EXCUSING HARMLESS ERROR IN WILL EXECUTION: THE ISRAELI EXPERIENCE

*by Samuel Flaks**†*

This article is a study of the Harmless Error Rule curing faults in the formal execution of wills in Israel. The Israeli rule has been persistently misunderstood in the English language literature. The article reports the author's examination of the original Hebrew language sources. Despite the claim of American reformers that Israel possessed a successful Harmless Error Rule, the Israeli will execution statute was construed by the courts to require strict compliance with certain will execution formalities. Recently, the Israeli will execution statute has been amended. The statute now requires strict compliance with the requirements that a proffered document be in writing and that it is presented by the testator as a will to two witnesses. All other will execution flaws can be cured if a court has "no doubt" that a proffered document was intended by the testator to be a will. A survey of the case law applying the new statute indicates that this rule, which amounts to a Harmless Error Rule with threshold requirements, will generally protect the authentic testamentary intent of testators. American reformers who are frustrated with strict compliance with Wills Act formalities but fear the possible abuses of a Harmless Error Rule can use the current Israeli statute as a model.

I. INTRODUCTION

Traditional Anglo-American Wills Acts, inspired by the English Statute of Frauds of 1677 and the Wills Act of 1837, require certain execution formalities before probating a document as a will.[1] The will must

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be in writing, the testator must sign the will, and there must be an attestation and signature by a specified number of witnesses.[2] The primary goal of those formalities is the assurance that the document "reflects the uncoerced intent of the testator."[3] Requiring strict compliance with these execution formalities has led to unfortunate results in notorious cases in which obviously reliable wills were denied probate.[4] Reform-minded scholars have argued that strict compliance with Wills Act formalities often conflicts with achieving the goal of confirming that a document was meant to be a will.[5] These critics have suggested that compliance with the Wills Act formalities should only be a requirement to the extent that those formalities serve the functional purpose of discerning whether the testator intended the document to be a will, and therefore, harmless errors should be excused.[6]

Section 25 of Israel's Succession Law, 5725-1965, was the first statute in the world to enable courts to cure execution errors that would have been fatal under a strict compliance standard, though the Israeli Supreme Court eventually construed the law to require strict compliance with some execution formalities.[7] A recent 2004 amendment to section 25 explicitly

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† Most of the relevant Israeli cases, statutes, and legislative commentary cited and discussed in this paper have not been officially translated. The material that has been translated is only available in short excerpts. In order to overcome these obstacles the Hebrew sources have been studied in the original. Unless otherwise noted, the translations provided in this paper are my own. The official reporter of the Israeli Supreme Court will be cited as "ISRSC." "CA" signifies a civil appeal, while "FH" signifies an en banc hearing of the Israeli Supreme Court. The citation of Israeli materials generally follows the templates provided by the Israel Law Reports, 2 ISRLR, Citation Note, xvii (2005), and THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION T.2.22, at 345 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

1. 29 Car. 2, c. 3. § 5 (1677); 7 Will. 4 & 1 Vict. ch. 26 (1837). *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f (1999).

2. RESTATEMENT (THIRD) OF PROP. § 3.1 cmt. f.

3. *In re* Will of Ranney, 589 A.2d 1339, 1344 (1991).

4. *See In re* Groffman, (1969) 1 W.L.R. 733, 735 (Eng.) (though the court stated that it was "perfectly satisfied that the document was intended to be a will," the document was not probated because the testator did not acknowledge his signature before both witnesses simultaneously); *see also* Stevens v. Casdorph, 508 S.E.2d 610, 612–13 (W. Va. 1998) (refusing probate when the witnesses, bank tellers, did not actually see the testator sign the will, even though they knew that the wheelchair-bound testator had come to the bank to execute his will).

5. *See, e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) [hereinafter Langbein, *Substantial Compliance*]; John H. Langbein, *Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine*, *in* AMERICAN/ AUSTRALIAN/NEW ZEALAND LAW: PARALLELS AND CONTRASTS 50, 64 (1980) [hereinafter Langbein, *Defects of Form*]; John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 41–45 (1987) [hereinafter Langbein, *Excusing Harmless Errors*]; John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROP. & PROB. J. 28 (2004) [hereinafter Langbein, *Curing Execution Errors*].

6. Gulliver & Tilson, *supra* note 5, at 3; Langbein, *Excusing Harmless Errors*, *supra* note 5, at 7.

7. The Succession Law, 5725-1965, 19 LSI 58, 63 Ch. 1, § 25 (1965) (Isr.); Langbein, *Excusing Harmless Errors*, *supra* note 5, at 48. *See, e.g.*, FH 40/80 Koenig v. Cohen, 36(3) IsrSC 701 [1982] (refusing to probate a proffered holographic will due to a lack of a signature when there was no doubt in the circumstances that a note was intended to be a will).

requires strict compliance with the requirements that a will be in writing and presented before two witnesses; this amendment dispenses with all other execution formalities if a court has no doubt that the testator intended the proffered document to be a will.[8] This paper will study the origins and evolution of section 25 because this legal history might anticipate possible doctrinal shifts towards strict compliance in the American jurisdictions that adopt a Harmless Error Rule in the execution of wills. Most significantly, I will examine the application of the current version of section 25 of Israel's Succession Law. The statute can be a model for American policy makers who wish to avoid the often senseless results of strict compliance with execution formalities but hesitate to entrust judges with the power to forgive all execution errors lest documents that were not intended to be wills enter into probate. Robert Frost said that "[w]riting free verse is like playing tennis with the net down."[9] If will execution can be analogized to tennis, the Harmless Error Rule permits playing with the net down; in contrast, the current Israeli Succession Law permits playing with a low net. Though this paper will not be able to provide a definitive answer to the question of which set of rules is better, this paper will update the existing English language literature about an interesting overseas statute that non-dogmatically intermixes the strict compliance and harmless error approaches to will execution formalities.

Part II of this paper describes the major role section 25 has played in the worldwide debate over the wisdom of granting courts the discretion to cure failings in the formal execution of wills. Part III recounts the genesis of the statute and how the Israeli Supreme Court construed the 1965 statute to not permit to curing the absence of certain fundamental will formalities; contrary to the impression of the current English language literature, this doctrinal development was not reversed by a statutory amendment. Part IV brings American practitioners and scholars up-to-date on the significant amendment to section 25 that was enacted in 2004.[10] The revised section 25 requires strict compliance with certain will execution formalities, but otherwise empowers courts to forgive defects if the court has no doubt that the document reflects the testator's genuine testamentary intent. Part V will examine recent Israeli cases and will suggest that the current Israeli approach of a dispensing power, with specified threshold requirements, generally protects testamentary intent and provides a persuasive model for American reformers.

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8. The Succession Law, 5725-1965, 5764-2004, 1930 S.H. 313, § 25 (Amendment No. 11, Mar. 2, 2004).

9. CLIFTON FADIMAN, THE AMERICAN TREASURY, 1455-1955 847 (1955).

10. *See infra* Part IV.

