THE UNCONVENTIONAL WISDOM OF FRAGMENTED WILLS

Mark Glover*

A will is typically a single document that is prepared by a testator at one time. Not all wills are typical, though. A will can comprise multiple documents that are prepared at different times during the testator's life. This scenario occurs when a testator executes an initial will and later executes one or more codicils that amend rather than replace the initial will. In this scenario, multiple documents must be collected at the testator's death and construed together to obtain a full understanding of the testator's intended estate plan. This Article refers to these atypical wills, which express the testator's intent across multiple documents, as fragmented wills.

Conventional wisdom within estate planning cautions against fragmented wills. It holds that they are unreliable estate planning tools that frequently embroil decedents' estates in costly litigation and, therefore, should be avoided. Instead of amending a will through codicils, conventional wisdom urges testators to execute new wills that supplant, rather than supplement, existing wills. This technique produces a singular will that comprehensively evidences the testator's intent and avoids the perceived pitfalls of fragmented wills.

Conventional wisdom is sometimes wrong, and, in this case, it is. This Article provides a counternarrative for fragmented wills that is supported by an original empirical study of fragmented wills, which were found within a sample of probate estates from Hamilton County, Ohio. The probate records of these estates were reviewed to determine whether they included codicils. If so, various data was collected, including the frequency that codicils appeared in the sample, the types of substantive changes that testators made through codicils, the drafting techniques that testators used in their codicils, and the frequency and types of disputes that arose related to fragmented wills.

This new empirical study tells a different story about fragmented wills. Wills that are accompanied by codicils are not the ineffective estate planning tools that their critics claim them to be. Instead, real-world data reveals them, overall, to be reliable

---

* Professor of Law, University of South Carolina, Joseph F. Rice School of Law; LL.M., Harvard Law School, 2011; J.D., *magna cum laude*, Boston University School of Law, 2008. Thanks to the University of South Carolina, Joseph F. Rice School of Law for research support.

means for testators to communicate their intent. Furthermore, they do not breed litigation or disrupt the efficient administration of probate estates. This counternarrative not only challenges the conventional wisdom but also suggests that change to the law regulating fragmented wills is needed. As such, this Article concludes by proposing reforms that will better align the law of fragmented wills with the overarching policy objective of the law of succession—accurately carrying out a decedent's intent at an acceptable administrative cost.

TABLE OF CONTENTS

INTRODUCTION

Conventional wisdom within estate planning is that wills should be singular documents.[1] An individual should not amend her will by preparing a succession of testamentary documents over time that must be collected and read together upon death.[2] Such fragmented wills, conventional wisdom holds, should be avoided

1. *See infra* Part I.

2. *See* THOMAS E. ATKINSON, LAW OF WILLS 835 (2d ed. 1953) ("As a whole, codicils should be avoided . . . ."); HARRISON TWEED & WILLIAM PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 114 (10th ed. 1988) (*quoted in* Stephan R. Leimberg & Charles K. Plotnick, *How to Review Will*, 34 PRAC. LAW 13, 27 (1988) ("Codicils are dangerous.")); REID KRESS WEISBORD ET AL., WILLS, TRUSTS, AND ESTATES: THE ESSENTIALS 158 (1st ed. 2018) ("Practitioners . . . discourage the use of codicils."); Benjamin H. Pruett, *Tales from the Dark Side: Drafting Issues from the Fiduciary's Perspective*, 35 ACTEC L.J. 331, 331 (2010) ("The author makes no bones about the fact that he does not favor the use of

because they are unreliable estate planning tools that frequently embroil decedents' estates in costly litigation.[3] Instead, conventional wisdom advises that each time a testator changes her mind, she should prepare a new will that replaces all that preceded it.[4] This strategy produces a single document that constitutes the testator's will and eschews the problems associated with fragmented wills.

This conventional wisdom is largely founded upon the individual experiences of practicing attorneys who have anecdotally encountered troublesome fragmented wills.[5] Published judicial opinions also provide examples of fragmented wills that support the conventional wisdom's critiques.[6] Anecdote and caselaw, however, cannot provide a full and balanced picture of fragmented wills. To begin with, one must question whether individual practitioners' views are informed by an honest assessment of both problematic fragmented wills,[7] which undermine the

---

codicils under almost any circumstances . . . ."); Stacy E. Singer, *Mistakes Fiduciaries See All the Time and How To Avoid Them*, 39 EST. PLAN. 16, 17 (2012) ("Avoid multiple . . . codicils. Do not keep . . . preparing codicils to a will . . . .").

3. *See* ATKINSON, *supra* note 2, at 835 (suggesting codicils "may lead to difficulties in construing the various instruments together, as well as an additional burden of probate"); Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death" – Common Non-Tax Errors and How to Prevent Them*, 1 EST. PLAN. & CMTY. PROP. L.J. 61, 85–86 (2008) ("[A]n attorney should avoid the use of codicils because codicils increase the chance of external integration problems."); *see also* Myles J. Laffey, *Common Drafting Errors*, 13 QUINNIPIAC PROB. L.J. 57, 57 (1998) (suggesting that amending a will through codicils "is the area in which most errors are made"); Pruett, *supra* note 2, at 332 ("Extensive amendment by codicil can present many 'traps' for both the attorney and the client."); Singer, *supra* note 2, at 17 ("Inconsistencies crop up, scrivener's errors are more likely, and clients and beneficiaries are more likely to be confused.").

4. *See* ATKINSON, *supra* note 2, at 835 ("It is better to prepare an entirely new instrument when a change of testamentary scheme is desired."); WEISBORD ET AL., *supra* note 2, at 158 ("It is preferable to create a new will than revise an old one."); Laffey, *supra* note 3, at 69 ("[M]ost drafting errors or problems can be avoided (or minimized) by [among other things] drafting a new document rather than an amendment or codicil . . . ."); Singer, *supra* note 2, at 17 ("[J]ust . . . create a new will.").

5. *See, e.g.*, MICHAEL S. HABER, YOUR PROBATE HANDBOOK 75 (2017), https://www.haberlawoffices.com/wp-content/uploads/sites/10028/2022/02/Your-Probate-Handbook-by-Michael-S.-Haber-F082317.pdf [https://perma.cc/V8WA-KHA5] ("My real point . . . is not to tell you how to make a proper codicil, but, rather to advi[s]e you to avoid codicils altogether. A codicil is almost never a good idea."); KAVESH, MINOR & OTIS, INC., *When You Should Rewrite Your Will Completely*, https://www.kaveshlaw.com/library/deciding-on-a-codicil-or-a-new-will.cfm [https://perma.cc/HQ3P-BDVG] (last visited Sept. 16, 2021) ("Estate planning attorneys often recommend that you avoid codicils and simply provide any desired alterations by writing a new will."); Virginia Hammerle, *How Changing Your Will With A Codicil Is Bad*, LEGAL TALK TEX. (Aug. 13, 2019), https://legaltalktexas.hammerle.com/estate-planning-and-probate/how-changing-will-with-codicils-is-bad/ [https://perma.cc/WUU3-4C5E] ("[I]f you want to change your will, do not use a codicil to do so.").

6. *See infra* notes 35, 44, 62, and 72.

7. This is true even when coming from experts in the field. *See* Adam J. Hirsch, *A Battle of Wills: The Uniform Probate Code Versus Empirical Evide*nce, 33 S. CAL. INTERDISC. L.J. 278, 279 (2023) ("Eminence is no substitute for evidence.").

testator's intent and invite disputes, and benign fragmented wills, which carry out the testator's intent in an effective and efficient manner.

Cognitive psychology recognizes that negative experiences typically make greater impressions on individuals than positive experiences.[8] This phenomenon is referred to as the negativity bias,[9] and it can result in inaccurate assessments of the relative frequency and severity of negative and positive events.[10] Influenced by this negativity bias, estate planning lawyers may unduly focus on their negative experiences with fragmented wills and underappreciate their positive experiences with them. This potentially biased assessment may have skewed the conventional wisdom.

Additionally, good reasons suggest that reported caselaw is deficient in telling the whole story of fragmented wills. Most probate proceedings do not generate published opinions.[11] Instead, the bulk of probate records, including those that include fragmented wills, are buried in county courthouses strewn across the country.[12] Published opinions, therefore, provide only a small glimpse of how fragmented wills function in the real world.[13] Moreover, the subset of fragmented wills that do generate published opinions are not necessarily representative of the entire population of fragmented wills.[14] After all, when fragmented wills are

---

8. *See* Lawrence A. Hamermesh, *Who Let You Into the House?*, 2012 WIS. L. REV. 359, 372 (explaining that the "'negativity bias' . . . inclines one . . . to give greater weight to negative events in decision-making and elsewhere and to minimize the relative significance of positive events").

9. *See* Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 606 (2015); Michael R. Smith, *The Sociological and Cognitive Dimensions of Policy-Based Persuasion*, 22 J.L. & POL'Y 35, 77 (2013).

10. *See* Bradley D. McAuliff & Jeana L. Arter, *Adversarial Allegiance: The Devil is in the Evidence Details, Not Just on the Witness Stand*, 40 LAW & HUM. BEHAV. 524, 532 (2016) ("[N]egative stimuli attract more attention, receive greater weight in evaluations, and are recalled more frequently than positive stimuli.").

11. *See* Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1430–31 (2013) ("[O]nly a fraction of probate proceedings degenerate into a will contest, only a fraction of those contests culminate in a decision rather than a settlement, and only an (apparently shrinking) fraction of those decisions ultimately appear, in print or in silica, as disseminated opinions.").

12. *See* Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 344 (2016) (describing the conventional way in which probate research was conducted as "pawing through physical court files in a local courthouse as the clerks of the court bustle about trying to keep the administration of justice moving . . . ."). Probate records increasingly are accessible through online electronic filing systems. *See id*. However, these systems generally are not as easily navigable as the online databases that contain published opinions. *See* Hirsch, *supra* note 11, at 1430 ("The cases are helpfully collected in electronic databases that the researcher can search by algorithm to pinpoint pertinent units of data.").

13. *See* Hirsch, *supra* note 11, at 1432 ("Ultimately, then, we should rate a data set composed of published cases in the inheritance realm as suggestive, rather than definitive, and we cannot ignore the possibility that results gleaned from published cases comprise an artifact of the data set.").

14. *See id.* at 1430–32; David Horton & Reid Kress Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149, 1156 (2022).

employed under appropriate circumstances and are well-drafted, no disputes are likely to arise, and consequently, no judicial opinions will be reported.

Given the conventional wisdom's shaky foundations, a more comprehensive and systematic analysis of fragmented wills is needed to determine their strengths and weaknesses as estate planning tools and to inform how the law should regulate their use. To satisfy this need, this Article presents the results of an original empirical study of fragmented wills.[15] In particular, this study analyzes a dataset of almost 1,700 estates that were administered by the probate court of Hamilton County, Ohio, which includes Cincinnati and the surrounding metropolitan area.[16] The probate record of each estate was reviewed to determine whether the decedent employed a fragmented will, and, if so, various data was compiled regarding how the decedent utilized the fragmented will and how such will proceeded through the probate process.

This empirical research reveals that fragmented wills are used perhaps more frequently than adherents of the conventional wisdom would expect and that testators use fragmented wills to change their estate plans in numerous ways. Bucking the conventional wisdom, it also shows that fragmented wills do not significantly disrupt the administration of the estates of the testators who use them, nor does their use appear to result in the disposition of property in ways that are contrary to the testator's intent. In sum, this Article's closer look at fragmented wills provides a counternarrative for the role of fragmented wills within estate planning.

In turn, this counternarrative sheds insights into how the law governing fragmented wills should be constructed. Traditionally, the law's regulation of fragmented wills has been neutral, as the process of creating fragmented wills has been neither easier nor harder than that of creating singular wills.[17] The law has neither encouraged nor discouraged fragmented wills. However, over the last several decades, changes to the law have moved it away from a neutral stance on fragmented wills, but these changes have swung in both directions.

A majority of states now, at least minimally, encourage fragmented wills by making their creation easier.[18] However, this trend contrasts with a recent emergence of caselaw in at least one state that has added requirements to the validity of fragmented wills. These additional requirements discourage the use of fragmented wills by making the creation process more difficult than that for singular wills.[19] Regardless of whether a shift in either direction is warranted, the regulation of fragmented wills should be based upon a clear understanding of how they function in the real world. This Article's original empirical study of fragmented wills not only establishes a counternarrative regarding fragmented wills but also provides the insights necessary for reasoned and informed legal reform.

---

15. *See infra* Part II.

16. *See About*, HAMILTON CNTY., http://www.hamiltoncountyohio.gov/about [https://perma.cc/FFT6-8QZL] (last visited Dec. 26, 2024).

17. *See infra* notes 177–78 and accompanying text.

18. *See infra* notes 233–37 and accompanying text.

19. *See infra* Section IV.B.

This Article proceeds in four Parts. Part I explores the conventional wisdom of fragmented wills, including their alleged shortcomings and the perceived advantages of singular wills. Part II then explains how fragmented wills operate in the real world by presenting the results of the original empirical study of fragmented wills found within the dataset of Hamilton County estates. Part III reframes the narrative of fragmented wills by using Part II's empirical data to explain that much of the criticism of fragmented wills is unfounded. Finally, Part IV explores the future of fragmented wills by identifying potential legal reforms that are supported by the real-world data and the counternarrative outlined in the preceding Parts. A brief conclusion follows.

I. THE CONVENTIONAL WISDOM OF FRAGMENTED WILLS

"Whenever possible, avoid codicils, those documents that amend a portion of an existing will . . . . It is advisable to make a new will instead."[20] This is the advice of one estate planning treatise, and it is not alone in its disfavor of codicils.[21] For example, one practitioner cautioned rather dramatically, "[I] *beg*[] *on bended knee*, an indulgence: Please, please, *PLEASE*, resist the urge to engage in significant modification of wills by codicil, as opposed to simply writing a new will."[22] A codicil, as the treatise explains, is a testamentary document that amends, rather than replaces, an existing will,[23] and traditionally, the execution of a codicil is the process where a testator creates a fragmented will. When a testator executes a will and then amends it through codicils, separate documents that were created at different times must be read together to obtain a complete picture of the testator's intent.[24]

The basis for the conventional wisdom that disfavors fragmented wills is the belief that codicils are particularly susceptible to estate planning mistakes that both undermine the testator's intent and entangle the testator's estate in litigation.[25] Moreover, because the process of executing a codicil typically is no different than the process of executing a new will,[26] the perceived risks of codicils can be avoided by executing a new will with no additional preparatory cost.[27] Simply put, the conventional wisdom is founded on the assessment that the potential costs of fragmented wills outweigh their benefits. The sources of these potential costs fit

---

20. MARTIN W. O'TOOLE ET AL., 6 HARRIS N.Y. ESTS.: EST. PLAN. & TAX'N § 4.95, Westlaw (database updated Nov. 2024).

21. *See supra* notes 2–4 and accompanying text.

22. Pruett, *supra* note 2, at 331.

23. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. a (AM. L. INST. 2003) ("A codicil is simply a will that amends or supplements a prior will.").

24. *See* Beyer, *supra* note 3, at 85 ("External integration is the process of establishing the testator's will by interpreting and construing various testamentary instruments that the testator leaves. The documents are pieced together to give effect to the latest statement of the testator's intent."); Pruett, *supra* note 2, at 332 ("[A]dministering a document that includes multiple and substantial modifications requires the fiduciary to cobble the various documents together in an effort to determine what the end result is supposed to be.").

