash. Rev. Code § 11.11.050(1) (stating different notice requirements based on how asset was held).

postage prepaid.¹⁵² Subsection two provides the required form of the notice and states that each asset "must be described with reasonable specificity."¹⁵³ Under subsection four, the claimant may provide written notice anytime after the owner's death as long as the claimant provides it before the discharge of the personal representative at the closing of the estate.¹⁵⁴

The legislature also limited financial institutions' exposure to liability by drafting the provision to state that financial institutions are not obligated to disburse the nonprobate asset to the testamentary beneficiary until they have actual knowledge of the testamentary beneficiary's claim and have received written consent from the personal representative of the owner's estate.¹⁵⁵ If, however, a dispute exists between the beneficiaries named in the will substitute and the testamentary beneficiaries concerning the ownership of the nonprobate property, the statute does not require financial institution to transfer the nonprobate property.¹⁵⁶ Without liability, financial institutions may notify the interested parties in writing of the institutions' uncertainty as to who owns the property and refuse to transfer the property until either: "(a) All the beneficiaries, testamentary beneficiaries, and other interested persons have consented in writing to the transfer; or (b) The transfer is authorized or directed by a court of proper jurisdiction."¹⁵⁷

Additionally, any argument that a state should not adopt the superwill because it creates the potential for "blind disposition" of the testator's nonprobate assets, contrary to the testator's intent,¹⁵⁸ fails to take into account that the testator intended only to revoke the beneficiary designation. When a testator uses a superwill to revoke the beneficiary

152. See Wash. Rev. Code § 11.11.050(1).

153. Wash. Rev. Code § 11.11.050(2). "FOR ACCOUNTS AT FINANCIAL INSTITUTIONS, THE WRITTEN NOTICE MUST SPECIFY THE OFFICE AT WHICH THE ACCOUNT WAS MAINTAINED, THE NAME OR NAMES IN WHICH THE ACCOUNT WAS HELD, AND THE FULL ACCOUNT NUMBER. FOR ASSETS HELD IN TRUST, THE WRITTEN NOTICE MUST SPECIFY THE NAME OR NAMES OF THE GRANTOR, THE NAME OF THE TRUST, IF ANY, AND THE DATE OF THE TRUST INSTRUMENT." Wash. Rev. Code § 11.11.050(2).

154. See Wash. Rev. Code § 11.11.050(4).

155. See Wash. Rev. Code § 11.11.090.

156. See Wash. Rev. Code § 11.11.100(1).

157. Wash. Rev. Code § 11.11.100(1).

158. See Kaufmann, *supra* note 4, at 1029-30. Blind disposition refers to the disposition of the testator's assets in a manner the testator never intended. It is argument that this will occur if the testator creates a superwill that negates the disposition of assets in a will substitute without leaving instructions as to how he wants the assets disbursed. See *id.*

designation of nonprobate assets without specifying how he wants those assets distributed, passage of the assets through the residuary clause of the testator's will is not necessarily contrary to his intent.¹⁵⁹ The testator's failure to name an alternate beneficiary may be a reflection of his intent for it to pass through the residuary clause of the will. The Washington legislature responded to this criticism, like the others, by drafting the superwill statute to allay such concerns.

III. PROBLEMS WITH WASHINGTON'S SUPERWILL STATUTE AND PROPOSED CHANGES TO CURE THOSE DEFECTS

A. *The Washington Legislature Drafted the Superwill Statute Too Narrowly*

Although Washington took a step in the right direction by adopting a superwill statute, it defined the term "nonprobate asset"¹⁶⁰ too narrowly. While the comments explain why the drafters excluded real property joint tenancies, future interest deeds, and community property agreements from the scope of the statute, it fails to delineate their reasons for excluding the majority of revocable nontestamentary devices.¹⁶¹ By limiting the definition of "nonprobate asset" to include only joint tenant bank accounts with right of survivorship and revocable living trusts,¹⁶² the legislature enacted a provision that fails to effectuate fully the intent of the testator. Among the purposes of the superwill statute, the legislators listed first their intent to "[e]nhance and facilitate the power of testators to control the disposition of assets that pass outside their wills."¹⁶³ Although this purpose comports with the general goal of probate law to effectuate the intent of the testator,¹⁶⁴ the legislature did not draft the statute broadly enough to meet that purpose.