II. SECTION 25'S ROLE IN THE SCHOLARLY LITERATURE

Though reformers called to ease the requirement of strict compliance with will execution formalities in the mid-twentieth century, the modern American debate over strict compliance with those requirements began in earnest in 1975.[11] In that year, Professor John Langbein proposed that common law courts should probate documents that suffer from execution formality errors so long as the documents were in "substantial compliance" with the functional purposes of the formalities.[12] Langbein argued that the formalities of a written document and a signature of the testator are the most essential requirements, while attestation of witnesses should be less important.[13]

A natural experiment soon followed when the Australian state of Queensland codified the doctrine of substantial compliance.[14] Several years prior, the neighboring state of South Australia took a different route towards easing strict execution formalities.[15] The South Australian law embodied a dispensing power that allowed judges to excuse execution errors so long as the court was "satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."[16] Unlike the substantial compliance rule in effect in Queensland, the South Australian dispensing power did not require courts to determine that the executed formalities substantially complied with the formalities' functions.[17]

In 1987, Langbein reported the results of the Australian experiment.[18] He concluded that the Queensland substantial compliance doctrine was a failure because judges deemed innocent omissions not to be in substantial compliance with Wills Act Formalities.[19] In Langbein's opinion, Queensland judges improperly applied the substantial compliance provision to require "near perfect" compliance with will execution formalities.[20] Langbein approvingly observed a strikingly different trend emerge in South Australia.[21] There, the dispensing power enabled South Australian judges to distinguish between documents that reflected testamentary effect and those that did not.[22] After observing the Australian experiment, Langbein

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11. *See., e.g.*, Gulliver & Tilson, *supra* note 5.
12. Langbein, *Substantial Compliance*, *supra* note 5.
13. *Id.* at 492–97.
14. Queensland Succession Act, 1981, § 9(a), Queensl. Stat. No. 69.
15. *See* S. Aust. Wills Act Amendment Act (No. 2), 1975, § 9, S. AUST. STAT. 366, 367 (amending Wills Act of 1936–1975, § 12(2), 8 S. AUSTL. STAT. 665).
16. *Id.*
17. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1040 (1994).
18. Langbein, *Excusing Harmless Error*, *supra* note 5, at 41–45.
19. *Id.*
20. *See id.*
21. *See id.*
22. *Id.* at 8–41.

came "to prefer the dispensing power over substantial compliance as a legislative corrective."[23]

Though apparently Anglo-American scholars did not know it until 1979, another country had already adopted a dispensing power statute before South Australia.[24] In 1965, Israel enacted section 25 of the Succession Law, 5725-1965.[25] It was the first statutory provision in the world to give courts a dispensing power to excuse flaws in Will Act formalities.[26] Israel's experience with the dispensing power has played a major role in the debate over whether to adopt the dispensing power in Anglo-American jurisdictions.

Judge I.S. Shilo of Tel-Aviv wrote an assessment of the Israeli provision for the British Columbia Law Reform Commission.[27] Shilo observed that after the passage of section 25, litigation decreased.[28] Shilo believed that the law discouraged challenges to defectively executed wills that reflected testamentary intent.[29] This empirical assessment neatly dovetailed with a theoretical prediction Langbein had made independently.[30] Anticipating the argument that a curing doctrine would encourage increased litigation by enabling more suspect wills to enter probate, Langbein argued that parties would stop challenging "harmless defects" because potential litigants would anticipate the judicial curing of those defects.[31] Langbein later cited the Australian and Israeli experiences to argue that American jurisdictions should adopt the dispensing power.[32]

Following Langbein's lead, the Uniform Probate Code (UPC) and the Restatement (Third) of Property (Restatement) have adopted the dispensing power under the title of a Harmless Error Rule.[33] Similarly, the official

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23. *Id.* at 7.

24. *Id.* at 48.

25. 19 LSI 58, § 25.

26. SHMUEL SHILO, COMMENTARY TO THE SUCCESSION LAW, 1965 (SEC. 1- 55) 227 (1992) [Heb.] [hereinafter SHILO, COMMENTARY]; Langbein, *Excusing Harmless Errors*, *supra* note 5, at 48 (Israel enacted in "1965 a statute that has the main attributes of the. . .dispensing power.").

27. Letter from Judge I.S. Shiloh, Tel Aviv, to the British Columbia Law Reform Commission (Oct. 18, 1979), *quoted in* Langbein, *Excusing Harmless Errors*, *supra* note 5, at 50.

28. *Id.*

29. *Id.*

30. Langbein, *Substantial Compliance*, *supra* note 5, at 525–26; Langbein, *Excusing Harmless Errors*, *supra* note 5, at 48, 51; Langbein, *Defects of Form*, *supra* note 5, at 64 ("Exactly the latter point has been made by an Israeli judge.").

31. Langbein, *Substantial Compliance*, *supra* note 5, at 525–26.

32. Langbein, *Excusing Harmless Errors*, *supra* note 5, at 48. Langbein's approval of the Israeli statute is qualified for reasons that will be discussed later on in this paper, but he largely considers section 25 to be "a success." *Id.* at 50.

33. The UPC provides that:

> Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked

comments of the Restatement and the UPC describe both the Israeli statute and the South Australian statute as codifications of the Harmless Error Rule that permit the curing of technical faults in wills.[34] Both comments urge American states to follow the example of these foreign jurisdictions by adopting a harmless error rule.[35]

In order to dispel concerns that the Harmless Error Rule would increase the amount of probate litigation, both the Restatement and the UPC's official comments place great stress upon Judge Shilo's view that the Israeli statute had decreased the incentive to challenge wills with mere technical flaws.[36] Australian and Israeli decisions also bolstered the proposition that a Harmless Error Rule would allow courts to excuse flaws in attestation. Those requirements do not have much functional weight.[37] Courts were much more wary of excusing the failures of a testator to sign his or her purported will.[38]

Much of the international evidence that has played such an important role in the movement to adopt the Harmless Error Rule in the 1980s and 1990s is out of date and the conclusions derived from that evidence is no longer necessarily true. In 2007, Stephanie Lester updated the literature regarding the Australian experience by extensively analyzing recent cases and statutory amendments.[39] Doron Menashe first brought the 2004 revision of the Israeli will curing statute to the attention of English speaking scholars.[40] This paper further clarifies and updates the English language literature on Israel's experiences in easing the formal will execution requirements. Indeed, the pro-dispensing power literature of the 1980s and 1990s, which describes Israel as a dispensing power jurisdiction, was

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will or of a formerly revoked portion of the will.

UNIF. PROB. CODE § 2-503 (1990) (amended 1997), 8A U.L.A. 146 (2008). *See also* RESTATEMENT (THIRD) OF PROP. § 3.3 ("A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will"),

34. UNIF. PROB. CODE § 2-503 cmt.; 8 U.L.A. 147 RESTATEMENT (THIRD) OF PROP. § 3.3.

35. UNIF. PROB. CODE § 2-503 cmt.; RESTATEMENT, § 3.3 cmt. b (noting that experience in these jurisdictions [in Australia, Canada, and Israel] appears to show that the statutes have worked well).