25. *See infra* Sections I.A–C.

26. *See infra* notes 177–78 and accompanying text.

27. *See infra* Section I.D.

within four general categories: (1) drafting mistakes, (2) ineffective safekeeping, (3) probate litigation, and (4) preparatory effort.

A. Drafting Mistakes

Drafting mistakes represent one source of potential costs that critics of fragmented wills frequently identify when advising against the use of codicils.[28] These mistakes are costly because they can undermine the testator's intent if they result in unintended substantive changes to the testator's estate plan or inconsistency with the provisions of the testator's underlying will.[29] Although drafting mistakes undoubtedly occur in the preparation of new wills,[30] critics of codicils view fragmented wills as presenting a heightened risk of drafting error.[31]

Because the drafter is not engaged in preparing an entirely new will, she may not fully appreciate how the codicil changes the testator's original will.[32] Even if the drafter appreciates the substantive changes that the codicil implements, she may also encounter difficulty in harmonizing the codicil with the formatting, cross-

---

28. *See* 10 FLA. JURIS. FORMS LEGAL & BUS. § 35.562 (2024) ("[T]o avoid some problems construing the will and codicils together, some estate planning attorneys suggest that . . . the testator should revoke the prior will in its entirety and execute a new one."); Pruett, *supra* note 2, at 331–32 ("[T]he modification of wills by codicil entails significant risk of error . . . ."); Singer, *supra* note 2, at 17 ("Multiple amendments or codicils lead to confusion and errors.").

29. *See* 2 MARC J. BLOOSTEIN & MAGDA L. FLECKNER, NEWHALL'S SETTLEMENT OF ESTS. & FIDUCIARY L. IN MASS. § 33:17 (5th ed. 2024), Westlaw (database updated May 2024) ("The execution of a codicil is a matter attended with considerable danger. It is apt to upset the scheme of the will in matters not intended, and by revoking certain clauses and changing others, render it impossible to tell just what the testator desired, or else produce results far different from what he intended.").

30. *See generally* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

31. *See* FRANCIS T. TALTY ET AL., MASSACHUSETTS PRAC., METHODS OF PRAC. § 31.87 (4th ed.), Westlaw (database updated Mar. 2024) ("The possibility of ambiguity is increased when a codicil is executed."); Ellis V. Rippner, *Drafting of the "Simple" Will*, 8 CLEV.-MARSHALL L. REV. 320, 337 (1959) ("Avoid 'as a plague' the making of a codicil whenever a major change is being made in a will, for the obvious reason that the difficulty of interpretation becomes doubled."); Singer, *supra* note 2, at 17 ("Inconsistencies crop up, scrivener's errors are more likely, and clients and beneficiaries are more likely to be confused.").

32. *See* TWEED & PARSONS, *supra* note 2, at 114–15 ("[T]he new provisions in the codicil, when read in conjunction with the will itself, may create ambiguities that would have been caught if the entire will had been redone."); John S. Miller, *Functions and Ethical Problems of the Lawyer in Drafting a Will*, 1950 U. ILL. L.F. 415, 440 (1950) ("A codicil should never be prepared without a careful examination of the will. . . . A review of the will may disclose advisable changes which would otherwise . . . be overlooked . . . ."); J.G. Thomas, *Mechanics of Drafting a Will*, 1950 U. ILL. L.F. 325, 338 (1950) ("No codicil should be drafted without careful study of the will itself to avoid inconsistencies. The same and possibly greater care should be exercised in drafting codicils than in drafting the original will.").

references, and drafting style of the testator's original will.[33] These difficulties may be particularly acute when the codicil's drafter did not also prepare the testator's underlying will.[34]

In re Estate of Smelser illustrates the scenario where the testator engages a lawyer to make specific changes to her estate plan, but the codicil that the lawyer prepares alters the testator's will in unintended ways.[35] In *Smelser*, paragraph four of the testator's will gave the north tract of a 160-acre parcel of farmland to one son and the south tract to two other sons in equal shares. Six years later, the testator wanted to alter her estate plan.[36] Because she had sold the south tract for $40,000, she decided to substitute the gift of the south tract with a general bequest of $20,000 to each of the two sons who were to receive equal shares of that property.[37] The testator engaged an estate planning lawyer to make these changes, and the lawyer prepared a codicil, which the testator executed.[38]

When the testator died less than a year later, a review of the testator's will and codicil revealed that the codicil expressly revoked the entirety of the will's fourth paragraph, which resulted in not only the intended revocation of the gift of the south tract but also the unintended revocation of the gift of the north tract.[39] At probate, the testator's attorney testified that the revocation of the gift of the north tract was a drafting error and that the testator unequivocally wanted the north tract to go to the son named in the original will because he was the only one of her three children interested in continuing the family's farming operations.[40] This intent was further evidenced by the fact that the son, who was named as the beneficiary of the north tract in the will, was also the purchaser of the south tract.[41] By giving the north tract to the son who purchased the south tract, the testator would ensure that the family farm remained intact.

---

33. *See* FAYE TAYLOR, 3 CAL. TRANSACTIONS FORMS—EST. PLAN. § 22:4, Westlaw (database updated May 2024) ("When changes are made by means of a codicil, there is a significant risk that the provisions of the will and codicil will not be integrated."); Laffey, *supra* note 3, at 58 (discussing the difficulties associated with maintaining consistency in the numbering and organization of provisions when "an amendment delet[es] a section or numbered paragraph").

34. *See* TAYLOR, *supra* note 33 ("Counsel should review the original will carefully to ensure that the codicil will not create inconsistencies, ambiguities, or undesirable tax consequences. This can be time consuming, particularly if counsel is unfamiliar with the provisions of the original will because it was prepared by another attorney.").

35. 818 P.2d 822 (Kan. Ct. App. 1991); *see* Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 831 (2001). Other cases involve similar drafting mistakes. *See, e.g.*, Conn. Junior Republic v. Sharon Hosp., 448 A.2d 190 (Conn. 1982); Idle v. Moody, 127 S.W.2d 660 (Mo. 1939); Paris v. Erisman, 300 S.W. 487 (Mo. 1927); *In re* Estate of Mullin, 128 So.2d 617 (Fla. Ct. App. 1961); *In re* Eveland's Will, 16 N.Y.S.2d 737 (1940).

36. *Smelser*, 818 P.2d at 824.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 825.

41. *Id.* at 824.

The erroneous revocation of the gift of the north tract, however, resulted in the property passing through the will's residuary clause, which gave each of the testator's three sons an equal share.[42] Consequently, whereas the testator intended to leave the north tract to the son who purchased the south tract, thereby reunifying the family's farmland in one owner, the codicil resulted in each of her three sons receiving a one-third share of the north tract.[43] The entire 160-acre farmland would therefore be owned by each of the testator's three sons in shares of two-thirds, one-third, and one-third, respectively.

Critics of codicils could be right that the type of error found in *Smelser* is less likely to occur when the drafting lawyer prepares an entirely new will that includes the testator's desired changes, rather than preparing a codicil, because reviewing one document in isolation is at least marginally easier than reviewing two documents in tandem. For instance, if the lawyer in *Smelser* had drafted an entirely new will that contained the same mistake as the codicil that he prepared, the absence of an integral part of the testator's estate plan, like the specific bequest of the north tract, would be glaringly obvious to a careful reader. Upon discovering this mistake, the lawyer could prepare a corrected draft before presenting the will to the testator for execution.

By contrast, a drafter's review of a codicil is not as straightforward. The task is not as simple as just ensuring that the substance of the testator's will reflects her actual intent. Instead, the drafter must understand how the will and codicil function together to carry out the testator's integrated estate plan. In *Smelser*, the drafting attorney presumably was aware that the original will contained a specific bequest of the north tract, and consequently, the absence of such a bequest in the codicil did not stand out as problematic. The drafter, however, failed to appreciate how the codicil's revocation clause interacted with the original will. This additional complexity in the lawyer's task of reviewing the documentation that he prepared would have been eliminated had he reduced the testator's estate plan to a single document.

In addition to the type of drafting error that produces unintended change to the testator's wills, the use of codicils can also generate drafting errors that result in the codicil amending the wrong will. *Dyess v. Brewton* illustrates this type of error.[44] The testator in *Dyess* executed a will on March 15, 2000, and executed a second will on May 10, 2000, that expressly revoked the first will.[45] The testator then executed a codicil in 2002 that purported to amend the March will, which had been revoked by the May will.[46] The effect of a testator amending a revoked will through the execution of a codicil is that the revoked will is treated as though the testator re-

42. *Id.*

43. *Id.* at 824–25.

44. 669 S.E.2d 145 (Ga. 2008); *see* Pruett, *supra* note 2, at 333. Other cases involve similar mistakes. *See, e.g.*, Fuller v. Nazal, 67 So. 2d 806 (Ala. 1953); *In re* Estate of Croft, 713 P.2d 782 (Wyo. 1986); Estate of Hargrove, No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App. Mar. 6, 2019); Hoffman v. Irizarry, 673 S.W.2d 674 (Tex. App. 1984); *In re* Estate of Scott, No. 78178-2-I, 2019 WL 3926156 (Wash. App. Aug. 19, 2019).

45. *Dyess*, 669 S.E.2d at 146.

46. *Id.* (explaining the codicil "referred to the March will by its date of execution and the names of its witnesses").

executed it.[47] The previously revoked will, along with the codicil, are then read together as the testator's legally effective will.[48]

In *Dyess*, however, compelling evidence suggested that the testator did not intend the codicil to amend the March will but instead that she intended the codicil to amend the May will. In addition to the testimony of the drafting lawyer, who admitted that the codicil's reference to the March will was a mistake,[49] the codicil was found after the testator's death in a sealed envelope that also contained the May will.[50] The envelope that contained these documents was located in the testator's safe deposit box and was labeled with an inscription that indicated its contents were the testator's will and codicil.[51] By contrast, the March will was found in the testator's filing cabinet and was not physically associated with the codicil.[52] Thus, despite the unambiguous language of the codicil, there was substantial evidence that the testator intended the codicil to amend the May will and not the March will.

An estate planning attorney who prepares a codicil typically refers to the will that the codicil amends by reference to the date on which the testator executed the will.[53] Moreover, the attorney also frequently refers to specific provisions or paragraphs within the original will that the codicil alters.[54] As *Dyess* illustrates, anytime a drafter must refer to the original will in these ways, opportunities for mistakes arise. However, when a lawyer prepares a completely new will, the testator's entire estate plan is contained within a single document. The drafter need not refer to other documents, and consequently, the type of drafter error that occurred in *Dyess* cannot transpire.

B. Ineffective Safekeeping

Even if a codicil is free from drafting mistakes, the storage and safekeeping of a will and codicil can cause problems that would not exist if the testator's estate plan were contained in a single document. After a testator executes a will, it must be stored until her death,[55] which might not occur for years or decades.[56] During this

---

47. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.4 (AM. L. INST. 2003).

48. *See id.* § 4.2 cmt. c.

49. *Dyess*, 559 S.E.2d at 146.

50. *Id.*

51. *Id.* at 146 n.1.

52. *Id.* at 146.

53. *See* MARC. J. BLOOSTEIN & MAGDA L. FLECKNER, 2 NEWHALL'S SETTLEMENT OF ESTS. & FIDUCIARY L. IN MASS. § 33:17 n.21 (5th ed.), Westlaw (database updated May 2024) ("Care should be taken to refer correctly in the codicil to the date of the will."); DAVID K. JOHNS & JULIA GRIFFITH MCVEY, COLO. EST. PLAN. HANDBOOK § 14.7.2 (7th ed.), Westlaw (database updated Mar. 2022) ("A specific reference to prior wills and codicils is required in order to . . . identify all testamentary documents . . . .").

54. *See* JOHNS & MCVEY, *supra* note 53, § 14.7.2 (advising that a codicil should "identify provisions of prior documents that are to be supplemented, amended, or revoked").

55. *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 166–67 (11th ed. 2022).

56. *See* Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 258–61 (2019); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1129–30 (2015).

time, a will's whereabouts might become unknown,[57] and when it is undiscoverable at the testator's death, potentially thorny issues arise. First, the reason for the will's absence must be determined, as the probate court must decide whether someone erroneously misplaced the will or whether the testator intentionally revoked it.[58] Second, if the court determines that a lost will was misplaced and not revoked, then the substantive terms of the missing document must be established.[59]

Of course, testators misplace wills that have not been amended by codicils,[60] but fragmented wills might pose a greater risk of being lost. Because fragmented wills comprise multiple documents, there is more to be misplaced; as such, the custody of one will is simply easier than the custody of a will and its associated codicils.[61] When a will and codicil are physically separated, either the will can be lost and the codicil located, or the codicil can be lost and the will located.[62] Either scenario raises the difficult questions associated with lost wills.

C. Probate Litigation

Another criticism of fragmented wills is that they generate litigation that would not be necessary had the testator amended her estate plan by executing an entirely new will. For instance, when the drafting errors or ineffective safekeeping that are described above occur,[63] they can produce disputes that must be resolved through litigation.[64] In addition to these previously discussed issues, one particular aspect of the use of codicils that can be a potential source of litigation is the issue of republication.

Republication refers to the principle that a testator's act of executing a codicil can be treated as also re-executing or republishing the will that the codicil amends.[65] Whether a codicil republishes a will can have significant consequences.

---

57. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 232–33.

58. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. j (AM. L. INST. 2003).

59. *See id.* § 4.1 cmt. k.

60. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 232–33.

61. *See* JEROME IRA SOLKOFF, 18A WEST'S LEGAL FORMS, ELDER LAW § 4:10 (4th ed.), Westlaw (database updated Dec. 2024) ("Codicils . . . are separate pieces of paper that may get misplaced. To avoid confusion it is best to make a new will rather than a codicil."); HABER, *supra* note 5, at 75 ("Any time there is a codicil, it requires keeping track of two documents, rather than just one. And keeping track of two documents creates a much greater change that something will go wrong.").

62. *See, e.g.*, Smith v. DeParry, 86 So.3d 1228 (Fla. App. 2012) (involving a lost codicil); *In re* Estate of Day, 753 P.2d 1296 (Kan. App. 1988) (involving a lost will); Bowles' Estate v. Bowles' Heirs, 114 N.E.2d 229 (Ohio App. 1953) (involving a lost will); *Estate of Zoltan Zantay, Late of Lakeville*, 25 QUINNIPIAC PROB. L.J. 16 (2010) (involving a lost codicil).

63. *See supra* Sections I.A–B.

64. *See* Miller, *supra* note 32, at 440 ("[I]nconsistencies between the will and the codicil . . . might create ambiguities and cause litigation."); Pruett, *supra* note 2, at 333 (observing that these errors can produce "extensive litigation over issues that never would have arisen had the testators executed entirely new wills").

65. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.4 (AM. L. INST. 2003).