159. See *id.* at 1030.

160. See Wash. Rev. Code § 11.11.010(7)(a) (defining nonprobate asset).

161. See Comments to Testamentary Disposition of Nonprobate Assets Provisions § 11.11.040 (unpublished) (on file with author).

162. See *supra* notes 42–46 and accompanying text for an explanation of joint tenant property and revocable living trusts.

163. Wash. Rev. Code § 11.11.003(1).

164. See Atkinson, *supra* note 18, at 807; see also Dubovich, *supra* note 5, at 738 ("Effectuating a testator's clearly manifested intent is a guiding principal frequently cited by the courts and reflected in the spirit of the Uniform Probate Code.").

A simple hypothetical illustrates the limitations of a superwill provision that does not encompass all nonprobate assets. Alice, a Washington resident, named her parents as beneficiaries of her life insurance policy and pension. She later decided that she wanted to appoint her sister, Betsy, as the beneficiary of both nonprobate assets because her sister was in need of money to fund her medical practice in a third-world country. After consulting an attorney, Alice realized that she could not change the beneficiary designations of her life insurance policy and pension by making a provision in her will because the superwill statute does not apply to those nonprobate assets. Rather, she was told that she had to fill out two sets of paperwork to change the beneficiary designations and send them to the companies dealing with those assets. Unfortunately, Alice was uncertain of whom to call to request the paperwork. Although Alice spent a considerable amount of time trying to determine whom to contact, she was unsuccessful in her efforts and did not request the paperwork before she died in a car accident. Because Alice never requested and submitted the paperwork to change the beneficiary designations of her life insurance policy and pension, the insurance companies distributed the proceeds to Alice's parents instead of Betsy. Alice's parents are estranged from Betsy and refused to give her the money.

Because Washington's superwill provision permits the testamentary disposition of joint tenant bank accounts with right of survivorship and revocable living trusts only, and not life insurance policies and pensions, a court would not effectuate Alice's intent. She wanted the proceeds to go to her sister rather than her parents and began the necessary steps to make the change. Due to circumstances that were beyond her control, the change was never made. A superwill provision encompassing all revocable nonprobate assets would have enabled Alice to effectuate her intent by permitting her to change the beneficiary of the policy to her sister in a simple and quick manner.

This hypothetical illustrates that the legislature, by excluding life insurance policies from the definition of "nonprobate asset," failed to adopt a superwill provision that fully effectuates the testator's intent. Thus, a life insurance policyholder receives no greater protection under the superwill provision than under prior law. Despite the enactment of the provision, a life insurance policyholder cannot effectively change the beneficiary of the policy with his superwill.

Because the Washington legislature did not include life insurance policies and other commonly used revocable will substitutes in the definition of nonprobate assets, courts will still be forced to adhere to the

rule of substantial compliance to validate a change in beneficiary designation pursuant to a will. The outcome of *Rice v. Life Insurance Co. of North America*¹⁶⁵ is indicative of how the courts will treat attempts to change the beneficiary designation by will even after the Washington legislature has adopted the superwill provision. In that case, the testator failed to comply with the policy terms for changing the beneficiary of his life insurance policy, so the court relied on the doctrine of substantial compliance to recognize the change.¹⁶⁶

By relying on the doctrine of substantial compliance, courts attempt to effectuate a testator's intent on a case-by-case basis,¹⁶⁷ which is not always effective. When a testator on his deathbed decides to change the beneficiary of his life insurance policy and does nothing more than execute a will expressing that desire, the court will not recognize that change because the testator did not substantially comply with the terms of the policy for changing the beneficiary.¹⁶⁸ Even though the testator manifested his intent to alter the terms of the policy by complying with the requirements of the state's Statute of Wills,¹⁶⁹ the court would not effectuate that intent because the testator was unable to comply with the terms of the policy for expressing that intent. In situations such as these, some courts state that the owner of the policy "had ample time and opportunity to comply with the policy requirements."¹⁷⁰ Even so, it is possible that a person will procrastinate in making an intended change until the final moments of his life.¹⁷¹ Rather than focusing on when the testator decided to alter his estate plan, the court should focus on the testator's clearly manifested intent.

Although the underlying purpose of probate law is to effectuate the testator's intent, Washington's superwill statute only partially achieves

165. 25 Wash. App. 479, 609 P.2d 1387 (1980).