36. UNIF. PROB. CODE § 2-503 cmt. (citing LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON THE MAKING AND REVOCATION OF WILLS 46 (1981) (quoting Letter from Judge I.S. Shiloh, *supra* note 27)); *see* RESTATEMENT (THIRD) OF PROP. § 3.3, cmt. b; *see also* Langbein, *Curing Execution Errors*, *supra* note 5, at 30 (The comments of the UPC and the Restatement both claimed, based in part on Judge Shilo's report, "that a main lesson of the experience abroad was that the harmless error rule did not breed litigation.").

37. Langbein, *Excusing Harmless Errors*, *supra* note 5, at 20.

38. UNIF. PROB. CODE § 2-503, cmt. ("Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement.").

39. Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 577 (2007).

40. Doron Menashe, *The Validation of Flawed Wills*, 40 ISR. L. REV. 119 (2007) [hereinafter, Menashe, *Validation of Flawed Wills*].

incomplete when written.[41] Judicial interpretation of that statute resulted in the creation of a rule more similar to Queensland's stringent substantial compliance provision than to the flexible Harmless Error Rule applied in South Australia.[42]

This study is now especially timely. In 2004, Israel amended its Succession Law in a way that seems to blend the Harmless Error Rule and a "near perfect" version of the substantial compliance rule:

> *Probating a Will Even if There Is a Fault or Lack in Its Form*:
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> (a) If the fundamental parts of a will are present, and the Court has no doubt that the will represents the true and free wishes of the testator, the Court may, in a reasoned judgment, grant probate thereof, notwithstanding any defect with regard to an element or procedure detailed in Sections 19, 20, 22, 23, or with regard to the capacity of the witnesses, or due to the absence of one of these elements or procedures.
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> (b) In this section, "the fundamental parts of a will" are:
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> i. In a handwritten will, as detailed in Section 19—the entire will is in the testator's handwriting;
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> ii. In a witnessed will, as detailed in Section 20—the will is in writing and the testator brought it before two witnesses;
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> iii. In a will made before the authority, as detailed in Section 22—the will was voiced before an authority, or presented to an authority, by the testator himself;
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> iv. In an oral will, as detailed in Section 23—the will was voiced by the testator himself, before two comprehending witnesses, while he was on his deathbed or when he considered himself, justifiably considering the circumstances, to be facing death.[43]

Section 25 now requires strict compliance with formalities deemed by the statute to be "the fundamental parts of a will."[44] A written document

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41. The Restatement Reporter's Note does acknowledge that the Australian, Canadian, and Israeli statutes "differ in detail." RESTATEMENT (THIRD) OF PROP. § 3.3 cmt. b. However, the Note goes on to assert that the "predominant rule" of those jurisdictions is that documents that are not in compliance with will act formalities are treated as if they were in compliance "if the proponent establishes (usually by a higher than normal standard of proof) that the decedent intended the document to constitute his or her will." *Id.* Likewise, a comment to the UPC strongly implies that section 25 of the Israeli statute is similar to the South Australian dispensing power Section 2-503 of the UPC. *See* UNIF. PROB. CODE § 2-503, cmt.

It is not surprising that those North American scholars who were not fluent in Hebrew may not have been aware of all the developments regarding Israel's will execution statute. Language barriers have hampered the previous studies of Section 25 made by American and Canadian scholars. *See* LAW REFORM COMMISSION OF BRITISH COLUMBIA, *supra* note 36, at 46 (cautioning that "any legal analysis of the Israeli law is somewhat difficult owing to the lack of source material and the necessity of relying on the opinions of our correspondents"); *see also* Langbein, *Excusing Harmless Errors*, *supra* note 5, at 49, n.241 (Langbein relied upon an Israeli correspondent to keep him up to date with Israeli case developments and upon translators in order to work with the sources).

42. *See* Langbein, *Excusing Harmless Errors*, *supra* note 5, at 1.

43. Menashe, *Validation of Flawed Wills*, *supra* note 40, at 125 (translating the 2004 amendment unofficially) (Flaks' translation of the provision title).

44. The Succession Law, 1930 S.H. 313, § 25 (Amendment No. 11, Mar. 2, 2004).

and two witnesses are deemed by the statute to be the fundamental parts of an attested will.[45] The fundamental part of a holographic will is, according to the statute, that the document be entirely handwritten.[46] One must strictly comply with these requirements.[47] All remaining will execution formalities are deemed not to be fundamental parts of a will.[48] The statute allows courts to apply a Harmless Error Rule to these non-fundamental parts of a will.[49] However, a court must have "no doubt that the will represents the true and free wishes of the testator" before a faulty will can be probated.[50] The heavy burden of proof and the strict compliance requirement for the fundamental parts of a will amount to significant threshold requirements before an exercise of the dispensing power can take place.

Indeed, the new section 25 seems to embody a new threshold requirement model of the dispensing power. The provision's merger of the dispensing power and strict compliance may disappoint purist advocates of the Harmless Error Rule. Still, the Israeli provision is just one of a growing number of jurisdictions, now including California, Colorado and Virginia, which have eased strict compliance requirements but have also adopted strict compliance threshold elements.[51] Two of these American statutes require, in most situations, that the testator sign the document before the Harmless Error Rule applies.[52] The recent Israeli decisions applying the dispensing power with threshold requirements can shed light on whether this recent American statutory trend is wise at a time when American state courts have not had a significant opportunity to interpret the new statutes. However, these recent decisions cannot be understood outside the context of the pre-2004 evolution of section 25 that the next part explores.

III. THE GENESIS AND EVOLUTION OF THE PRE-2004 SECTION 25

Some English language literature is under the misimpression that original Israeli law has a robust dispensing power rule directly derived from

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45. *Id.* § 25(b)(ii) (fundamental parts of an attested will are that "the will is in writing and the testator brought it before two witnesses").

46. *Id.* § 25(b)(i) (fundamental part of a holographic will is that "the entire will is in the testator's handwriting").

47. Id. § 25(a).

48. *Id.* § 25(b)(i).

49. *Id.*

50. *Id.* § 25(a).

51. *See* COLO. REV. STAT. Ann. § 15-11-503(2) (2008) (requiring testator's signature as a threshold requirement for application of the Harmless Error Rule except when the will is not signed in a switched spousal will case); VA. CODE ANN. § 64.1-49.1 (2008) (requiring testator's signature as a threshold requirement for the Harmless Error Rule except when the will is not signed in a switched spousal will case and when the self-proving affidavit was signed instead of the will); *but see* CAL. PROB. CODE § 6110(c)(2) (Deering 2008) (instituting a clear and convincing evidence of the testamentary intent threshold requirement before an execution error can be cured).