For instance, in some states, a gift to an attesting witness is purged, which means that the interested witness is prohibited from accepting the gift.[66] However, when a testator executes a codicil to a will that contains a gift to a witness, the witness's gift can be saved through the doctrine of republication. If the codicil is attested to by disinterested witnesses who did not witness the original will, then the original will can be treated as being re-executed without the involvement of the interested witness, and consequently, the law will not purge any of the will's gifts.[67]

Litigation can arise when a probate court must determine whether a will should be treated as being republished by the testator's execution of a codicil. Ideally, a codicil explicitly states whether it republishes the will.[68] In such a situation, the unambiguously expressed intent of the testator typically determines the issue.[69] However, when a codicil is ambiguous regarding the issue of republication, the court must consider other evidence of the testator's intent,[70] and litigation can ensue. Particularly relevant evidence in these disputes is the extent to which the codicil refers to the will.[71]

Consider, for example, the case of *Honeycutt v. Honeycutt*,[72] where the testator executed a will in 1988 and a codicil in 2003 that did not expressly state whether it republished the will.[73] The testator's son and ex-spouse litigated the issue of republication because the testator executed the will while married and executed the codicil after his divorce.[74] In most states, the event of divorce revokes any gifts

---

66. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 163. *See generally*, Mark Glover, *Conditional Purging of Wills*, 57 U. RICH. L. REV. 275 (2023).

67. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 251; *see also* Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 326 (2011) (suggesting that the issue of republication by codicil has "potential downstream effects on subsidiary doctrines such as interested-witnesses analysis").

68. *See* Pruett, *supra* note 2, at 332 ("Codicils typically include language that either expressly *republishes* the original will (as modified by codicil) or states that the original will continues in full force and effect, as modified.").

69. *See* Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277, 305 n.114 (1989) ("Ordinarily, intent to republish is not an issue . . . [when] a codicil is executed that expressly provides that the will is to be republished."). However, if evidence suggests that the testator would not have wanted the codicil to republish a will, republication will not occur. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.4 cmt. b (AM. L. INST. 2003) ("That a codicil contains a provision expressly republishing the prior will does not require the doctrine to be applied. The doctrine is still in applicable if the effect of applying it would be inconsistent with the testator's intent.").

70. *See* Kwall & Aiello, *supra* note 69, at 305 n.114 ("The issue of intent . . . arise[s] . . . when a codicil refers to the revoked will but does not expressly provide that it is to be republished.").

71. *See id.* ("In some jurisdictions, the mere reference to the earlier will is sufficient to republish the will without further proof. Some jurisdictions, however, provide by statute that the mere reference to an earlier, revoked will in a subsequent codicil is insufficient to republish the will unless the intention to revive the will is also shown." (citation omitted)).

72. 663 S.E.2d 232 (Ga. 2008).

73. *Id.* at 233–34.

74. *Id.*

to a spouse in a will that was executed during the duration of the marriage.[75] Thus, in the absence of a codicil, the testator's divorce in 1995 would have revoked the gifts to the ex-spouse in the 1988 will.[76] However, if the 2003 codicil republished the will, the law would treat both the will and codicil as being executed after the divorce, and the gifts to the ex-spouse would not be revoked.[77]

The testator's son argued that because the codicil did not expressly state that it republished or reaffirmed the original will, the testator did not intend for the doctrine of republication to apply.[78] The testator's ex-spouse, by contrast, argued that while the codicil did not expressly republish the will, it contained language that evidenced the testator's intent that it do so.[79] Specifically, the codicil referred to the original will by its date of execution and stated that "[e]xcept as expressly modified," the 1988 will "shall remain in full force and effect."[80] Although the court ultimately decided that this evidence sufficiently established the testator's intent that the codicil republish the will,[81] this issue would not have been litigated had the testator executed an entirely new will rather than a codicil that amended his original will.[82] Indeed, the doctrine of republication can be at issue only if the testator leaves behind a codicil, and as such, the doctrine illustrates that fragmented wills can generate litigation that singular wills do not.

D. Preparatory Effort

An additional critique of fragmented wills entails the costs associated with amending an existing will. These costs include the time and effort that the testator expends to plan and implement her desired changes, and also the monetary cost of employing legal counsel to advise in the process and to prepare the documentation. The law has traditionally required the same process for the execution of both new wills and codicils, as both must be written, signed by the testator, and attested by two witnesses.[83] These costs are therefore the same regardless of whether the testator executes a new will or a codicil.

Other costs of amending an estate plan may be different depending upon the mechanism that the testator uses to effectuate her desired changes. Although the process of execution for both new wills and codicils is typically the same, the planning and drafting of codicils may be simpler and, therefore, monetarily cheaper

---

75. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. a (AM. L. INST. 2003).

76. *Honeycutt*, 663 S.E.2d at 233–35.

77. *Id.*

78. *Id.* at 235 (explaining that the son "argue[d] that the codicil's failure to use words such as 'republish,' 'revive,' or 'reaffirm' shows that the testator did not intend to republish the . . . 1988 will").

79. *Id.* at 234.

80. *Id.* at 235.

81. *Id.*

82. *See* Kwall & Aiello, *supra* note 69, at 305 n.114 ("[I]ntent to republish is not an issue [when] the will has been re-executed in its entirety.").

83. *See infra* notes 177–78 and accompanying text.

than the preparation of entirely new wills.[84] This is especially true if the changes to the testator's estate plan are relatively minor.[85]

Critics of codicils, however, suggest that the view that codicils are easier and cheaper to prepare does not typically match the realities of practice.[86] Because of the complications associated with ensuring that the codicil correctly interacts with the underlying will and that the cross-references and language of the two documents harmonize,[87] some practitioners suggest that the drafting of an entirely new will is actually more efficient than the preparation of a codicil.[88] Moreover, the pervasiveness of computerized word processing and electronic data storage bolsters the idea that the preparation of a codicil is no more cost effective than the preparation of an entirely new will.[89]

In sum, the conventional wisdom regarding fragmented wills is bleak. Codicils are portrayed as fertile grounds for drafting errors, custody blunders, and estate disputes.[90] Moreover, because wills and codicils must be executed with the same formalities and because modern technology has eased the burden of producing documents, the cost and effort of creating a new will is substantially like that of executing a codicil.[91] Consequently, the conventional wisdom suggests that fragmented wills should be avoided at all costs. Instead, the story goes, a testator should execute an entirely new will each time she wants to change her estate plan.

---

84. *See* Pruett, *supra* note 2, at 332 ("It is understandable that clients tend to be fee sensitive and therefore may wish to limit the scope of the attorney's engagement to a codicil, under the belief that such is less expensive than a complete rewrite.").

85. *See id.* (suggesting codicils may be cheaper "[i]n the case of simple changes").

86. *See id.* at 331 ("[I]t has been the author's experience, as well as that of many other practitioners with whom the author has spoken, that it often takes less time and effort (and, therefore, expense) to simply write a new will than it does to piece together extensive changes to an existing document.").

87. *See supra* Section I.A.

88. *See* Singer, *supra* note 2, at 17 ("In many cases, the cost of a restatement will not be significantly more, considering the increased risks of inconsistencies or errors.").

89. *See* HON. EVE PREMINGER ET AL., N.Y. PRAC., TRS. & ESTS. PRAC. IN N.Y. § 3:82, Westlaw (database updated Nov. 2024) ("With the widespread availability of computer-based word processing programs that can store the text of a will and easily reproduce it in revised form, it is ordinarily just as convenient (if not more so) to prepare a new will for execution than a separate codicil to the existing will."); Pruett, *supra* note 2, at 331 ("Long gone are the days when producing an entirely new will, rather than a codicil, required some overworked secretary to re-type dozens of pages of text on an Underwood manual typewriter."); Kenneth H. Ryesky, *Ma Bell's Legacy: Artifacts in Decedents' Estates from the Forced Divestiture of American Telephone & Telegraph*, 8 J. SUFFOLK ACAD. L. 1, 17 n.71 (1992) ("The average practitioner's use of word processing technology has enabled the practitioner to draft a will as easily as drafting a codicil to a will."); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 754 (2011) ("The use of word processors may be responsible for a decline in the drafting and executing of codicils. With the aid of the computer . . . the drafting attorney can readily access and update a copy of the will . . . .").

90. *See supra* Sections I.A–C.

91. *See supra* Section I.D.

II. FRAGMENTED WILLS IN THE REAL WORLD

Conventional wisdom grimly portrays fragmented wills as perilous estate planning tools that do more harm than good.[92] This portrayal is founded upon numerous reported opinions that illustrate the potential shortcomings of fragmented wills and the broad experience of estate planning lawyers, who have personally encountered the difficulties of successfully using codicils to alter their clients' estate plans.[93] Although caselaw and collective experience rightly tell a cautionary tale of problematic fragmented wills, they cannot tell the whole story of how fragmented wills function in the real world.[94]

Thus, to provide a more complete understanding of the realities of fragmented wills, this Article reports the results of an original empirical study of codicils. The study analyzes a data set of 1,670 decedents' estates that were administered in Hamilton County, Ohio, and that included a will. This sample was compiled by reviewing an online database of probate matters, which is maintained by Hamilton County's probate court.[95] A copy of each will in the sample was examined to identify those accompanied by a codicil. If a codicil was part of the probate record, the will and codicil were reviewed together to determine how the codicil substantively altered the testator's estate plan, how much time intervened between the execution of the will and the execution of the codicil, and how the drafter of the codicil integrated its terms with those of the will. Additionally, the probate record of each of the estates that contained a codicil was reviewed to determine whether any codicil was purportedly lost and whether the will or codicil was subject to any type of estate dispute. Each of these types of information regarding codicils can provide insights into how fragmented wills are used and how they function in the real world.

A. Frequency

Given the conventional wisdom's disfavor of fragmented wills,[96] it is to be expected that most testators do not execute codicils. The Hamilton County data supports this expectation, but it also reveals that codicils are used perhaps more frequently than their critics would like. Of the 1,670 wills within this study's sample, 110 were amended by at least one codicil. Thus, roughly 93% of testators did not leave behind a legally effective codicil, but a little less than 7% did. Moreover, of the 110 testators who used codicils, some amended their wills more than once. Specifically, 13 wills were amended by two codicils, and 4 wills were amended by three codicils. In total, the Hamilton County study included 131 codicils executed by 110 testators. Figure 1 below summarizes these results.

---

92. *See supra* Part I.

93. *See supra* notes 5–6 and accompanying text.

94. *See supra* notes 8–13 and accompanying text.

95. *Case Search*, HAMILTON CNTY. PROB. CT., https://www.probatect.org/court-records [https://perma.cc/E6MK-JHFL] (last visited Mar. 13, 2025). The criteria for inclusion with this sample includes not only that the estate must include a will and have been opened in Hamilton County in 2014 but also that the testator died in 2013 or 2014 while domiciled in Hamilton County. Furthermore, the will must have been submitted to Hamilton County's probate court for administration purposes and not for other purposes.

96. *See supra* Part I.

FIGURE 1

FREQUENCY OF CODICIL USE

CODICILS	TESTATORS		PERCENTAGE	
0	1,560		93.4%	
1	93	110	5.57%	6.6%
2	13		0.78%	
3	4		0.002%	

While this data provides a glimpse of how frequently testators in Hamilton County used codicils, it does not capture the entire picture, as it does not reflect instances where a testator executed a codicil but later revoked it. Among the dataset, 110 testators left behind legally effective codicils that dictated, in part, how their estates should be administered, and these codicils rightly found their way into the Hamilton County probate system. However, if a testator revoked a previously executed codicil, that codicil would have no bearing on the administration of the testator's estate, and consequently, it would not become part of the estate's probate records. Because revoked codicils are largely undiscoverable, they are therefore not included within the results of this study.

Although there is no way to accurately report how often testators in Hamilton County revoked codicils, there is evidence that such revocation did occur. For instance, one of the sample's 131 codicils expressly revoked the testator's prior codicil.[97] Additionally, in two other cases, the testator's will was accompanied by a codicil that the testator identified as a second codicil, but in each case, no first codicil was submitted to probate.[98] One possible explanation for the absence of a first codicil is that the testator revoked this codicil by destroying it during life. Thus, the frequency of codicil use that is reflected in this study's data certainly undercounts the number of codicils that testators in Hamilton County actually executed. Nonetheless, this underreporting is not alarming for two reasons. First, the total number of revoked and therefore uncaptured codicils is likely small; and second, in any event, the unreported codicils had no effect on the administration of decedents' estates in Hamilton County.

B. Substance

Hamilton County testators used codicils to change their wills in three general ways. First, 81 codicils, or almost 62%, altered a fiduciary nomination by

97. Second Codicil to the Last Will and Testament of Leonard Bosserman, Estate of Bosserman, No. 2014004091 (Ohio Prob. Ct., Hamilton Co. Nov. 15, 2006).

98. One second codicil expressly referred to the first codicil by name and dates. Second Codicil to the Last Will and Testament of John H. Brueggeman, Estate of Brueggeman, No. 2014002400 (Ohio Prob. Ct., Hamilton Co. Oct. 8, 2001). The other was referred to as a second codicil but in no way referenced the first codicil. Codicil to Last Will and Testament of Joseph A. Mazzei, Estate of Mazzei, No. 2014005230 (Ohio Prob. Ct., Hamilton Co. Nov. 4, 2010).

either adding or removing a primary or alternate nominee. Second, 75 codicils, or about 57%, made dispositive changes to their respective underlying wills. These changes entailed adding, revoking, or altering a gift. Third, 11 codicils, or 8.4%, changed administrative provisions in some way. Figure 2 below reports these findings.

FIGURE 2

FREQUENCY OF SUBSTANTIVE CHANGES

TYPE OF CHANGE	CODICILS	PERCENTAGE
Fiduciary	81	61.8%
Dispositive	75	57.3%
Administrative	11	8.4%

The most common type of change that Hamilton County testators made through codicils was an alteration to a fiduciary nomination. Eighty-one codicils altered at least one fiduciary nomination relating to who should serve as executor of the decedent's estate, who should serve as trustee of a trust created in the will, or who should serve as guardian of the testator's minor children. In particular, 78 codicils, or nearly 60%, changed a will's nomination of executor; 4 codicils changed the nomination of a guardian of minor children; and 1 changed a trustee nomination. These findings appear in Figure 3 below.

FIGURE 3

FREQUENCY OF FIDUCIARY NOMINATION CHANGES

TYPE OF FIDUCIARY	CODICILS	PERCENTAGE
Executor	78	59.5%
Guardian	4	3.1%
Trustee	1	0.8%

The 75 codicils that include dispositive changes altered a variety of different types of gifts. For instance, 27 codicils, or 20.6%, made changes to specific bequests, including gifts of both personal property and real property. Thirteen codicils, or almost 10%, changed general bequests of sums of money. Finally, 27 codicils, which again constitutes about 20% of this study's sample, included changes to a will's residuary clause, which disposes of any property the will does not otherwise dispose. These findings, along with more granular data, are summarized in Figure 4 below.

FIGURE 4

FREQUENCY OF DISPOSITIVE CHANGES

TYPE OF BEQUEST	CODICILS		PERCENTAGE	
Specific	21	27	16%	20.6%
Contingent Specific	6		4.6%	
General	11	13	8.4%	9.9%
Contingent General	2		1.5%	
Residual	21	27	16%	20.6%
Contingent Residual	6		4.6%	

Only 11 of the 131 codicils in this study's sample made changes to a will's administrative provisions. Six of these codicils made a change to a will's provision relating to the payment of tax. Six codicils altered the provisions relating to the role of the executor, such as: enumerating specific powers of the executor, directing that the executor serve without bond, or specifying the executor's compensation. Additionally, one codicil added a provision that authorizes unsupervised administration of the testator's estate. Figure 5 below reports these findings.