166. *See id.* at 482, 609 P.2d at 1389.

167. *See, e.g., id.* (explaining that court looks to manifestation of particular testator's intent and to actions of that testator to see if he has done everything possible to change beneficiary according to terms of life insurance policy).

168. *See Andersen, supra* note 11, at 124. Having the superwill as an option would be helpful in those circumstances when testators make wills to alter disposition of their nonprobate assets while on their deathbeds. *See id.*

169. *See supra* notes 17-24 and accompanying text for a discussion of a typical Statute of Wills and the requirements that the testator must meet to execute a valid will.

170. *Cook v. Equitable Life Assurance Soc'y of the United States*, 428 N.E.2d 110 (Ind. Ct. App. 1981). "Surely, if Douglas had wanted to change the beneficiary he had ample time and opportunity to comply with the policy requirements." *Id.* at 116.

171. *See Andersen, supra* note 11, at 124.

that goal because it excludes such a large number of nonprobate assets from its scope. The court's continued application of the substantial compliance doctrine with respect to life insurance policies is an illustration of how the statute falls short of meeting the underlying purpose of probate law.¹⁷²

B. Proposed Changes to Washington's Superwill Statute

To facilitate the testator's power to dispose of his nonprobate assets, and thus effectuate his intent, the legislature should broaden the definition of nonprobate asset for purposes of this statute to include a larger number of the generally recognized nonprobate assets.¹⁷³ Rather than limiting the definition of nonprobate asset to include only joint tenant bank accounts with right of survivorship and revocable living trusts, the legislature should amend section 104(7)(a) of the superwill statute to state: "Nonprobate asset includes any will substitute that transfers an interest at the transferor's death pursuant to a revocable beneficiary designation." This would broaden the scope of the statute to encompass joint tenancies in personal property, joint bank accounts with provisions for survivorship, revocable P.O.D. designations, life insurance beneficiary designations, revocable inter vivos trusts, and retirement benefits. This definition would better effectuate the testator's intent by allowing him to alter the terms of any revocable will substitute.

The scope of the superwill statute should be broadened to encompass a greater number of will substitutes than currently included; however, it should encompass only revocable nonprobate assets because the inclusion of irrevocable nonprobate assets would increase the testator's power of disposition rather than merely facilitate the use of his existing power. Because individuals cannot alter irrevocable nonprobate beneficiary designations, the inclusion of such will substitutes in the definition of nonprobate asset would expand a testator's power to dispose of nonprobate assets.

If the hypothetical case posed above arose after such an amendment was made to the superwill statute, Alice would have greater control over the disposition of the proceeds of her life insurance policy and her

172. See Dubovich, *supra* note 5. "If possible, a will should be interpreted according to its terms viewed in the light of the general circumstances surrounding the testator in order to effectuate his intention." *Id.*

173. See *supra* note 31 for a substantially complete list of nonprobate assets.

pension. She would not have to research whom to call to request paperwork to change the beneficiary designations. Rather, she could save time and avoid confusion by executing a will with a provision that changed the beneficiary designations from her parents to her sister. As the hypothetical illustrates, the legislature should amend the definition of nonprobate asset and provide the court with a statute that permits it to effectuate better the testator's clearly manifested intent.

IV. CONCLUSION

Washington has taken a very important step in the evolution of probate law by being the first state to enact a superwill statute. Although the legislature had the right idea by drafting a statute intended to enhance the testator's power to dispose of his nonprobate assets, it failed to draft the statute broadly enough to achieve that goal. It may be courageous to enact a statute that no other state is willing to adopt, but there is no point in taking that step if the legislature is going to do it only halfheartedly. The statute is drafted so narrowly that it will fail to help effectuate the testator's intent in many situations. The scenario in which the testator executes a deathbed will to alter the disposition of his nonprobate assets is a compelling illustration of the limitations of Washington's superwill provision.

The legislature should amend the definition of nonprobate asset as it applies to the superwill. The legislature should draft a broader definition of "nonprobate asset" so that the statute provides a convenient method for the testator to manifest clearly his intent with respect to the disposition of his estate. Until the legislature makes this change, Washington's superwill provision will merely be a partial achievement of the legislature's objective to enhance and facilitate the power of the testator to control the disposition of his nonprobate assets.¹⁷⁴

174. See Wash. Rev. Code § 11.11.003(1) (1998).