52. *Id.*

Jewish law. American and Canadian observers were struck by the claim of the drafters of the original Israeli statute empowering courts to cure execution formalities that they were inspired by the traditional Jewish religious-legal doctrine that "it is a *mitzvah* (commandment or good deed) to fulfill the wishes of the deceased."[53] However, it is important to understand that traditional Jewish law only vaguely inspired the original Israeli statute's dispensing power feature. That law, also known as the *Halakha*, a Hebrew word that literally means "to go" or "the path," is a body of ritual and civil laws derived from the Bible and Rabbinic traditions.[54] The *Halakha*'s law of inheritance is framed by the Hebrew Bible's (known as the Torah) parentelic system of succession, which only permitted sons to inherit land.[55] The Torah also required that a father's firstborn son inherit a portion equal to the shares of two ordinary heirs.[56] Traditionally, Jewish law did not recognize wills.[57] The law generally prohibited a testator from devising property to a beneficiary who would not inherit under the mandatory default rules of Biblical law, but the Rabbis of the Talmudic era (100-600 C.E.) developed several countervailing rules to provide flexibility to testators.[58]

The most important liberalizing doctrine was that "it is a *mitzvah* to carry out the wishes of the deceased."[59] The term *mitzvah* has multiple

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53. *See* LAW REFORM COMMISSION OF BRITISH COLUMBIA, *supra* note 36, at 44 (quoting ISRAEL MISRAD HA-MISHPATIM, HATZAAT HOK HA-YERUSHA 73 (5712-1952) 44 [hereinafter, ISRAEL MISRAD HA-MISHPATIM, HATZAAT HOK HA-YERUSHA]"; JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 263 (2009).

54. Encyclopædia Britannica Online, Halakha, http://www.britannica.com/EBchecked/topic/252201/Halakhah.

55. Shmuel Shilo, *Succession in* THE PRINCIPLES OF JEWISH LAW 446 (Menachem Elon, ed., 1975) [hereinafter Shilo, *Succession*]. The Biblical source for this law is found in the book of Numbers:

> If a man dies and leaves no son, turn his inheritance over to his daughter. If he has no daughter, give his inheritance to his brothers. If he has no brothers, give his inheritance to his father's brothers. If his father had no brothers, give his inheritance to the nearest relative in his clan, that he may possess it. And it shall be unto the children of Israel a statute of judgment, as the LORD commanded Moses.

Numbers 27: 8–11 (New Int'l Version 1984) (with alterations).

56. *Id.* at 447; *Deuteronomy* 21:16–17 (New Int'l Version 1984) (proclaiming that when a father "wills his property to his sons" he must give his firstborn "a double share of all he has. That son is the first sign of his father's strength. The right of the firstborn belongs to him.").

57. *See Numbers*, *supra* note 55. "One may not constitute as an heir him whom the Law does not constitute as his heir, nor may one remove the inheritance from an heir—although this is a matter pecuniary—because—in the division of Scripture treating of inheritances, as it is said 'And it shall be unto the children of Israel a statute of judgment' (*Numbers* 27:11). That is to say: this Law is not subject to change and a condition qualifying it is not valid." MOSES MAIMONIDES, MISHNEH TORAH, Laws of Inheritance, Ch. 6, para. 1, *translated in* JACOB J. RABINOWITZ, THE CODE OF MAIMONIDES BOOK THIRTEEN: THE BOOK OF CIVIL LAWS 277 (1949).

58. *See generally* Shmuel Shilo, *Wills*, *in* THE PRINCIPLES OF JEWISH LAW 454 (Menachem Elon, ed., 1975) [hereinafter Shilo, *Wills*] (allowing testators to give outright gifts before death, give gifts before death while retaining the usufruct during life; bequeath while critically ill; and bequeath in the contemplation of impending death).

59. BABYLONIAN TALMUD, TRACTATE KETHUBOTH 69b–70a, *translated in* SAMUEL DAICHES, ISRAEL W. SLOTKI, KETHUBOTH: HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD 69b–70a

meanings that blend into each other depending on the context. The literal meaning of the word is "commandment."[60] Usually the commandment is referring to a divine command expressed in the Bible, but it also can connote a good deed that is not tied to any specific religious requirement.[61] The Talmudic passages discussing the "*mitzvah* to fulfill the wishes of the deceased" do not mention the scriptural source for the *mitzvah*. This most likely indicates that the Talmudic Rabbis thought that the *mitzvah*, though having some legal force, was not a formal divine command.[62] In Talmudic literature, the phrase "it is a *mitzvah* to fulfill the wishes of the deceased" is not a general ethical injunction or specific law requiring the fulfillment of any wishes of the deceased.[63] The term refers to a specific legal device that acts in practice like a type of will.[64] A non-literal, but more accurate, interpretation of the phrase is: "A will produced by the duty to maintain the decedent's words."[65]

The passages in the Talmud referring to the *mitzvah* to carry out the wishes of the deceased do not clearly explain the doctrine.[66] The resulting ambiguity produced conflicting views among the medieval authorities over its scope.[67] There were two main schools of thought regarding the scope of the *mitzvah* to carry out the wishes of the deceased.[68] Both severely limited the situations in which the duty to maintain the decedent's words form a will.[69] The first school of thought held that a will not in accordance with the Biblical inheritance scheme was only legally binding when the testator, during her lifetime, placed the property in the hands of a trustee, and then

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(Isidore Epstein, ed. 1971) (explaining that if a decedent directs a stipulated sum of money a week, the beneficiaries can only receive the stipulated amount, even though the beneficiaries require more for their maintenance because it is a "*mitzvah* to carry out the wishes of the deceased"); BABYLONIAN TALMUD, TRACTATE GITTEN. 14b–15a, *translated in* MAURICE SIMON, GITTEN: HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD 14b–15a (Isidore Epstein, ed. 1977) (holding that if A says to C to take a sum of money to B, and A dies before C delivers the money to B, C should then deliver the money to B rather than A's estate because it is a "*mitzvah* to carry out the wishes of the deceased").

60. *See* MyJewishLearning, Mitzvot: A Mitzvah Is a Commandment http://www.myjewish learning.com/practices/Ritual/Jewish_Practices/Mitzvot.shtml.

61. DUKEMINIER, ET AL., *supra* note 53, at 235, n.20; LAW REFORM COMMISSION OF BRITISH COLUMBIA, *supra* note 36, at 44, n.104.

62. This ethical obligation could have been derived in a broad sense from Jacob's burial instructions to his sons. *Genesis* 49: 29–33.

63. Shilo, *Wills*, *supra* note 58, at 458 (citing TOSAFOT, BAVA BATRA 149a).

64. *Id.*

65. *See* Israel Misrad ha-Mishpatim, *A Succession Bill for Israel: Text and Explanatory Notes*, *translated in* HARVARD LAW SCHOOL-ISRAEL COOPERATIVE RESEARCH ON ISRAEL'S LEGAL DEVELOPMENT 67 (2d ed. 1961) (1952) [hereinafter, Israel Misrad ha-Mishpatim, *Succession Bill for Israel*] (translating the phrase as "a will because of the duty to maintain the decedent's words.").