FIGURE 5

FREQUENCY OF ADMINISTRATIVE CHANGES

TYPE OF CHANGE	CODICILS	PERCENTAGE
Payment of Tax	6	4.6%
Executor Power	6	4.6%
Type of Administration	1	0.8%

In sum, testators in Hamilton County used codicils to change their original wills in various ways. Most testators who executed codicils did so to update fiduciary nominations, including those of executors, trustees, and guardians. Likewise, most altered the dispositive provisions of their wills through codicils, including those providing for specific, general, and residual bequests. Finally, a small fraction made codicils to change the administrative provisions of their wills, such as changes relating to the payment of tax and the role of the executor.

C. Integration

In addition to making a variety of substantive changes through codicils,[99] Hamilton County's testators used various strategies to integrate their codicils within their overall estate plan. First, most took great strides to plainly express that they intended their codicils to amend existing wills and to clearly identify these existing wills. For instance, each of the 131 codicils in this study were labeled as a codicil or

99. *See supra* Section II.B.

contained language indicating they were codicils. Moreover, 106 codicils, or almost 81%, indicated whether they were the testator's first, second, or third codicil.

Additionally, the vast majority of the codicils in this study clearly identified the will that the codicil amended. All but one referred to the will that they amended by the will's date of execution. Ten codicils went further by identifying the individuals who witnessed the wills they amended. Figure 6 below summarizes these findings.

FIGURE 6

FREQUENCY OF INTEGRATIVE REFERENCES

MECHANISM	CODICILS	PERCENTAGE
Labeled as Codicil	131	100%
Number of Codicil	106	80.9%
Date of Will	130	99.2%
Witnesses of Will	10	7.6%

In addition to the variety of methods that Hamilton County testators used to identify *what* documents they intended their codicils to amend, the testators used various mechanisms to describe *how* they intended their codicils to amend their wills. Ninety-six codicils, or slightly more than 73%, amended specific provisions or portions of wills by restating in whole the modified provision or portion. Nineteen codicils, or 14.5%, added entirely new provisions. Fifteen codicils, or 11.5%, altered a will by describing how the will's language should be changed—for example, by providing that one individual should be replaced by another individual in the list of nominees to serve as the executor of the testator's estate. Finally, 14 codicils, or 10.7%, deleted a specific provision of a will. Some of these findings are summarized in Figure 7 below.

FIGURE 7

FREQUENCY OF INTEGRATIVE MECHANICS

REFERENCE	CODICILS	PERCENTAGE
Restatement	96	73.3%
Addition	19	14.5%
Alteration	15	11.5%
Deletion	14	10.7%

Finally, most of the testators who executed codicils in Hamilton County attempted to clearly express that they intended the execution of a codicil to republish the original will. Forty-five codicils, or roughly one-third, contain an express republication provision either stating that the codicil republished the original will or that the original will should be treated as if it were executed on the date the testator executed the codicil. Most testators who executed codicils did not include an express republication clause, but they did include clauses strongly suggesting they intended

republication by, for example, stating that the will was reaffirmed or remained in effect except as modified by the codicil.[100] By contrast, only 12 codicils were silent regarding the issue of republication. Figure 8 below summarizes these findings.

FIGURE 8

FREQUENCY OF REPUBLICATION CLAUSES

CLAUSE	CODICILS	PERCENTAGE
Express	45	34.4%
Suggestive	74	56.5%
None	12	9.2%

In sum, Hamilton County testators took various steps to express how their wills and codicils functioned together. All referred to their codicils as codicils, and the vast majority clearly identified the wills that their codicils amended. Additionally, most testators made plain how their codicils altered their wills, such as by restating a provision or by specifically identifying a deleted or modified provision. Finally, most testators communicated the intent that their codicils republished their wills, either through an express statement of republication or other language clearly expressing such intent.

D. Timing

Testators in Hamilton County executed these codicils at various times during their lives. To obtain data regarding the timing of codicil use, copies of the wills and codicils of the 110 testators who executed codicils were reviewed, and the dates of execution as they appear on these documents were compared to determine the duration of time between the execution of wills and the execution of codicils. Additionally, the duration between initial codicils and subsequent codicils was calculated.

The mean timespan between the execution of a will and the execution of a first codicil was 2,949 days, or roughly eight years, and the median timespan was 2,532 days, or roughly seven years. At the extremes, the longest duration between the execution of a will and that of a first codicil was 14,582 days, or almost 40 years, and the shortest duration was at most mere hours, as one codicil was executed on the same day the testator executed the will that the codicil amended. Additionally, on average, the 17 testators who executed at least two codicils executed their second codicils 2,039 days—or a little more than five and a half years—after executing their first codicils. Finally, the four testators who executed three codicils executed their third codicils 140 days, 467 days, 1,475 days, and 2,191 days, respectively, after their second codicils. These findings are summarized in Figure 9 below.

100. *See, e.g.*, First Codicil to the Last Will and Testament of Eleanor Jamison, Estate of Jamison, No. 201400021 (Ohio Prob. Ct., Hamilton Co. Feb. 21, 1994) (stating that "[i]n all other respects, my said Last Will and Testament, as originally executed by me, and any Codicils thereto, shall remain in full force and effect").

FIGURE 9

DAYS BETWEEN WILLS AND CODICILS

INTERVAL	MINIMUM	MAXIMUM	MEDIAN	MEAN
Will to C1	0	14,587	2,532	2,949
C1 to C2	48	7,142	1,738	2,039
C2 to C3	140	2,191	971	1,068

Over and above the timespans between: (1) the execution of a will and a first codicil, (2) the execution of a first codicil and a second codicil, and (3) the execution of a second codicil and a third codicil, the timespan between the execution of a will and last codicil was calculated for each of the 110 testators who executed at least one codicil. This calculation reveals that the average timespan between the execution of a will and last codicil was 3,278 days, or almost nine years, and the median duration was 2,760 days, or roughly seven and a half years. Moreover, the longest duration was 14,587 days, or almost 40 years, and the shortest was negligible because as mentioned previously, one testator executed a will and codicil on the same day. This testator did not execute subsequent codicils. Figure 10 below provides more detailed data regarding the duration between the execution of a will and the execution of a last codicil.

FIGURE 10

TIME FROM WILL TO LAST CODICIL

TIMING	NUMBER	PERCENTAGE
Fewer than 5 Years	39	35.5%
5 Years to 10 Years	33	30.0%
10 Years to 15 Years	17	15.5%
15 Years to 20 Years	13	11.8%
20 Years to 25 Years	4	3.6%
25 Years to 30 Years	2	1.8%
More than 30 Years	2	1.8%

Along with the timing from the execution of a will to the execution of a last codicil, the timing between the execution of a last codicil and the testator's death was calculated by reference to the date of death as reflected in each testator's probate records. This calculation rendered an average time of 3,100 days, or approximately eight and a half years, and a median duration of 2,555 days, or seven years. Moreover, the longest timespan was 13,471 days, or almost 37 years, and the shortest was a mere three days. More detailed findings regarding the time between the execution of a testator's last codicil and death are depicted in Figure 11 below.

FIGURE 11

TIME FROM LAST CODICIL TO DEATH

TIMING	NUMBER	PERCENTAGE
Fewer than 6 Months	7	6.4%
6 Months to 1 Year	4	3.6%
1 Year to 3 Years	21	19.1%
3 Years to 5 Years	9	8.2%
5 Years to 10 Years	34	30.1%
10 Years to 15 Years	18	16.4%
15 Years to 20 Years	11	10.0%
20 Years to 25 Years	1	0.9%
25 Years to 30 Years	3	2.7%
More than 30 Years	2	1.8%

In sum, testators who executed codicils did so at various times relative to both the execution of their underlying wills and their deaths. Some executed codicils shortly after the execution of their wills, and others left their estate plans untouched for many years before executing codicils. Likewise, some testators executed codicils many years before their deaths, and others did so very close to the ends of their lives.

E. Custody

Hamilton County's probate records suggest that the testators who executed codicils successfully safeguarded their wills and codicils. Indeed, the administration of none of these testators' estates involved proceedings to establish the validity or contents of a lost codicil. This datapoint, however, does not tell the whole story of lost codicils in Hamilton County. As explained previously, two of the wills in this study's sample were accompanied by codicils that referenced other codicils that were not submitted to probate.[101]

These absent codicils were apparently revoked rather than lost, but the lack of proceedings to establish these codicils does not necessarily confirm this assumption. Additionally, any codicil that was lost but unknown to the testator's friends and family would not reveal itself in the probate records. Regardless of these limitations, however, the Hamilton County data does not suggest that testators who execute codicils face significant difficulty in safeguarding their testamentary documents.

F. Disputes

Just as the testators who executed codicils seem to have safely maintained custody of their wills and codicils, the estates of nearly all these testators passed through probate without dispute. As explained immediately above, none of these

101. *See supra* note 98 and accompanying text.

estates involved hearings to establish a lost will or codicil.[102] Furthermore, the administration of only 1 of the 110 estates involved litigation to establish the validity or meaning of a will or codicil.[103]

This isolated dispute involved a petition to interpret how a codicil altered the will of Marvis Hasenohr.[104] Marvis executed her will on May 25, 2000.[105] Item III of the will contained Marvis's entire dispositive plan, which comprised four gifts, including three general bequests and a bequest of the residue of her estate.[106] On May 6, 2011, Marvis executed a codicil, which completely revoked and restated Item III.[107] Pursuant to this new dispositive plan, two of the general bequests remained unchanged, and the other general bequest and the residuary bequest were eliminated.[108] In their place, Marvis added several general and specific bequests, but noticeably absent from the restated Item III was a new residuary bequest to replace the one that the codicil removed from Marvis's original will.[109]

When Marvis died in 2014,[110] her will and codicil were submitted to probate, and her executor filed a complaint for interpretation of the will and codicil to determine whether Marvis's residuary estate should go to the residuary beneficiary named in the original will or to Marvis's intestate heirs, who would take her residuary estate if the codicil revoked the original will's residuary bequest.[111] Although the unambiguous language of Marvis's codicil clearly revoked the residuary bequest in the will, the lawyer who drafted the codicil submitted an affidavit stating that "[he] was not requested nor did [he] draft any changes to [the residuary bequest] of Marvis'[s] original will."[112] Ultimately, the dispute was settled 117 days after the complaint was filed,[113] and because the codicil unambiguously

---

102. *See supra* Section II.E.

103. Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co.); *see also infra* notes 142–50 and accompanying text. Additionally, none of the estates involved a hearing or litigation to establish the validity of a will or codicil through the application of Ohio's harmless error rule. *See* Mark Glover, *Incremental Change in Wills Adjudication*, 49 FLA. ST. U. L. REV. 883, 918–19 (2022).

104. Complaint for Will Construction, Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co. Jul. 24, 2014).

105. Last Will and Testament of Marvis H. Hasenohr, Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co. May 25, 2000).

106. *Id.*

107. Codicil to the Last Will and Testament of Marvis H. Hasenohr, Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co. May 6, 2011).

108. *Id.*

109. *Id.*

110. *See Marvis Helen Hasenohr*, LEGACY.COM, https://www.legacy.com/funeral-homes/obituaries/name/marvis-hasenohr-obituary?pid=171034999&v=batesville&view=guestbook [https://perma.cc/XL38-PJJC] (last visited Oct. 21, 2021).

111. Complaint for Will Construction, Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co. Jul. 24, 2014).

112. Complaint for Will Construction, Exhibit D (Affidavit of Michael L. Einterz), Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co. Jul. 24, 2024).

113. Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co.) (case opened on July 24, 2014, and closed on November 18, 2014). The estate's lawyers application

revoked the will's residuary clause, the court ordered that Marvis's residuary estate descend to intestacy.[114]

Although Marvis's is the only codicil in this study's sample of wills that generated a dispute requiring litigation, a review of the entire sample reveals that opportunities for additional litigation existed. For example, as described elsewhere, some questions lingered regarding whether absent codicils were revoked or lost,[115] whether some codicils were properly integrated within their respective wills,[116] and whether testators intended to republish wills through the execution of codicils.[117] No litigation arose to resolve these questions, but the opportunity for disputes nonetheless remained.

In addition to these opportunities for dispute, two other examples are worth noting. First, one of the wills in this study's sample is accompanied by a document that is labeled as a codicil but was unexecuted.[118] This document is handwritten on a preprinted codicil form, but neither the testator nor a single witness signed the document. Moreover, it purports to add a sentence to the will's residuary clause that describes how the share of a predeceasing residuary beneficiary should be distributed. No dispute regarding the validity of this ostensibly unexecuted codicil arose because both named residuary beneficiaries survived the testator,[119] but had the contingency of a predeceasing residuary beneficiary occurred, litigation may have occurred. Image 1 below depicts this unexecuted codicil.

---

for attorneys' fees describes the settlement: "Following a conference between the Magistrate, counsel for the estate and the attorney for the ten (10) beneficiaries, an out of Court settlement was reached[.] That settlement involved the sharing of a majority of the joint with right of survivorship account of the decedent (owned with Maureen C Williams) with the ten (10) beneficiaries which resolution was conducted by counsel for the estate[.]" Application for Attorney's Fees, Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co. Apr. 24, 2015).

114. *See* Magistrate's Order, Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co. Nov. 17, 2014).

115. *See supra* note 98 and accompanying text.

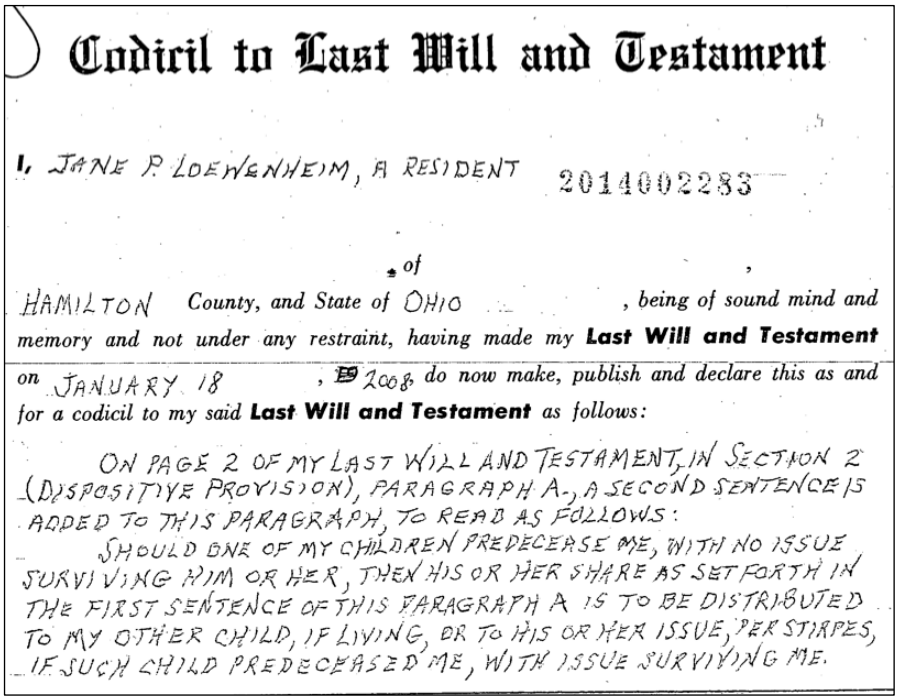
116. *See supra* Figure 6; *see also infra* notes 137–41 and accompanying text.

117. *See supra* Figure 7, note 100 and accompanying text.

118. Codicil to Last Will and Testament, Estate of Loewenheim, No. 2014002283 (Ohio Prob. Ct., Hamilton Co. Jan. 18, 2008).

119. Surviving Spouse, Children, Next of Kin, Legatees and Devisees, Estate of Loewenheim, No. 2014002283 (Ohio Prob. Ct., Hamilton Co. May 25, 2014) (listing Lori L. Smith and Frederick S. Loewenheim Jr. as surviving the testator).

IMAGE 1
UNEXECUTED CODICIL OF JANE LOEWENHEIM



Codicil to Last Will and Testament

I, JANE P LOEWENHEIM, A RESIDENT 2014002283

of

HAMILTON County, and State of OHIO , being of sound mind and memory and not under any restraint, having made my **Last Will and Testament** on JANUARY 18 , 2008, do now make, publish and declare this as and for a codicil to my said **Last Will and Testament** as follows:

ON PAGE 2 OF MY LAST WILL AND TESTAMENT, IN SECTION 2 (DISPOSITIVE PROVISION), PARAGRAPH A., A SECOND SENTENCE IS ADDED TO THIS PARAGRAPH, TO READ AS FOLLOWS:

SHOULD ONE OF MY CHILDREN PREDECEASE ME, WITH NO ISSUE SURVIVING HIM OR HER, THEN HIS OR HER SHARE AS SET FORTH IN THE FIRST SENTENCE OF THIS PARAGRAPH A IS TO BE DISTRIBUTED TO MY OTHER CHILD, IF LIVING, OR TO HIS OR HER ISSUE, PER STIRPES, IF SUCH CHILD PREDECEASED ME, WITH ISSUE SURVIVING ME.

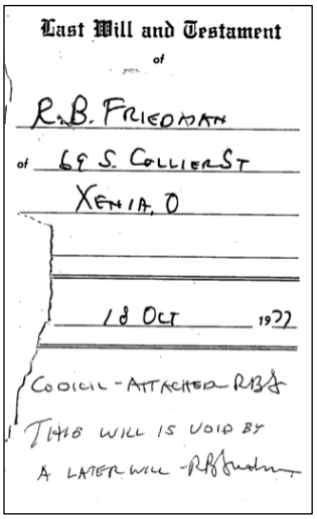
Second, one of the codicils contained a curious provision regarding how it could be revoked.[120] This codicil states that it "is in effect along with my last will and testament . . . unless otherwise noted and cancelled by my own signature on my last will and testament."[121] The testator indicated in a written and initialed note on the will's cover that this codicil was attached to the will. Immediately below this statement was another handwritten and initialed note that reads, "This will is void by a later will."[122] Image 2 below depicts the cover of this will.

120. Codicil to Will of Robert B. Friedman, Estate of Friedman, No. 2014004099 (Ohio Prob. Ct., Hamilton Co. Dec. 21, 1999).

121. *Id.*

122. Last Will and Testament, Estate of Friedman, No. 2014004099 (Ohio Prob. Ct., Hamilton Co. Oct. 18, 1977).

IMAGE 2
COVER OF ROBERT FRIEDMAN'S WILL



Because the executor of this estate reported that no other wills were discovered,[123] the probate court gave no consequence to the testator's revocatory note. However, it is possible that the testator's reference to a "later will" is not to another will but to the attached codicil, which was executed after the original will and thus a "later" testamentary document. In this scenario, the testator's reference to the will being "void" could be an invocation of the codicil's revocation provision that required him to make a notation of cancellation on the will. Thus, although this estate did not devolve into litigation, reasonable arguments over the will's validity exist. As such, it illustrates that while only one of the estates of testators who executed codicils generated litigation, the use of codicils by Hamilton County testators produced additional grounds for potential disputes.

In sum, this Article's original empirical study provides a different perspective from which to consider fragmented wills. Whereas the conventional wisdom is based largely on the personal experience of individual practitioners and decades of reported caselaw, both potentially providing a distorted picture, fragmented wills can now be examined objectively with data. From this new vantagepoint, a different and likely truer assessment of fragmented wills emerges.

III. A COUNTERNARRATIVE OF FRAGMENTED WILLS

As explained in Part I, the conventional wisdom suggests that fragmented wills are problematic and should be avoided.[124] Nonetheless, at the very least, the results of the empirical study of fragmented wills show that not all testators, and indeed not all estate planning lawyers, abide by the conventional wisdom's guidance

123. Affidavit of William F. Russo, Estate of Friedman, No. 2014004099 (Ohio Prob. Ct., Hamilton Co. Oct. 2, 2014).

124. *See supra* Part I.

of eschewing codicils.[125] But the study does not only illuminate the prevalence of fragmented wills—it also casts fragmented wills in a better light than does the conventional wisdom. The counternarrative of fragmented wills, as informed by how they function in the real world, is that codicils are largely innocuous estate planning tools that rarely cause problems and that generally improve the testator's estate plan.

This counternarrative can be constructed using the economic tool of decision theory, which provides a framework for crafting decision-making processes.[126] Specifically, decision theory suggests that the total costs of making a decision, such as determining how a testator intended her estate to be distributed, should be minimized to maximize the efficiency of the decision-making process.[127] Decision theory considers two kinds of costs—error costs and decision costs[128]—and the Hamilton County data suggests that a testator's use of codicils likely does not significantly increase either the error costs or the decisions costs associated with the probate court's task of determining the testator's intent.

A. Error Costs

Probate generates error costs when a testator's intent is not carried out.[129] These errors sometimes occur when a will is unclear, and the probate court inaccurately interprets ambiguous expressions of intent.[130] The conventional wisdom regarding fragmented wills suggests that codicils present an increased risk

---

125. *See supra* Part II.

126. *See* C. Frederick Beckner, III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 41–42 (1999) ("Decision theory sets out a *process* for making factual determinations and decisions when information is costly and thereby imperfect. It formulates a methodology for determining when to make decisions on the basis of current information and when to gather and consider further information before making a decision."); Keith H. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 498 (2001) ("Decision theory provides a powerful framework for understanding situations in which choices among alternative actions must be based on imperfect information. It helps us understand the tradeoffs between, in effect, convicting the innocent and absolving the guilty."); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1065 (1968) ("[T]he typical decision-theory problem involves the proper course of action to be taken by a decisionmaker who may gain or lose by taking action upon uncertain data that inconclusively support or discredit differing hypotheses about the state of the real but nonetheless unknowable world.").

127. *See* Beckner & Salop, *supra* note 126, at 46 ("A rational decision maker will try to minimize the sum of the two types of costs. This is the second key insight of the decision theoretic approach."); Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 910 (2009) ("The optimal rule from among the set of feasible alternatives is the rule that maximizes the expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs.").

128. *See* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 879 (2011) ("[D]ecision theory's instruction [is] to craft legal rules so as to minimize the sum of decision and error costs.").

129. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 144. *See generally* Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613 (2016).

130. *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 651–52 (2014).

of ambiguity because the testator's intent is expressed across multiple documents.[131] If this is true, then a testator's use of codicils might increase the risk of error. Yet, the experience in Hamilton County strongly calls this perception of fragmented wills into question.

For instance, the conventional wisdom points to the difficulty that testators have in clearly integrating multiple documents into a cohesive estate plan.[132] However, challenging the conventional wisdom, the vast majority of Hamilton County testators clearly communicated how their wills and codicils functioned together. As reported above, each of the 131 codicils in this study's sample indicated on its face that it was a codicil, and all but one specifically identified the will that it amended by the will's date of execution.[133] By including this information in their codicils,[134] most Hamilton County testators left no doubt regarding what documents they intended to amend. Furthermore, the most common method by which a codicil altered an original will was by specifically identifying a provision and completely restating it.[135] This method of amending a will reduces the need to go back and forth between the will and codicil to understand the testator's desired changes; therefore, it largely eliminates any confusion regarding how the testator intended multiple testamentary documents to interact with each other.[136]

Although most Hamilton County testators tried to clearly express how their wills and codicils functioned together, not all successfully did so. For instance, of the 19 codicils that added entirely new provisions,[137] 15 provided cross-references to the original will to specify where the new language should have been inserted; however, 44 did not.[138] A careful reader should have no trouble understanding how the testators of these four codicils intended to amend their respective wills. Nevertheless, the lack of specific guidance regarding where a new provision should be inserted into a will can lead to confusion and potential error costs.

---

131. *See supra* Section I.A.

132. *See supra* notes 32–34 and accompanying text.

133. *See supra* Figure 6.

134. *See* PATRICIA M. ANNINO, 21 MASS. PRAC., PROB. L. & PRAC. § 22:21 (3d ed.), Westlaw (database updated Jun. 2024) ("A codicil need not be labeled 'codicil' nor refer to the testator's will or any previous codicil. However, litigation may be avoided by precise reference to the will and its date of execution.").

135. *See supra* Figure 7.

136. *See* DIANE HUBBARD KENNEDY, 26 IND. PRAC., ANDERSON'S WILLS, TR. & EST. PLAN. § 2:43 (2024–2025 ed.), Westlaw (database updated Oct. 2024) ("It is recommended that, rather than stating that certain words or paragraphs are being deleted, the entire article should instead be revoked and a completely new article inserted in lieu thereof. This eliminates problems for the personal representative at a later date in referring back and forth between several documents.").

137. *See supra* Figure 7.

138. Codicil to Last Will and Testament of Joe A Buckhalter, Jr., Estate of Buckhalter, No. 2014000577 (Ohio Prob. Ct., Hamilton Co. Nov. 21, 2012); Codicil to Last Will and Testament of Judith Lee O'Bryan, Estate of O'Bryan, No. 2014001119 (Ohio Prob. Ct., Hamilton Co. Feb. 24, 2014); Codicil to Last Will and Testament of Mildred V. Howe, Estate of Howe, No. 2014001565 (Ohio Prob. Ct., Hamilton Co. Jan. 19, 2000); Codicil to Will of Robert B. Friedman, Estate of Friedman, No. 2014004099 (Ohio Prob. Ct., Hamilton Co. Dec. 21, 1999).

Moreover, if a testator attempts to provide guidance regarding how to integrate a will and codicil, this guidance can be erroneous. For example, three codicils in the Hamilton County sample included an incorrect date for the wills that they amended,[139] and one codicil incorrectly identified the witnesses to the will that it amended.[140] An additional two codicils incorrectly identified the cross-references to the provisions in the wills that they altered.[141] Although the probate records of these decedents' estates do not indicate whether these discrepancies were examined or even noticed, the erroneous references do raise questions regarding how the testator intended her various testamentary documents to function together. However, the ambiguity caused by these mistakes is the exception rather than the rule.

Even when the testator's intent is unambiguous, error costs can occur when drafting mistakes cause a will to clearly express an erroneous intent.[142] The conventional wisdom regarding fragmented wills suggests that these types of errors are also more prevalent when a testator uses a codicil to amend her estate plan,[143] but again, the codicils of Hamilton County testators cast doubt on the conventional wisdom. Although detecting this type of error is difficult by a simple review of a testator's will and codicils, one codicil in the Hamilton County sample, namely the previously discussed codicil of Marvis Hasenohr,[144] almost certainly contains such a mistake.

Recall that Marvis's codicil revoked her will's residuary clause without adding a substitute residuary clause.[145] After payment of all debts and administrative costs, Marvis's estate was valued at $354,295.44.[146] From this amount, several

---

139. First Codicil to Last Will and Testament of Harry R. Hoerr, Estate of Hoerr, No. 2014002187 (Ohio Prob. Ct., Hamilton Co. Mar. 7, 2005); Second Codicil to Last Will and Testament of Harry R. Hoerr, Estate of Hoerr, No. 2014002187 (Ohio Prob. Ct., Hamilton Co. Jan. 8, 2013); Codicil to Last Will and Testament of Robert Aaron Harden, Estate of Harden, No. 2014003450 (Ohio Prob. Ct., Hamilton Co. Jun. 27, 2013).

140. First Codicil to the Last Will and Testament of Thomas H. Siemers, Estate of Siemers, No. 2014002508 (Ohio Prob. Ct., Hamilton Co. Jun. 20, 1998).

141. First Codicil to Last Will and Testament of Mary Ann Finn, Estate of Finn, No. 2014000270 (Ohio Prob. Ct., Hamilton Co. Sept. 8, 2006); First Codicil to the Will of Irvin T. Scharfenberger, Estate of Scharfenberger, No. 2014001789 (Ohio Prob. Ct., Hamilton Co. Aug. 29, 2006).

142. *See* Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 395 (2001) ("Unambiguous wills alleged to contain a mistake present a difficult dilemma. If the will does in fact contain a mistake, then failure to correct it will defeat realization of testamentary wishes. On the other hand, permitted extrinsic evidence to override the terms of an unambiguous will reduces the testator's control over the presentation of his dispositive wishes and therefore creates the possibility that his attempt to exercise testamentary freedom will fail through no fault of his own.").

143. *See supra* Section II.F.

144. Codicil to the Last Will and Testament of Marvis H. Hasenohr, Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co. May 25, 2000).

145. *See supra* notes 104–14 and accompanying text.

146. *See* Fiduciary's Account (Executors and Administrators) – Final and Distributive, Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co.) (listing total disbursements of $471,993.08 with $63,697.64 disbursed to pay various fees and expenses of administration).

bequests were distributed to beneficiaries named in Marvis's will and codicil,[147] which left $262,429.44, or roughly 75% of her estate, undistributed. This amount would have gone to the residuary beneficiaries named in Marvis's will had the codicil not revoked the will's residuary clause. However, because the probate court found that the codicil did revoke the will's residuary clause, the amount fell into intestacy.[148] Although it seems clear that given the law in Ohio,[149] the probate court correctly resolved the issue, the court's outcome of partial intestacy almost certainly was not what Marvis wanted.[150]

To begin with, the law generally presumes that by executing a will, a testator intends to avoid partial intestacy.[151] The rationale of this presumption is that if the testator expends the time and effort to execute a will, then she likely did not want to rely upon the intestacy statute to dispose of any of her property.[152] This presumption is supported by Marvis's estate planning. Remember that Marvis's original will contained a residuary clause and therefore expressed the intent to dispose of the entirety of her estate.[153] It seems highly unlikely that Marvis lived with a will that disposed of 100% of her property for over a decade, but she then intentionally changed her will to dispose of only 25%. Put simply, it seems odd that Marvis would express her intent with respect to a small portion of her estate but remain silent with respect to the majority of her estate, especially given that she had previously expressly disposed of the entirety of her estate.

That the lawyer who drafted the codicil submitted an affidavit admitting that Marvis did not request him to make any changes to the will's residuary clause perhaps eliminates any remaining doubt regarding the suspected drafting error

---

147. *See id.*

148. *See* Magistrate's Order, Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co. Nov. 17, 2014).

149. *See id.*

150. Additionally, the settlement agreement does not seem to produce an outcome that Marvis wanted, as it resulted in the proceeds from bank account that she owned jointly with right of survivorship going to someone other than the joint owner. *See* Application for Attorney's Fees, Estate of Hasenohr, No. 2014002411 (Ohio Prob. Ct., Hamilton Co. Apr. 24, 2015).

151. *See* Pimpel v. Pimpel, 253 S.W.2d 613, 614 (Ky. 1952) ("We recognize a primary rule of construction to be that in construing wills every reasonable presumption will be indulged against partial intestacy."); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 52 B.C. L. REV. 877, 884–85 (2012) ("[S]tate inheritance law favors the affirmative exercise of testamentary freedom by well through a presumption that avoid intestacy; courts abhor intestacy and go to great lengths to give effect to a testamentary document if the alternative is partial intestacy.").