66. Dukeminier, Et. Al., *supra* note 53, at 235.

67. DAYAN I. GRUNFELD, THE JEWISH LAW OF INHERITANCE: PROBLEMS & SOLUTIONS IN MAKING A JEWISH WILL 49 (1987).

68. Shilo, *Wills*, *supra* note 58, at 458.

69. *See id.*; *see also* ASHER GULAK, 3 YESODE HAMISHPAT HA-'IVRI: SEDER DINE MAMONOT BE-YISRA'EL 'AL PI MEKOROT HA-TALMUD VEHA-POSKIM § 60, at 126–27 (1966 reprint of 1922 ed.) [Heb.].

commanded the trustee to convey it to the intended beneficiaries.[70] The adherents of this view apparently thought that establishing the testator's firm testamentary intent was not valid unless the testator deposited the property with a trustee.[71]

The other well-established view held that the duty to maintain the decedent's words produced a will. There was a stipulation; however, that the decedent would have to personally charge the potential intestate heirs to fulfill his requests, and that the potential intestate heirs would not protest.[72] The supporters of this view may have reasoned that the will produced by the duty to maintain the decedent's words could only overcome the usual course of succession if the heirs, bound by Biblical law, implicitly abandoned their rights.[73] The most authoritative commentators agree that the intended beneficiaries of the decedents only have an enforceable right under these two circumstances.[74]

There was a more liberal position that would require the intestate heirs selected by Biblical law to transfer the property in all circumstances to the beneficiaries intended by the decedent.[75] That school of thought did not gain wide acceptance.[76] Even this liberal third position, which imposed a duty on the intestate heirs, did not provide any enforceable remedy to the intended beneficiaries.[77] Therefore, if the heirs of the decedent sold the property to a third party, the law provided no remedy. The command by the decedent to give the property to the intended beneficiaries does not obligate third parties.[78] Ultimately, the principle that it is a "*mitzvah* to carry out the wishes of the deceased" derived its main power from moral suasion rather than legal force.[79] Most significantly, the doctrine was never traditionally conceived as a roaming commission to implement the testamentary intent of the deceased regardless of the technical flaws in a will.

After the birth of Zionism, some members of that movement sought, for nationalistic reasons, to create a secular Jewish law governing social relations based upon the sources and principles of *Halakha*.[80] Some

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70. *See generally* GRUNFELD, *supra* note 67, at 48 & Shilo, *Wills*, *supra* note 58, at 458.

71. GRUNFELD, *supra* note 67, at 49.

72. Shilo, *Wills*, *supra* note 58, at 458; GRUNFELD, *supra* note 67, at 48.

73. *But see* GRUNFELD, *supra* note 67, at 49 (suggesting that the followers of this second school wanted to determine "upon whom the duty falls to carry out the wishes of the testator, and whether he is able to do so. Hence the stress on the instruction rather on a deposit.").

74. GULAK, *supra* note 69, at § 60 at 127, n.3 .

75. Shilo, *Wills*, *supra* note 58, at 458.

76. *Id.*

77. *See id.*

78. *Id.* at 458; GULAK, *supra* note 69, at § 60, 127, n.4; MOSES ISSERLES, MAPPAH, CHOSEN MISHPAT, § 242, para. 2 (1571) [Heb.] (stating that if the heirs sell the property, what they "did, they did," and the court will not provide a remedy for the intended beneficiaries).

79. GULAK, *supra* note 69, at 127 ("But a will always has ethical value, both in regard to monetary manners and regard to other manners, and also in a place that no court will enforce the will, as an ethical obligation falls upon the heirs to fulfill the wishes of the decedent.") .

80. *See* Bernard S. Jackson, *Mishpat Ivri, Halakha, and Legal Philosophy:* Agunah *and the Theory of "Legal Sources"*, 1 JSIJ 69, 83 (2002) ("it is the nationalist agenda of the *mishpat iviri* movement

adherents of this Zionist *Mishpat ha-Ivri* (which can be translated as "Hebrew Law") movement attempted to use the actual doctrines of Jewish law and adapt them to modern life. Others viewed Jewish law as just another possible source of law, on an equal footing but no better than other foreign sources of law.[81]

During the Mandate period of British rule over Palestine, Ottoman law was binding.[82] All questions not dealt with by Ottoman law were resolved based on English common law and equity.[83] Shortly before Israeli independence there was much excitement among Zionist lawyers about proposals to base the law of the new state on Jewish law.[84] Because none of these plans were well developed before the declaration of statehood in 1948, the pre-independence system of law continued in the new country.[85]

In 1952, the Israeli Ministry of Justice presented for public debate and translated into English a draft Israeli Succession Bill with commentary.[86] The draft bill was the first product of the Zionist effort to create an indigenous Israeli civil law inspired by Jewish law.[87] The drafters of the draft bill did not intend to codify traditional Jewish law (or in the terminology of the commentary, Hebrew Law).[88] Instead, they looked to it for general inspiration. They gave greater, though not decisive, weight to Jewish Law over the many foreign inheritance laws that they examined and synthesized. The drafters cast out rules that they perceived to be overly technical or out-of-step with modern society.[89]

Though a revised bill was officially introduced into the Knesset (which is the Israeli Parliament) in 1958 along with corresponding new legislative commentary, the bill did not pass until 1965.[90] A major point of contention throughout the extended public debate over the bill was the role of Jewish

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which itself generates the theoretical model used to describe Jewish Law"); MENACHEM ELON, IV JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1588 (Bernard Auerbach & Melvin J. Sykes trans. 1994) [hereinafter ELON, JEWISH LAW].

81. ELON, JEWISH LAW, *supra* note 80, at 1589 n.26.

82. *Id.* at 1612.

83. *Id.*

84. *Id.* at 1612–18.

85. *Id.* at 1618, 1620 (discussing section 11 of the Law and Administration Ordinance (1948)).

86. Israel Misrad ha-Mishpatim, *Succession Bill for Israel*, *supra* note 65 (Dr. Uri. Yadin, the first head of the Israeli Ministry Justice Division of Legal Planning, was the main author of the draft Succession Bill; Yadin was assisted by R. Braunstein, M. Goldberg, A. Vita, Mordechai Cohen, E. Sabat and Rabbi A. Karlin).

87. *See* ELON, JEWISH LAW, *supra* note 80, at 1671–90 (discussing draft bill).

88. *Introduction*, Israel Misrad ha-Mishpatim, *Succession Bill for Israel*, *supra* note 65, at 1.