152. *See In re* Farrington's Estate, 220 A.2d 790, 793 (Pa. 1966) ("When a decedent drafts a last will and testament, he is presumed, in the absence of an indication to the contrary, to have intend to dispose of the entire estate and not to intestate as to any part of it."); Colville v. Am. Sec. & Tr. Co., 10 App. D.C. 56, 69 (D.C. App. 1897) ("[T]he very undertaking of a person to make a will creates a strong presumption of a purpose to dispose of the whole estate. Undoubted the theory is correct that the undertaking of a person to make a will creates a presumption of purpose on the part of that person to dispose of his whole estate.").

153. *See supra* note 106 and accompanying text.

contained in Marvis's codicil.[154] Thus, although whether the codicil accurately expressed Marvis's intent cannot be known with certainty, compelling evidence suggests that the codicil's removal of the residuary clause was a mistake. The resulting unintended disposition of part of Marvis's estate represents the cost of this mistake.

Although Marvis's fragmented will likely generated error costs, this seems to be an isolated occurrence among the entire sample of fragmented wills. Indeed, the Hamilton County data suggest that the conventional wisdom's concern regarding drafting mistakes and integrative problems is largely unfounded.[155] The entire sample of codicils simply raises little concern that fragmented wills present a higher risk of error than singular wills. This reality alone undermines the conventional wisdom, but the Hamilton County data reveal that the use of codicils may actually reduce error costs. This possibility of diminished error costs stems for the timing of the Hamilton County testators' use of codicils.

In particular, the timing of the execution of a testator's last codicil relative to the testator's death can serve as evidence regarding how closely the testator's expressed intent, as found in her will and codicils, conforms with her actual intent.[156] Because wills and codicils are executed during a testator's life but do not become effective until her death,[157] events can occur after their execution that alter how the testator intends to dispose of her property.[158] For example, when a testator marries after executing a will that excludes her spouse, her changed marital status strongly suggests that she intends to benefit her new spouse.[159] Similarly, when a testator becomes a parent after executing a will while childless, her changed parental status strongly suggests that she intends to benefit her children.[160]

When a testator does not update her will in light of these changed circumstances, her dispositive plan becomes stale. It no longer accurately expresses her intent, and as the number of changed circumstances grows, the accuracy of her expressed intent decreases. Thus, the closer to death a testator executes her last will or codicil, the less likely that changed circumstances will render the testator's estate plan stale simply because fewer opportunities exist for the testator's circumstances to change. Fresher wills more accurately carry out the testator's intent at death, and for this reason, they generate fewer error costs.

---

154. Complaint for Will Construction, Exhibit D (Affidavit of Michael L. Einterz), Estate of Hasenohr, No. 2014003006 (Ohio Prob. Ct., Hamilton Co. Jul. 24, 2014); *see supra* note 112 and accompanying text.

155. *See supra* notes 129–41 and accompanying text.

156. *See generally* Glover, *supra* note 56.

157. *See* Sitkoff, *supra* note 130, at 650 ("A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies.).

158. *See* Coughlin v. Bd. of Admin., 199 Cal. Rptr. 286, 287 (Cal. Ct. App. 1984) ("[U]pon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, [testators] would most likely intend to provide for their new family members, and/or revoke prior provisions for their ex-spouses.").

159. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 582–83.

160. *See* Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP. TR. & EST. L.J. 175, 179–83 (2015).

The data from Hamilton County reveal that testators who executed codicils left behind fresher wills than testators who did not. Recall that for Hamilton County testators who executed codicils, the mean and median timespans that intervened a testator's execution of her last codicil and her death were approximately eight and a half years and seven years, respectively.[161] By comparison, for the entire sample of wills including those accompanied by codicils, the mean timespan between a testator's execution of will and her death was about nine years, and the median timespan was roughly seven and a half years.[162] Thus, fragmented wills were fresher on average than then entire sample of mostly singular wills, albeit not dramatically so. This suggests that the use of fragmented wills does not increase costs and, in fact, might suggest that fragmented wills decrease error costs by decreasing the risk that changed circumstances undermine a decedent's intent.

B. Decision Costs

As Section III.A explained, contrary to the conventional wisdom, fragmented wills are not necessarily accompanied by an increased risk of error costs.[163] In fact, the Hamilton County data suggests that fragmented wills might, on average, better carry out a decedent's intent than singular wills.[164] Nonetheless, singular wills might still be preferable to fragmented wills if the process of accurately carrying out a decedent's intent as expressed in a fragmented will is significantly more difficult than it is in a singular will.

Efficiency is a key policy objective of inheritance law,[165] so the benefits of fragmented wills, namely the potential for greater accuracy in determining a decedent's intent, must be weighed against their costs. In particular, decision theory focuses on decision costs, which are the costs of decision-making procedures,[166]

---

161. *See supra* Section II.D.

162. *See* Glover, *supra* note 56, at 259.

163. *See supra* Section III.A.

164. *See supra* notes 161–62 and accompanying text.

165. *See* Reid Kress Weisbord, *The Governmental Stake in Private Wealth Transfer*, 98 B.U. L. REV. 1229, 1244 (2018) ("[M]aximizing efficiency in the administration of justice[] reflects a longstanding and bipartisan political preference to streamline the costs and burdens of government bureaucracy. The efficient administration of justice reduces the costs and burdens borne by taxpayers in funding the government as a whole. In the private wealth transfer context, this interest is served by principles of judicial economy that favor conserving the resources of courts through procedural rules that, where appropriate, reduce the volume of litigated matters."); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 387 (2017) ("With the myriad of competing claims on public resources, it is poor public policy to spend excessive funds on ascertaining testator's intent . . . . Limiting the costs of administration associated with ascertaining and giving effect to a decedent's testamentary intent is a reasonable and important public policy consideration, just as important as ascertaining and giving effect to a decedent's intent.").

166. *See* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 616 (2006) ("'Decision costs[] . . . means any burden, such as a resource expenditure or opportunity cost, associated with reaching a decision. This covers time, money, and emotional distress from uncertainty, conflict, worry and the like.").

such as the process of determining a decedent's intent at probate.[167] These costs include the time, money, and effort of litigating the issue of donative intent,[168] and decision theory suggests that fragmented wills are a worthwhile estate planning tool only if their marginal benefits outweigh their marginal costs.[169]

On this point, the conventional wisdom suggests that fragmented wills do indeed generate greater decision costs than singular wills. Even if courts can decipher a decedent's intent as expressed in a fragmented will, the conventional wisdom suggests that this process is more costly than it is for singular wills because of three reasons. First, the difficulties of clearly integrating separate documents into a cohesive estate plan generate litigation to determine the validity and meaning of fragmented wills.[170] Second, the burden of safekeeping multiple documents results in lost wills, and this requires the court to decide whether the decedent intended to revoke the will.[171] Third, fragmented wills raise issues, like republication, that do not arise with singular wills; consequently, courts must resolve more questions during the administration of fragmented wills.[172]

The conventional wisdom, however, is simply not supported by this Article's study of Hamilton County's fragmented wills. As described previously, only 1 of the 110 fragmented wills generated litigation regarding its validity or

---

167. *See* Guzman, *supra* note 67, at 316 ("While an ad hoc, pure intent approach would obviously uphold intent as paramount, it would do so at the cost of vastly increased likelihood of error or fraud in its creation, assertion, or scope, and litigation over the 'answers' to each."); Wendel, *supra* note 165, at 391 ("If decedent's intent and testamentary freedom were the sole public policy concerns, a court would hold a hearing either prior to immediately following a person's death to determine the person's testamentary wishes . . . . The cost of administration [however] would be prohibitive . . . ."); *see also* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941) ("The fact that our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so much accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified, seems to furnish the chief justification for requirement of transfer beyond evidence of oral statement of intent.").

168. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 111 (2000) ("'Decision costs' is a broad rubric that might encompass (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including costs of supplying judges with information to decide the case at hand [and] the opportunity costs of litigation to litigants and judges . . . .").

169. *See* Wendel, *supra* note 165, at 384–85 ("An economic analysis focuses on *marginal* costs and benefits. Whether one should enter into a proposed transaction, or adopt a proposed law, depends on whether the marginal benefits of the proposed transaction or law exceed the marginal costs of the proposed transaction or law. The proposed transaction/law is efficient if the marginal benefits exceed the marginal costs."); *see also* Champine, *supra* note 142, at 445 (explaining that changes in the law of wills "should be support[ed] . . . with cogent reasons for believing that the benefit afforded by the change will justify the costs"); Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 367 (2017) ("Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality.").

170. *See supra* Section I.A.

171. *See supra* Section I.B.

172. *See supra* Section I.C.

meaning.[173] Specifically, this lone instance of probate litigation involved an issue of the meaning of a fragmented will.[174] Thus, in this regard, more than 99% of fragmented wills passed through probate uneventfully. Moreover, not only did fragmented wills almost never generate litigation regarding their validity or meaning, but they also generated this type of litigation at a rate comparable to singular wills. Of the 1,560 singular wills in the study's sample, only 6, or less than 1%, produced litigation. Two of these six singular wills raised issues of construction; four raised issues of testamentary capacity; and four raised issues of undue influence. Figure 12 below summarizes these findings.

FIGURE 12

FREQUENCY OF PROBATE LITIGATION

ISSUE	SINGULAR WILLS	FRAGMENTED WILLS
Construction	2	1
Capacity	4	0
Undue Influence	4	0

Just as fragmented wills produced relatively little litigation regarding their validity and meaning as compared to singular wills, they also required fewer evidentiary hearings to resolve issues related to lost wills. In fact, none of the Hamilton County fragmented wills were lost; therefore, no additional decision costs related to lost wills were incurred during the administration of estates that included fragmented wills.[175] By contrast, 19 singular wills in this study's sample were lost and required a hearing to determine the lost will's validity and meaning.

Finally, even though the issue of republication is only relevant when decedents choose to employ fragmented wills, none of the Hamilton County fragmented wills required the court to consider the issue. As described previously, many codicils expressly included an unambiguous republication clause, and the vast majority strongly evidenced the decedent's intent that the codicil republish the will.[176] Moreover, even the small number of fragmented wills that did not clearly address the issue of republication failed to generate litigation.

In sum, this Article's original empirical analysis of codicils suggests that the conventional wisdom regarding fragmented wills is flawed. Indeed, a more comprehensive and systematic analysis of fragmented wills produces a counternarrative to the conventional wisdom. This counternarrative paints fragmented wills, at worst, as an innocuous estate planning tool and, at best, as a beneficial one. With this counternarrative in place, this Article concludes by exploring how it might inform changes to the law surrounding fragmented wills.

173. *See supra* Section II.F.
174. *See supra* note 104 and accompanying text.
175. *See supra* Section II.E.
176. *See supra* Figure 8.

IV. THE FUTURE OF FRAGMENTED WILLS

Historically, the law of wills has bolstered the conventional wisdom of fragmented wills. Under traditional law, the process by which a testator executes a will, either one that is to be read in isolation or one that is to be read together with other testamentary documents, is the same—the testator must produce a writing that she signs and that is attested by two witnesses.[177] The traditional law provides the testator no easier path to make wills that supplement existing wills than it does for wills that supplant existing wills.[178] By requiring the same execution process, the traditional law does not direct testators toward either singular wills or fragmented wills. Consequently, the perceived problems with fragmented wills drove the conventional wisdom to favor singular wills.

This Article's original empirical analysis paints fragmented wills in a more favorable light than does the conventional wisdom,[179] and in turn, it suggests that the law should not bolster the conventional wisdom's disfavor of fragmented wills. Indeed, contrary to conventional wisdom, fragmented wills should not be avoided or discouraged; rather, policymakers should encourage the use of fragmented wills through reforms that make the use of fragmented wills easier. Facilitating fragmented wills in this way would expand a testator's ability to update her will and, which in turn, would better serve the law of wills' primary policy objectives. Specifically, such reform would not only better facilitate the testator's freedom to dispose of property as she pleases but would also maintain an efficient process for the administration of decedents' estates.

A. Codicil Formality

Although the law of most states clearly requires codicils to comply with the same formalities as the wills that they amend, there is historical precedent for the proposition that the formal requirements for fragmented wills should be more stringent than those for singular wills. Consider the saga of the law of codicils in the State of Washington, a good entry point is *In re Whittier's Estate*[180]—a case that involved the will and purported codicil of Margaret Whittier. Margaret executed her will in 1937, which gave the bulk of her estate to her surviving family.[181] Subsequently, in 1942, Margaret signed a document that purported to give

177. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f (AM. L. INST. 2003); SITKOFF & DUKEMINIER, *supra* note 55, at 144–45.

178. *See* WEISBORD ET AL., *supra* note 2, at 157–58 ("A codicil is a testamentary instrument (a) amends a previously executed will, and (b) satisfies Wills Act formalities or meets statutory requirements for a holographic will."); Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 395 (2011) ("Valid wills and will codicils share the same basic elements: the testator must have reached the age of majority, be of sound mind, intend that the document in question be their will or codicil, and follow the will formalities."); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. a (AM. L. INST. 2003) ("The term 'will' includes a codicil.").

179. *See supra* Part III.

180. 176 P.2d 281 (Wash. 1947).

181. *Id.* at 282.

substantial gifts to a non-relative, who was her landlord and neighbor.[182] When Margaret died in 1944,[183] her executor challenged the 1942 document, arguing that it was not a legally effective codicil to her 1937 will and, therefore, should not be admitted to probate.[184]

In preface to consideration of the executor's specific arguments, the Washington Supreme Court framed the issues presented in this way:

> [T]he question [is] whether, under the accepted facts, the document of April 28, 1942, was admissible in evidence as a testamentary disposition of the decedent's property. The solution of that problem depends upon the answers to two other questions: (1) Whether the document constituted or operated as an independent will or whether it served simply as a codicil to the decedent's formal will of December 15, 1937; and (2) its character in the one respect or the other having been determined, whether it complied with the requirements of the law as pronounced by this court with reference to the admissibility of such instrument to probate.[185]

By framing the validity of the alleged codicil in this way, the Court suggested that the formal requirements for an underlying will are different than those for a codicil. If the formal requirements for wills and codicils were the same, then the Court would not have needed to first determine whether the 1942 document was a will or codicil.

With respect to the Court's first question, it decided that Margaret intended the 1942 document to function as a codicil.[186] From there, the Court turned to the issue of the formalities of codicils. To begin with, Margaret's executor argued that the 1942 codicil was invalid because it was not physically attached to the will.[187] This argument was grounded in Washington's statutory definition of a will, which at the time provided: "The term 'will,' as used in this chapter, shall be so construed as to include all codicils attached to any will."[188] Based upon this language, the executor argued that in addition to the writing, signature, and witnessing formalities that are required for all wills, codicils must also be physically attached to the wills that they amend to be valid.[189] The Court noted this argument; however, it declined

---

182. *Id.* at 284.

183. *Id.* at 285.

184. *Id.* at 286.

185. *Id.* at 287.

186. *Id.* at 288 (explaining that it reached "this conclusion from the following circumstances: She was found by the trial court to have had testamentary capacity at the time she executed the later document. Accepting such finding of the court, . . . we must assume that she had at least a general recollection of her estate and of her prior will . . . . She purported to dispose of only a minor part of such estate. Lastly, there is no indication that she indented to have the later document as her last and *only* will.").

187. *Id.* at 289.