89. *See id.* The drafters "considered Hebrew law to be" their principal source but not a "conclusive or an exclusive one." *Id.* Nor did they attempt to adapt traditional Jewish law to modern conditions through "legal fictions." *Id.*

90. HATZAAT HOK HA-YERUSHA, 5718-1958, H.H. 212 [hereinafter 1958 Legislative Commentary]; ELON, JEWISH LAW, *supra* note 80, at 1672.

law in the statute.[91] However, the enactment of the1952 bill's dispensing power provision passed without any pertinent changes.[92]

Israel's Succession Law authorizes specific requirements for four different modes validating a testament as a will: section 19 provides for holographic wills, section 20 provides for attested wills, section 22 provides for wills authenticated before a notary, and section 23 provides for oral wills.[93] The original 1965 version of section 25 allowed a court to probate a will that had a "defect" in the formalities required by those provisions as long as the court had no doubt about the document's authenticity.[94] The text was succinct:

> Where the Court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in [s]ections 20, 22, 23, or the capacity of the witnesses.[95]

Though the role of Jewish law in the original section 25's dispensing power provision was not mentioned in the text of the statute, the commentary on the dispensing power section of the draft statute makes it clear that the drafter's interpretation of Jewish law influenced the provision.[96] The drafters acknowledged that Jewish law "requires painstaking adherence to certain formula."[97] Still they stressed that Jewish law had developed a counterweight to that formalism with the concept of a will produced by the duty to maintain the decedent's words.[98] Nonetheless, the drafters certainly did not claim that the dispensing power embodied in the bill interpretation faithfully reflected Jewish law as traditionally understood. Instead, they sought to derive broad principles from both Jewish law's formalism and its supposed, if not actual, codification of the *mitzvah* to carry out the wishes of the deceased as a legal doctrine.[99]

Indeed, it appears that the true source of the dispensing power section of the draft statute was a postulate similar to Langbein's later premise that testamentary freedom is the foundation of wills law.[100] Like Langbein, the authors of the draft Israeli Succession Bill Commentary believed that will formalities have no "absolute value in themselves."[101] Therefore, they reasoned, there was "no reason to attach excessive importance to particular

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91. ELON, JEWISH LAW, *supra* note 80, at 1672.
92. 19 LSI 58 § 25.
93. 19 LSI 58 at § 19, § 20, § 22, § 23.
94. 19 LSI 58 at § 25.
95. *Id.*
96. *Id.*
97. Israel Misrad ha-Mishpatim, *Succession Bill for Israel*, *supra* note 65, at 67.
98. *Id.*
99. *Id.*
100. *See* Langbein, *Substantial Compliance*, *supra* note 5, at 491.
101. Israel Misrad ha-Mishpatim, *Succession Bill for Israel*, *supra* note 65, at 67.

forms."[102] Though the drafters realized that the statutory dispensing power provision was unprecedented, they felt that this new departure was justified.[103] They argued that will formalities only exist to assure "the authenticity of the decedent's will and of guarding against forgeries and fraudulent designs."[104]

The Israeli Supreme Court invoked the *mitzvah* to fulfill the wishes of the deceased in an early landmark interpretation of the original section 25.[105] They described it as the major "guide-line" of the law of wills.[106] However, the Court did not link that guideline to any of the specific doctrines of the traditional concept.[107] Instead, it explained that guideline meant that "[w]here the intent of the testator is expressed in a will, and no doubt exists as to the genuineness of the will, then his intentions should be ascertained . . . in order to uphold the wishes of the deceased and not to frustrate them merely for formal defect."[108] Given this commitment to giving effect to the testator's substantive wishes without regard to technical formula, it is ironic that the Supreme would soon afterward construe section 25 to embody a substantial compliance rule.

The Israeli Supreme Court in *Koenig v. Cohen* refused to probate a purported holographic will that lacked the testator's signature and date because the Court read statutory term "defect" in a literal matter.[109] The facts reported in the decision are tragic. A young woman who had been unable to secure a divorce from her abusive husband checked into a hotel room with her three year old daughter. The woman decided to jump out of the window with her daughter, and the fall killed them both. A series of unsigned and undated notes in the woman's handwriting were found in the hotel room, which directed her husband not to attend her funeral, and that her estate should go to her brothers rather than to her husband. The Court held that the statute could cure defective formalities, but not the complete omission of a will formality. The Court defined a formality that was attempted but improperly executed as defective. In contrast, if there was no evidence of an attempt to execute the formality, then the formality was deemed omitted. Because the Supreme Court ruled that section 25 could only cure a defect, not the omission of a signature or date, the husband inherited his estranged wife's estate through intestacy.[110]

Langbein sharply attacked the *Koenig v. Cohen* decision as "wrong" because there was no dispute about the testamentary intent of the woman's

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102. *Id.*

103. *Id.* "In foreign statutes we have found no provision comparable to the present one." *Id.*

104. *See id.* at 66.

105. CA 869/77 Brill v. Gov't Advisor IsrSC 32(1) 98 [1977] (*translated in* LAW REFORM COMMISSION OF BRITISH COLUMBIA, *supra* note 36, at 45).

106. *Id.*

107. *Id.*

108. *Id.*

109. FH 40/80 Koenig v. Cohen 36(3) IsrSC 701 [1982].

110. *Id.* at 708–09.

notes, which were written while contemplating her impending suicide.[111] He argued that "the only plausible object" of the statute was to enable courts to dispense with the requirements of a signature and date in a holographic will in cases, such as this one, where the testator's intent was clear.[112] For Langbein, it was illogical to say that the complete omission of a will formality was "somehow more fundamental than a mere defect" in a will formality.[113]

However, Dr. Shmuel Shilo has suggested that the distinction between defects and omissions could be derived from the legislative history of the Israeli Succession Law, even though the *Koenig v. Cohen* Court did not rely upon that argument.[114] The legislative commentaries on the original Israeli Succession Law explain that the reference to "procedures" in the original section 25 referred to the relatively inconsequential requirements that an oral will must be presented before an authority, or that it be swiftly committed to writing.[115] Shilo drew the inference that though the drafters intended to allow the dispensation of technical faults in the signature of the testator or of the witnesses that were similar in importance to the relatively unimportant procedures, they did not intend to permit the probating of a will that completely lacked such central elements.[116]

Regardless of the legislative intent, Langbein's evaluation of the intellectual cogency of the *Koenig* doctrine perhaps was uncharitable. The Court went beyond a spare, technocratic reading of the statutory provision. It infused the distinction between omissions and defects with a deeper rationale: courts could not cure a document that lacked an "essential component" of a will.[117] That is to say, without the execution of these essential formalities, a document simply could not be a will. A reasonable policy concern that possibly motivated the formalistic distinction between complete omissions and defects is that, in the absence of these essential formalities, fraudulent documents would be probated. Langbein has himself suggested that the lack of a testator's signature should be fatal to a proffered will except in the most exceptional circumstances.[118]

A few years after *Koenig*, the Knesset reacted to its sad facts by adding a new subpart that empowered courts to dispense with an "omission of a signature or date" in a holographic will.[119] The legislative commentary

111. Langbein, *Excusing Harmless Errors*, *supra* note 5, at 49.

112. Id. at 49–50.

113. *Id.* at 49.

114. Shmuel Shilo, *Section 25 of the Succession Law, 5725-1965—Probate of a Will Despite Formal Defects*, 35 HAPRAKLIT 91 (1983) [Heb.] [hereinafter Shilo, *Section 25*].

115. *Id.* at 92; 1958 Legislative Commentary, *supra* note 90.

116. Shilo, *Section 25*, *supra* note 114, at 93.

117. FH 40/80 Koenig, IsrSC 36(3)at 708.

118. *See* Langbein, *Substantial Compliance*, *supra* note 5, at 492–97.