188. REMINGTON'S REV. STAT. § 1338 (1916); *see In re Whittier's Estate*, 176 P.2d at 289 (contrasting the statutory language then in effect to the prior iteration which provided that "[t]he term 'will,' as used in this act shall be so construed to include all codicils, *as well as wills*" (quoting 7 Laws of Wash. Terr. § 49, (1854))).

189. *In re Whittier's Estate*, 176 P.2d at 289.

to expressly hold that attachment is an additional formality required of codicils because the 1942 document failed to satisfy another codicil formality.[190]

In particular, the Court found that the codicil's validity depended upon whether it made sufficient reference to the 1937 will that Margaret intended it to amend.[191] The Court derived this sufficient reference requirement from a case it had decided 20 years earlier in 1927.[192] In that case, *State v. Superior Court for Spokane County*, the Court invalidated a codicil because "[t]he so-called codicil to the will [was] not connected with the will in any way sufficient to identify it."[193] Because Margaret's codicil made no reference at all to any prior wills, the Court found that the sufficient reference requirement was not satisfied, and it noted that Margaret's codicil presented an easier case for invalidity then the one from the prior 1927 case:

> It will be observed that the codicil involved in that case presented a stronger basis for its admission to probate than does the codicil in this case. There, the document was not labeled 'codicil,' but also did make reference to *some* will 'heretofore mentioned,' although it did not specifically identify the particular will which the testatrix may have had in mind. Here, the codicil, regarded as such, makes no reference to any will whatever, either by special reference or by implication.[194]

After this comparison, the Court held that Margaret's 1942 codicil could not be admitted to probate because it failed to satisfy the formalities required of codicils.[195] Although the Court seems to have reached this conclusion primarily upon the codicil's lack of reference to its underlying will—and although it previously stated that there was no need to rule on the attachment issue[196]—the Court indicated that the lack of either attachment or reference would lead to the document's invalidity: "Since the codicil in this case was neither *attached* to the will nor made any reference whatever to it . . . , the document was . . . not entitled to be admitted to probate."[197]

After the Court's decision in *Whittier's Estate*, the Washington legislature altered the statutory definition of codicil. Specifically, in 1965, the legislature changed the definition of codicil to "an instrument executed in the manner provided by this title for wills, which refers to an existing will for the purposes of altering or changing the same, and which need not be attached thereto."[198] This definition not only eliminated the language that suggested a codicil must be attached to a will but also went further by expressly stating that a codicil need not be attached to a will.[199]

---

190. *See id.* ("It is not necessary, in this case, to determine which of these two contentions is correct, for we have here a situation where the codicil was not only *not* attached to the will, but also made no reference whatever to it.").
191. *See id.* at 288–89.
192. *See id.* at 289.
193. 255 P. 960, 961 (Wash. 1927).
194. *In re Whittier's Estate*, 176 P.2d at 290.
195. *See id.* at 290.
196. *See id.* at 289.
197. *Id.* at 290 (alteration in original).
198. WASH. REV. CODE § 11.02.005(9) (1974).
199. *See id.*

It therefore undercut the Court's suggestion in *Whittier's Estate* that a codicil must be attached to a will to be legally effective.

But while this definitional iteration expressly eliminated any need to attach a codicil to a will, it also alluded to a codicil needing to refer to a will.[200] This definition was arguably ambiguous regarding whether a sufficient reference to a will is a requirement for the validity of a codicil.[201] Nonetheless, at least some Washington courts viewed it as statutorily imposing the sufficient reference requirement that seems to have originated in *State v. Superior Court for Spokane County*, thereafter affirmed by *Whittier's Estate*. For instance, in *In re Estate of Bowechop*, the Washington Court of Appeals decided an appeal of an order admitting a document, which was labeled as a codicil, to probate.[202] The court ultimately reversed the probate court order, thereby denying the document's admission to probate, because the decedent intended the document to be a codicil but the document did not refer to an underlying will.[203] The court reasoned that the statutory definition of codicil required a codicil to make such a reference; therefore, any codicil that did not was invalid.[204]

Following *Bowechop*, the Washington legislature again amended the statutory definition of codicil, which presently provides: "'Codicil' means a will that modifies or partially revokes an existing earlier will. A codicil need not refer to or be attached to the earlier will."[205] This revised definition expressly overrules any suggestion in prior caselaw that codicils need to refer to the wills that they amend or that they need to be attached to their underlying wills. While no other state defines codicil in a way that expressly abolishes the formalities of attachment and sufficient reference, those that do statutorily define codicil do so without alluding to either requirement.[206] Moreover, because most states have not grappled with the issue of

---

200. *See id.*

201. The ambiguity regarding the sufficient reference requirement in this iteration of the statutory definition of codicil harkens back to the previous iteration's ambiguity regarding the attachment requirement. *See In re* Whittier's Estate, 176 P.2d at 289 ("Appellant argues that this change in the wording of the original statute clearly indicates that the legislature intended that a codicil, to be effective as a testamentary instrument, must be *attached* to the will which it is intended to modify . . . . Respondent, on the contrary, argues that this statute means simply that a codicil must be executed with the same formality as a will, and does not *require* that a codicil be attached to the will which it modifies.").

202. 764 P.2d 657, 658 (Wash. Ct. App. 1988).

203. *See id.* at 659.

204. *See id.* at 658 ("Leonard's first line of attack in the adversary proceedings that ensued was to challenge the validity of the 'codicil.' The court agreed with Leonard's argument, holding the document invalid as a codicil for failure to satisfy the statutory requirement of internal reference to an earlier will.").

205. WASH. REV. CODE ANN. § 11.02.005(2).

206. *See* GA. CODE ANN. § 53-1-2(4) ("'Codicil' means an amendment to or republication of a will."); NEV. REV. STAT. ANN. § 132.070 ("'Codicil' means an addition to a will that may modify or revoke one or more provisions of the will, or add one or more provisions to the will, and is singed with the same formalities as a witnessed will, electronic wills or holographic will."); N.Y. EST. POWERS & TRUSTS LAW § 1-2.1 ("A codicil is a supplement to a will, either adding to, taking from or altering its provisions or confirming it in whole or in part by republication, but not totally revoking such will.").

codicil formality in the same way as Washington, they lack caselaw that suggests codicils require greater formality than singular wills.

Although the issue of codicil formality seems settled in most states, the issue recently reemerged in Texas. In the case of *In re Estate of Hargrove*,[207] the Texas Court of Appeals assessed the validity of a purported codicil of Mary Jane Hargrove. The document was dated March 31, 2017, and stated, "I, MARY BARBER HARGROVE (also known as Mary Jane Hargrove), a resident of Val Verde County, Texas, do make and publish this the First Codicil to my Last Will and Testament, which was executed in the Summer of 2016 . . . ."[208] Despite the fact that the codicil was written, signed, and witnessed and that it referred to the will that it amended, a contestant challenged the codicil's validity because Mary Jane actually executed her will in 2017; thus, the reference in the codicil to a 2016 will was erroneous.[209]

Both the codicil's contestant and its proponent seem to have conceded that a valid codicil must sufficiently refer to the will that it amends.[210] For instance, the proponent's appellate brief states, "A codicil is valid and fully enforceable if it gives enough information to permit adequate identification to the prior will."[211] With both parties agreeing on the reference formality, the validity of the codicil turned upon whether the *erroneous* reference was sufficient to satisfy the requirement.[212] Ultimately, the court found that the reference was insufficient: "We hold that the trial court's finding that the Codicil lacks the requisite formalities to be admitted to probate with the February 13, 2017 Will is supported by evidence that the Codicil does not contain a sufficient reference to that Will."[213]

The arguments and analysis in *Hargrove* are relatively straightforward, but the origins of the sufficient reference requirement, which all parties conceded is part of Texas law, are not clear. Unlike the experience in Washington,[214] the Texas sufficient reference formality is not rooted in a statutory definition of codicil or any other statutory authority.[215] Instead, the sole authority that the court cited in its opinion, and that the codicil's proponent cited in his brief, is the 1955 Supreme

---

207. No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App. Mar. 6, 2019).

208. *Id.* at *1.

209. *See id.* at *2.

210. *See id.* ("The parties agree that a codicil must contain 'a sufficient reference to a prior will . . . .'").

211. Appellant's Br. at A21, Estate of Hargrove, No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App. Mar. 6, 2019).

212. *See Estate of Hargrove*, 2019 WL 1049293 at *2–3.

213. *Id.* at *3.

214. *See supra* notes 180–205 and accompanying text.

215. The statutory definition of "will" seems to contemplate that codicils are a form of will. *See* TEX. EST. CODE ANN. § 22.034(1) ("'Will' includes . . . a codicil."). Moreover, the will-execution statute draws no distinction between wills and codicils. *See* TEX. EST. CODE ANN. § 251.051. Finally, older Texas Court of Appeals decisions have interpreted prior iterations of the will-execution statute to require the same formalities of wills and codicils. *See In re* Estate of Jansa, 670 S.W.2d 767, 767–68 (Tex. Ct. App. 1984) ("A codicil is a testamentary writing that is supplementary to an earlier testamentary writing . . . and . . . must be executed with the same formalities required in the making of a will.").

Court of Texas case of *Hinson v. Hinson*.[216] *Hinson* involved a codicil, and to be sure, the opinion supports the proposition that codicils must sufficiently refer to their underlying wills.[217] However, the *Hinson* opinion does not support the *Hargrove* holding that failure to sufficiently refer to an underlying will completely invalidates a codicil.

Indeed, *Hinson* does not treat a sufficient reference to an underlying will as a requirement for a will's validity. Unsurprisingly, *Hinson* actually addresses the issue of republication.[218] Recall that republication occurs when a testator intends for the execution of a codicil to function as the re-execution of the will that the codicil amends.[219] *Hinson* posited that a codicil republishes a will only when it sufficiently references the will.[220] Specifically, the Court stated, "It is well settled, however, that a properly executed and valid codicil which contains a sufficient reference to a prior will, operates as a republication of the will in so far as it is not altered or revoked by the codicil . . . ."[221] Nowhere did the Court in *Hinson* suggest that the lack of a sufficient reference leads to the complete invalidity of a codicil.[222]

As a matter of positive law, the issue of whether codicils require additional execution formalities has been settled in the negative by the Washington legislature;[223] and in Texas, the *Hargrove* decision that recognizes the additional sufficient reference formality is supported neither by legislation nor judicial precedent.[224] However, from a normative perspective, questions remain regarding whether the validity of a codicil should depend upon additional formalities, such as the attachment or sufficient reference requirements discussed above. Like all will-execution formalities, the utility of an attachment or sufficient reference formality should be assessed by the purposes they serve[225]—in particular, whether they further

---

216. 280 S.W.2d 731 (Tex. 1955); *see Estate of Hargrove*, 2019 WL 1049293 at *2 (referring to "the *Hinson* rule"); Appellant's Br. at A21, *Estate of Hargrove*, No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App. Mar. 6, 2019). (referring to "the *Hinson* rule").

217. *See Hinson*, 280 S.W.2d at 735–36.

218. *See id.* at 735 ("Respondent also contends that the typewritten instrument is republished by . . . the holographic writing and thus is validated . . . .").

219. *See supra* notes 65–82 and accompanying text.

220. *See Hinson*, 280 S.W.2d at 735–36.

221. *Id.* at 735.

222. To be sure, *Hinson* held that the codicil was invalid. *See id.* at 736. However, the Court found the codicil invalid, not because it lacked a sufficient reference to the will, but because the decedent did not intend the codicil to function as a will at all. *See id.* at 734 ("We agree with respondent that the decedent intended to make a testamentary disposition of his property. It is our opinion, however, that the holographic instrument of August 24th was not intended as a declaration of the manner in which he would have his property pass and vest at his death."). *See generally* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016) (explaining the various aspects of testamentary intent that court consider when authenticating and interpreting wills).

223. *See supra* note 205 and accompanying text.

224. *See supra* notes 207–22 and accompanying text.

225. *See In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991) ("Compliance with statutory formalities is important not because of the inherent value that those formalities possess, but because of the purposes they serve."); Ronald J. Scalise, Jr., *Will Formalities in*

the law of will's twin concerns of accurately determining a decedent's intent and efficiently administering decedents' estates.[226]

For instance, a requirement that a codicil be attached to the will that it amends could serve obvious purposes, such as clearly identifying the will that the codicil amends and reducing the risk that a will and codicil are separated in the interregnum between execution of the codicil and the testator's death. An attachment requirement could make the determination of a testator's intent more accurate and more efficient. However, this Article's study of fragmented wills found that neither the identification of the wills that codicils amend nor the safekeeping of fragmented wills were a significant problem within the study's sample.[227] Consequently, an attachment requirement would not seem to serve a meaningful purpose and, conversely, would increase the risk that clearly authentic codicils would be invalidated for failing to be attached to a will.

Similarly, Texas's specific reference requirement could serve legitimate purposes that promote accurate determinations of testamentary intent and efficient administration of decedents' estates. Indeed, a specific reference requirement provides evidence of a testator's intent to republish the original will, which perhaps reduces the likelihood of litigation regarding the issue. However, this Article's empirical study suggests that in the absence of a specific reference requirement, most testators provide unambiguous statements of their intent to republish and that the issue of republication does not breed litigation.[228] A specific reference requirement would seem to provide little benefit. Instead, as *Hargrove* illustrates,[229] requiring that all codicils specifically refer to the wills that they amend in order to be legally effective has the potential to undermine the goals of accuracy and efficiency. This is so because some clearly authentic codicils could be needlessly invalidated, and a codicil's proponents and contestants will litigate the issue of what constitutes a sufficient reference to a will.

In sum, additional codicil formality beyond that required of all wills could serve legitimate purposes that pursue the overarching objective of the law of wills. However, this Article's empirical study of fragmented wills suggests that additional codicil formalities generally, and the attachment and specific reference requirements specifically, are not needed. In Hamilton County, Ohio, where no addition codicil formality is required,[230] fragmented wills simply do not cause much difficulty in

---

Louisiana: Yesterday, Today, and Tomorrow, 80 LA. L. REV. 1331, 1435 (2020) ("The legislature . . . must be cognizant of whether the formalities adopted are not only serving the purposes for which they are designed but also whether there are better ways to serve those purposes without imposing an unjustifiable risk upon testators.").

226. *See* James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 544 (1990) ("The question . . . is whether the formality promotes the primary goal of our system of testation—effectuating the intent of the testator at an acceptable administrative cost.").

227. *See supra* Section II.E, Figure 6.

228. *See supra* Figure 8.

229. *See* Estate of Hargrove, No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App. Mar. 6, 2019).

230. *See* Clark v. Carpenter, 14 Ohio App. 278, 281 (1921) ("A valid codicil to a will must be executed with the same legal formalities as a last will and testament.").

deciphering the testator's intent and do not breed litigation that disrupts the efficient administration of the decedent's estate.[231] Rather than promoting accuracy and efficiency, additional codicil formalities would seem to lead to the invalidity of clearly authentic codicils and also to litigation regarding the testator's compliance with the additional formalities. Consequently, courts should resist the temptation to impose additional requirements for the validity of codicils. Moreover, state legislatures should send a clear message to courts by enacting express statutory language that not only dictates that codicils must be executed with the same formalities as other wills but also that clarifies that codicils need not be attached or refer to the wills that they amend.