119. Shilo, *Section 25*, *supra* note 114. "If the court has no doubt as to the authenticity of a holographic will and as to the testamentary intent of the testator, it may, in special circumstances, admit the will to probate even if the signature or date required by Section 19 is lacking." Succession Law (Amendment No. 7) 1985, 1985 S.H. 1140 *translated in* ELON, JEWISH LAW, *supra* note 80, 1876, n.204.

explains that the intention of the amendment was to prevent further injustices in holographic will cases.[120] The amendment made it possible for the courts, "even in the absence of a signature and a date, to probate the will as written if the court has no doubt as to the authenticity of the document and as to the testamentary intent of the testator, and there are special circumstances justifying such action."[121]

Soon after, Langbein made the reasonable inference that "the Israeli legislature amended section 25 in 1985 to sweep away the conceptual ground on which [*Koenig v. Cohen*] rested."[122] Justice (and later Israeli Supreme Court President) Aharon Barak made the same argument.[123] Nonetheless, Langbein's prediction that the distinction between defects and omissions had been eliminated was belied by the post-1985 Israeli cases.[124]

An Israeli Supreme Court panel ruled that the amendment did not affect the *Koenig* doctrine in relation to nonholographic wills even before Langbein's prediction appeared in print.[125] Following a distinction first made in *Koenig v. Cohen*, the Court's majority described certain formalities as "dynamic" formalities that could possibly be dispensed with, and others as indispensable "static" or "constitutive" formalities.[126]

In practice, the 1985 amendment only swept aside the difference between an omission and a defect in the rare case of a holographic will.[127] If the Knesset intended to erase the distinction between will execution faults and omissions, it missed its mark.[128] Indeed, the amendment actually implies approval of the omission/defect distinction in all nonholographic wills.[129]

Before 2004, there was no clear consensus as to what were indispensable, constitutive will formalities.[130] A few years before *Koenig*, the Israeli Supreme Court wrote in *Brill v. Attorney General* that the distinguishing features, without which "the will is not a will," were a command by the testator, a written document, and two witnesses.[131]

See Langbein, *Excusing Harmless Errors*, *supra* note 5, at 50 (discussing 1985 amendment).

120. Explanatory Note to Bill No. 1653 of 1984, p. 84 *translated in* ELON, JEWISH LAW, *supra* note 80, at 1876, n.204.

121. *Id.*

122. Langbein, *Excusing Harmless Errors*, *supra* note 5, at 50.

123. CA 87/127 Bidichi v. Bidichi IsrSC 43(4) 341, 349–50 [1989].

124. *See* SHILO, COMMENTARY, *supra* note 26, at 243–44.

125. CA 284/84 Azriel v. Attorney General IsrSC 39(3) 166 [1985]; s*ee* CA 87/127 Bidichi, IsrSC 43(3) 341, 346–47 (adopting *Azriel*'s holding).

126. CA 284/84 Azriel, IsrSC 39(3) at Justice Lewin's op. par. 3; *see* FH 40/80 Koenig, IsrSC 36(3) at 712 .

127. SHLOMI NARKIS & IRIS MARCUS, YERUSHA, 'AL-PI TSAVA'AH: PEGAMIM BAH, TSURATAH VE-TOKPAH 47 (2008) [Heb.] [hereinafter NARKIS & MARCUS].

128. *See, e.g.*, Eli Shachor, *Probate of Will Despite Formal Defect or Lack*, 36 HAPRAKLIT 538, 548–49 (1985) (hereinafter Shachor, *Probate of Will*).

129. *See, e.g.*, SHILO, COMMENTARY, *supra* note 26, at 234.

130. *See e.g.*, CA 869/77 Brill, IsrSC 32(1) at 101.

131. *Id.*

However, after *Koenig* the static formalities became more restrictive.[132] In the 1980s and 1990s, the courts came to use section 25's dispensing power only when the execution of the document was in an almost perfect compliance with execution formalities, much like the stringent substantial compliance standard adopted in Queensland.[133]

Indeed, before he switched his allegiance to the Harmless Error Rule, Langbein suggested that section 25 embodied a form of the substantial compliance doctrine.[134] For instance, the Supreme Court deemed the failure of one of the two present attesting witnesses to sign a will to be a static formality, as was a testator's failure to sign or date the document offered as a nonholographic will.[135] In a dissent, Justice Barak protested these developments and argued for the application of the more permissive *Brill* doctrine.[136] Barak believed that the original 1965 statute, even after the 1985 amendment, endowed courts with a broad dispensing power.[137]

IV. THE 2004 AMENDMENT TO SECTION 25

The Supreme Court's distinction between faulty formalities and completely absent formalities provoked much academic criticism in Israel.[138] It seemed illogical and inconsistent that omissions in formalities would be fatal for attested and notarized wills but not for holographic wills.[139] Though Professor Shilo believed the statute compelled such a distinction, he argued that international experience showed the efficacy of a wider dispensing power.[140] These criticisms bore fruit with the enactment of the 2004 amendment to section 25. The amendment's legislative commentary reveals the heavy influence of the judicial dissents and academic literature that called for a statutory amendment to empower courts to cure the complete lack of execution formalities.[141] Responding to those analyses, the commentary stated that the goal of the amendment was to extinguish the distinction between faulty formalities and the lack of formalities in all types of wills.[142]

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132. *See, e.g.*, CA 2089/97 Buskila v. Buskila IsrSC 55(3) 837, 844–49 [2001].

133. *See id.* (recounting judicial decisions listing indispensable formalities); *see also Langbein, Excusing Harmless Errors*, *supra* note 5, at 41–45.

134. Langbein, *Defects of Form*, *supra* note 5, at 62.

135. *See* cases cited *supra* note 125.

136. CA 127/87 Bidichi, IsrSC 43(3) at 349-350 (Barak, J, dissenting).

137. *See id.*; *see also* SHILO, COMMENTARY, *supra* note 26, at 243–44 (discussing Barak's position).

138. *See* SHILO, COMMENTARY, *supra* note 26, at 230–31; *see also* Shachor, *Probate of Will*, *supra* note 128, at 541.

139. *Id.* at 244.

140. *Id.*

141. Nissan Slomiansky, Comment on Draft Bill Amending Succession Law Bill (No. 11), 2003, HH 30 [hereinafter *Succession Law Bill Comment* (No. 11)] (discussing Succession Law Bill (No. 11) and citing CA 127/87 Bidichi, IsrSC 43(3) at 350 (Barak, J., dissenting)); *see also Shachor, Probate of Will*, *supra* note 128, at 549; *and* SHILO, COMMENTARY, *supra* note 26, at 244.

142. *Succession Law Bill Comment*, (No. 11), *supra* note 141.