B. Supplementary Memoranda

Although this Article's original empirical analysis of fragmented wills supports the proposition that codicils should not be more formal than underlying wills,[232] whether fragmented wills should be less formal than singular wills is a distinct issue. In this regard, policymakers in recent decades have demonstrated some willingness to promote fragmented wills by reducing their formal requirements. Indeed, with the promulgation of the initial iteration of the Uniform Probate Code ("UPC"), the extent to which the law reinforced the conventional wisdom regarding fragmented wills began to wane, as the 1969 UPC included a provision that made it easier for testators to amend their estate plans through fragmented wills.[233]

In particular, this provision permits a testator, after the execution of her will, to maintain a running list of specific gifts of tangible personal property.[234] Although this provision requires these so-called tangible personal property memoranda to be written and signed by the testator, it does not require witnesses to attest the document.[235] Because the path to fragmented wills is easier through the use of tangible personal property memoranda,[236] the UPC alters the calculus of whether a testator should strive for singularity or settle for fragmentation.

---

231. *See supra* Part II.

232. *See supra* Section IV.A.

233. *See* UNIF. PROB. CODE § 2-513 (UNIF. L. COMM'N 1969).

234. *See* SITKOFF & DUKEMINIER, *supra* note 55, at 259.

235. *See* UNIF. PROB. CODE § 2-513 (UNIF. L. COMM'N 1990) (revised 2019) (requiring a written and signed document). The original 1969 iteration did not require the testator's signature. UNIF. PROB. CODE § 2-513 (UNIF. L. COMM'N 1969); *see* Guzman, *supra* note 67, at 318 n.48 ("[T]he original provision permitting the document to be unsigned was modified in 1990 on the theory that unsigned documents do not provide as much evidence of testamentary intent as signed ones.").

236. *See* Earl M. Curry, Jr., *West Virginia and the Uniform Probate Code: An Overview Part I*, 76 W. VA. L. REV. 111, 138–39 (1974) ("A typical situation where this provision would be most useful would be that of allowing a testator to list both his personal effects and the persons he desired to take these specific items without requiring him to re-execute his will where there is a change of mind as to the disposition sought."); Kent D. Schenkel, *Planning and Drafting Basics under the New Massachusetts Uniform Probate Code*, 16 ROGER WILLIAMS U. L. REV. 535, 542 (2011) ("[S]ection 2-513 creates a new opportunity for streamlining the drafting and amendment of basic wills.").

At least 30 states have enacted some version of the UPC's tangible personal property memorandum legislation.[237] As such, the state of the law regarding fragmented wills is, itself, fragmented, and from this lack of uniformity amongst the states, policy questions emerge. Should the holdouts follow the majority of their sister states and enact the UPC's personal property memorandum legislation? Should the UPC's favor of fragmented wills be lessened or indeed eliminated? Or should the UPC encourage states to enact legislation that is even more favorable to fragmented wills?

This Article's counternarrative of fragmented wills is consistent with the majority trend that promotes fragmented wills through tangible personal property memoranda legislation. If codicils are useful tools for testators to make incremental estate planning changes,[238] then perhaps less formal personal property memoranda can be just as, if not more, useful in accurately conveying the testator's intent while maintaining the efficiency of the probate process. Indeed, the UPC's official commentary couches its personal property memoranda provision as "part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution."[239] This broader policy that the UPC refers is squarely focused on identifying ways to more accurately carry out a testator's intent without significantly increasing probate's administrative costs.[240]

Personal property memoranda, however, raise legitimate policy concerns that codicils do not. In particular, the reduction of formalities—namely, the elimination of attestation—potentially increases the likelihood of fraudulent entries on the memorandum placed not by the testator, but by those who are to receive the property.[241] Recognizing this concern, the UPC places substitute safeguards against

---

237. ALASKA STAT. ANN. § 13.12.513; ARIZ. REV. STAT. ANN. § 14-2513; ARK. CODE ANN. § 28-25-107; CAL. PROB. CODE § 6132; COLO. REV. STAT. ANN. § 15-11-513; DEL. CODE ANN. tit. 12, § 212; FLA. STAT. ANN. § 732.515; HAW. REV. STAT. ANN. § 560:2-513; IDAHO CODE ANN. § 15-2-513; IND. CODE ANN. § 29-1-6-1; IOWA CODE ANN. § 633.276; KAN. STAT. ANN. § 59-623; ME. REV. STAT. tit. 18-C, § 2-512; MASS. GEN. LAWS ANN. ch. 190B, § 2-513; MICH. COMP. LAWS ANN. § 700.2513; MINN. STAT. ANN. § 524.2-513; MO. ANN. STAT. § 474.333; MONT. CODE ANN. § 72-2-533; NEB. REV. STAT. ANN. § 30-2338; NEV. REV. STAT. ANN. § 133.045; N.J. STAT. ANN. § 3B:3-11; N.M. STAT. ANN. § 45-2-513; N.D. CENT. CODE ANN. § 30.1-08-13; S.C. CODE ANN. § 62-2-512; S.D. CODIFIED LAWS § 29A-2-513; TENN. CODE ANN. § 32-3-115; UTAH CODE ANN. § 75-2-513; VA. CODE ANN. § 64.2-400; WASH. REV. CODE ANN. § 11.12.260; WYO. STAT. ANN. § 2-6-124.

238. *See supra* Part III.

239. UNIF. PROB. CODE § 2-513 cmt. (UNIF. L. COMM'N 1990) (revised 2019).

240. *See* UNIF. PROB. CODE § 1-102(b)(2)–(3) (stating that "[t]he underlying purposes and policies of this Code" include "to discover and make effective the intent of a decedent in distribution of the decedent's property" and "to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors").

241. *See In re* Last Will & Testament & Trust Agreement of Moor, 879 A.2d 648, 655 (Del. Ch. 2005) ("The more rigorous formalities required of the body of a will itself were relaxed, permitting a testator to dispose of personal property by a simple, unwitnessed writing that becomes an annex to the will. By that tradeoff, [the drafters of the UPC] made the judgment that the flexibility and convenience of this method were, on balance, worth the enhanced possibility that such a writing might not reflect the uncoerced, free will of the testator.").

fraud or forgery.[242] For instance, the personal property memorandum mechanism is available only if the testator specifically reserves the power to use it in her will.[243] At the very least, this requirement prevents a wrongdoer from wholly fabricating a personal property memorandum when the testator never intended to use the mechanism.

Perhaps more importantly, the UPC permits a memorandum to dispose of only tangible personal property, and it expressly excludes money from the memorandum's purview.[244] Pursuant to this limitation, wrongdoers must identify specific items of personal property, which might make their fraudulent undertakings more difficult because they must have some knowledge of the testator's property. Fraudulent entries on a personal property memorandum would be easier to create if the wrongdoer could simply identify a sum of money. Whether these safeguards are sufficient is a matter of policy, and in this regard, the policymakers in the states that followed the UPC's lead have made the judgment that the potential benefits of personal property memoranda outweigh their risks.

Although this Article's empirical analysis reveals little concern about fragmented wills that are created through the execution of codicils,[245] it provides no insights into how personal property memoranda function in the real world. Ohio is in the minority of states that have not adopted personal property memoranda legislation,[246] and consequently, none of the fragmented wills in the Hamilton County sample included a personal property memorandum. The study therefore sheds little light into whether personal property memoranda do more harm than good or whether they are an effective estate planning tool.

Nonetheless, the Article's empirical study does reveal that testators who employ fragmented wills are oftentimes concerned with issues other than the disposition of tangible personal property. Recall that more codicils made fiduciary appointments than disposed of property.[247] More specifically, over 60% of the codicils in the sample contained a provision that nominated someone to serve as personal representative of the testator's estate, while 57% of the codicils altered dispositive provisions of the testator's estate plan.[248] If personal representative appointments are a major reason for codicil use, then perhaps a similar mechanism

---

242. *See* Daniel H. O'Connell & Richard W. Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 244 (1972) ("The provision contains sufficient limitations to prevent the abuse of and to justify an exception to the general requirements for formal execution of a will."). Once of these potential safeguards is the provisions applicability only to tangible personal property. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 67 OHIO ST. L.J. 1057, 1106 n.142 (1996) ("The provision appears to have been premised on the assumption that tangible personality is typically of small value . . . .").

243. *See* UNIF. PROB. CODE § 2-513 (UNIF. L. COMM'N 1990) (revised 2019).

244. *See id.*

245. *See supra* Part II.

246. *See* Richard H. Harris, *Transferring Tangible Personal Property by Beneficiary Designation*, 29 PROB. L.J. OHIO 144, 144–47 (2019).

247. *See supra* Figure 2.

248. *See supra* Section II.B.

to the UPC's personal property memorandum should permit testators to more easily make personal representative appointments.

Greater ease in making personal representative appointments aligns with the law's objective of accurately and efficiently effectuating the testator's intent.[249] Testamentary freedom extends beyond dispositive decisions and includes the discretion over certain aspects of estate administration,[250] like who should serve as personal representative.[251] Permitting a testator to communicate her intent regarding who should serve as personal representative in an additional way that is less formal than a traditional will increases the amount and ripeness of the evidence of the testator's intent. This, in turn, increases the likelihood that a court will accurately determine whom the testator would prefer to serve as personal representative.

Furthermore, in contrast to the UPC's personal property memoranda,[252] personal representative memoranda raise fewer concerns regarding fraud or forgery because personal representative appointments are already accompanied by greater scrutiny than dispositive decisions.[253] In the words of the *Restatement (Third) of Property*, "American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[254] To be sure, if a contestant of a will can establish that fraud or another type of wrongdoing affected the will, then a court will ignore the will or the part of it that is the product of wrongdoing.[255] However, if a court determines that a testator intended to make a particular gift, the court is not empowered to second-guess the merits of that decision.

By contrast, probate courts defer to the testator's personal representative nominations,[256] but a testator's freedom to appoint a personal representative is

---

249. *See supra* note 226 and accompanying text.

250. *See* Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 U.C. DAVIS L. REV. 2561, 2564 (2020) ("Under modern probate law, testators enjoy broad autonomy to customize many aspects of estate administration, including the work of the executor.").

251. *See* Hirsch, *supra* note 7, at 309 ("A testator can name an executor under the will . . . . Because a testator is free to choose a personal representative, laws governing the appointment in the absence of a testamentary provision constitute default rules."); Lauren A. Kirkpatrick, Comment, *Treading on Sacred Ground: Denying the Appointment of a Testator's Nominated Personal Representative*, 63 FLA. L. REV. 1041, 1048 (2011) ("[S]tronger policy reasons exist for affording strong deference to a testator's nominated personal representative. The strong deference afforded to a testator's nominated personal representative derives from the principle of testamentary freedom.").

252. *See supra* notes 232–44 and accompanying text.

253. Of such type of wrongdoing in the context of personal representative appointments is possible. *See* David Horton, *Probate Standing*, 123 MICH. L. REV. 1, 28 (explaining that a "wrongdoer usually maximizes their control over the inheritance process by also coercing the senior into naming them as personal representative").

254. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

255. *See id.* § 8.3.

256. *See* UNIF. PROB. CODE § 3-203(a) (UNIF. L. COMM'N 1990) (revised 2019) (placing at the top of the order of priority for whom should serve as personal representative "the person with priority as determined by a probated will").

tempered in two general ways. First, prior to serving as personal representative, a testator's nominee must qualify to serve,[257] and the UPC explains that "[n]o person is qualified to serve as a personal representative who is . . . a person whom the court finds unsuitable in formal proceedings."[258] Thus, any personal representative nominee, whether genuinely nominated by the testator or fraudulently nominated by a wrongdoer, is subject to judicial scrutiny prior to appointment, which is in contrast to the greater deference that courts give the testator's dispositive decisions.[259] This greater scrutiny reduces the expected costs of fraudulently procured personal representative appointments by weeding out those nominees that a court determines cannot perform the job of personal representative.

Second, even if a fraudulently nominated personal representative passes muster and obtains the office, she is subject to ongoing oversight and potential judicial intervention. A personal representative must administer a decedent's estate in the best interest of the estate's beneficiaries,[260] and the beneficiaries can sue the personal representative for breach of fiduciary duties. If the beneficiaries prevail in a breach of fiduciary duty claim, the personal representative can be personally liable for any harm borne by the beneficiaries and caused by the personal representative's breach.[261] The personal representative's personal liability both remedies the beneficiaries' harm and disincentivizes future breaches of fiduciary duties by all personal representatives.[262] Ultimately, if the personal representative's conduct is sufficiently egregious, the beneficiaries can petition the court to remove the personal representative.[263] Moreover, in some jurisdictions, it might be possible for a court to

---

257. *See* UNIF. PROB. CODE § 3-601 ("Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.").

258. UNIF. PROB. CODE § 3-203(f)(2).

259. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

260. *See* UNIF. PROB. CODE § 3-703(a) (UNIF. L. COMM'N 1990) (revised 2019) ("A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this [code], and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this [code], the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.").

261. *See* UNIF. PROB. CODE § 3-712 ("If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of the representative's duty to the same extent as a trustee of an express trust.").

262. *See* Sitkoff, *supra* note 130, at 659 ("The functional core is *deterrence*. The fiduciary is induced to act in the best interests of the beneficiary by the threat of after-the-fact liability for breach of fiduciary duty.").

263. *See* UNIF. PROB. CODE § 3-611 (UNIF. L. COMM'N 1990) (revised 2019) (providing both that: (a) "[a] person interested in the estate may petition for removal of a personal representative for cause at any time" and (b) "[c]ause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking the personal representative's appointment intentionally

unilaterally remove the personal representative in the absence of a beneficiary's petition to do so.[264] These safeguards, which do not protect against fraudulently obtained testamentary gifts, reduce the risk that a fraudulently appointed personal representative will wreak havoc during the administration of a decedent's estate.

In sum, this Article's counternarrative of fragmented wills,[265] which is supported by original empirical evidence,[266] counsels in favor of change to the law of wills. First, the temptation of courts to fiddle with the formalities for the validity of codicils should be curtailed by express statutory language clearly stating that codicils need not be attached to wills nor reference the wills that they amend.[267] Second, the UPC's encouragement of fragmented wills should be expanded by the enactment of legislation that authorizes testators to informally appoint individuals as personal representatives of their estates.[268]

CONCLUSION

Critics have given fragmented wills a bad name.[269] This criticism, however, is largely unfounded.[270] Wills that are accompanied by codicils are not the ineffective estate planning tools that their critics claim them to be. Instead, this Article's original empirical study of fragmented wills reveals them, on the whole, to be reliable means for testators to communicate their intent.[271] Furthermore, they do not breed litigation or disrupt the efficient administration of probate estates.[272] Put simply, the conventional wisdom regarding fragmented wills is wrong.

This counternarrative of fragmented wills suggests that state legislatures should implement reforms that, at a minimum, do not discourage the use of fragmented wills[273] and that more progressively encourage testators to update their estate plans through fragmented wills.[274] In the end, such reforms will better align the law of fragmented wills with the overarching policy objective of the law of succession—namely, accurately carrying out a decedent's intent at an acceptable administrative cost.[275]

---

misrepresented material facts in the proceedings leading to the appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office.").

264. *See* Horton, *supra* note 253, at 30.
265. *See supra* Part III.
266. *See supra* Part II.
267. *See supra* Section IV.A.
268. *See supra* Section IV.B.
269. *See supra* Part I.
270. *See supra* Part III.
271. *See supra* Sections II.A–D.
272. *See supra* Sections II.E–F.
273. *See supra* Section IV.B.
274. *See supra* Section III.A.
275. *See supra* Parts III–IV.