The version of the 2004 amendment first introduced to the Knesset would have left to judicial discretion the establishment of the essential elements of a will that must exist before section 25 could apply.[143] However, during debate of the proposed bill it was suggested that it would be preferable for the statute to explicitly list the essential elements as the fundamental parts of a will.[144] This would serve to close judicial debate over the question as to what are the essential elements of a will.[145] The legislative commentary states that Knesset intended to "anchor" the fundamental parts of a will to the *Brill* list of indispensable formalities.[146] The commentary implicitly rejected the much more restrictive standard of later decisions. In those cases, courts deemed the lack of a testator's signature, or even the failure of one of the two present witnesses to sign a document, as fatal flaws.[147] The final statute lists two fundamental parts of a witnessed will: a written document and the presentation of the document as the testator's will before two witnesses.[148]

Theoretically, the 2004 amendment of section 25 ended the era of a full dispensing power in Israel. In practice, that power had never fully traveled from the Knesset into the courtroom. The 2004 amendment expanded judicial discretion in some ways and limited it in others.[149] In the place of *Koenig*'s formalistic distinction between omissions and defects the 2004 revision of section 25 substituted a two-tiered hybrid system. First, the statute requires strict compliance with the listed fundamental parts of a will, but empowers courts to exercise a full dispensing power for less important formalities. The fundamental parts are conceived as safeguards necessary to establish true testamentary intent.[150] The legislation makes a clear and explicit distinction between faults in the formal requirements found in Section 1, Chapter 3 of the Succession Law and faults in the substantive requirements found in Section 2, Chapter 3 of the Succession Law.[151] An example of a substantive requirement of a will is the refusal to

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (citing CA 869/75 Brill, IsrSC 32(1) at 101.

147. *See* Estate File No. 11632/99 Fam. Ct. (TA) Ploni v. Weizmann Institute, at op. para. 5(h) (Apr. 25, 2004), Takdin (by subscription) (describing impact of the 2004 amendment).

148. Menashe, *Validation of Flawed Wills*, *supra* note 40, at 125. The fundamental part of a holographic will is that it is completely handwritten by a testator. *Id.* Notarized wills must have the fundamental part of having been voiced by the testator himself before an authority. *Id.* The fundamental part of an oral will is that there be two witnesses, and the testator must be on his deathbed or justifiably consider himself to be on the brink of death. *Id.*

149. CA 8991/04 Bargut v. Bargut-Neseret, at Justice Rubinstein's op. para. 30 (Apr. 10, 2006), Takdin (by subscription). In light of the legislative history, an Israeli District Court Judge's view that the 2004 amendment merely codified the existing restrictive case law is untenable. See Fam. App. 729/05 Dist. Ct. (Jer) Sobel v. Litwin, at Judge Druri's op. para. 22 (Aug. 8, 2005), Takdin (by subscription).]

150. *See* Fam. App. 729/05 Sobel, at Judge Rvid's op. para. 20.

151. NARKIS & MARCUS, *supra* note 127, at 51.

recognize an involuntary will produced by force, fear, or undue influence.[152] Even within the formal requirements, courts perceive a distinction between fundamental formalities that are "constitutive," without which they cannot be considered a will, and essential "dynamic" formalities.[153] If a constitutive formality is executed in a faulty manner or is completely lacking, then it cannot be corrected; however, if a dynamic formality is faulty or lacking, then it can be fixed, in order to fulfill the goal of executing the will of the deceased.[154]

Second, there is a very high burden of proof before curing a formal defect. Even if a document possesses the fundamental components of a will, it cannot be probated unless the court has no doubt that the "will represents the true and free wishes of the testator."[155] The truth of the will and the free will of the testator intertwine because a document is only valid as a will if it is the product of the free will of the testator.[156]

The Israeli Supreme Court in *Bargut v. Bargut* rejected Professor Doron Menashe's proposal to adopt a clear and convincing evidence test regarding the authenticity of the will when there is a formal defect because the text of section 25 itself requires the no doubt standard.[157] Menashe had suggested the adoption of a clear and convincing evidence standard because the no doubt standard placed too heavy a burden on the party attempting to probate a defective will.[158] As the law now stands, the party attempting to nullify the will has the burden of proof when the will does not have a fault in its form.[159] In contrast, when there is a defect in the formalities of a will, the burden of proof falls on the party attempting to probate the will.[160] The

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152. The Succession Law, 5725-1965. 19 LSI 58, 63 § 30.

153. Estate File 40180/05 Fam. Ct.(Jer) Estate of the Deceased R.C., at para. 37 (Feb. 19, 2007). Takdin (by subscription).

154. *Id.*

155. The Succession Law, § 25.

156. FH 7818/00 Aharon v. Aharoni, IsrSC 59(6), 653, 713 [2005] (Arbell, J.). An Israeli Supreme Court opinion has recognized that the intent of the reform was to broaden the scope of section 25 by abandoning the difference between an "omission" and a "defect." *Id.* at 714–13. Israeli Supreme Court Justice Edna Arbel wrote an extensive dictum that emphasized that the 2004 amendment had established that the "free and true" will of the testator is fundamental. According to Justice Arbel, the wishes of the testator should not be sacrificed on the "alter of formal requirements." *Id.* at 713. Nonetheless, even she recognized that the amended law places some limit upon the discretion of a judge to probate a will, though she thought those restrictions to be undesirable. *Id.* at 714. Overall, the 2004 amendment gave courts more discretion to deem a document to be a will if there was testamentary intent.

157. CA 8991/04 Bargut, at paras. 29–30 (discussing Doron Menashe, *The Rationale of Section 25 of the Succession Law*, *in* 463 MENASHE SHAVA (Aharon Barak & Doron Menashe ed., 2006) [Heb]); *see* Doron Menashe, *Validation of Flawed Wills*, *supra* note 40, at 127–29); s*ee also* Langbein, *Defects of Form*, *supra* note 5, 62 (stating that Israeli "case law places upon the proponents of a defective instrument the burden of proving genuineness—and according to an unusually high standard of persuasion").

158. *See* Menashe, *Validation of Flawed Wills*, *supra* note 40, at 127–29.; *see also* Langbein, *Defects of Form*, *supra* note 5, at 62.

159. Estate File 14940/99 Fam. Ct. (TA) E.R. v. Em. R. & Eder. (Jan. 7, 2008), Takdin (by subscription).

160. CA 217/74 Gomez v. Guliv IsrSC 29 (2) 337 [1975]; SAUL SHOCHET, FLAWS IN WILLS 171–

party must bear that burden, and failing the burden, even a minor flaw cannot be cured.[161] It is almost impossible to satisfy a real no doubt standard if it were to be applied in a rigorous manner.

However, Menashe himself has observed that pre-2004 Israeli courts in practice, if not in theory, have probated wills under a significantly more reasonable and lenient standard.[162] *Bargut*, an oral (nuncupative) will case, is a prime example of how, since the recent post-2004 amendment, Israeli courts have continued that trend. Israeli Courts sensibly allow wills to be probated even when there is some (but not truly significant) doubt as to the authenticity of the will.[163]

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75 (2nd ed. 2001) [Heb.].

161. *See* CA 564/71 Adler v. Nesher IsrSC 26(2) 745, 747 [1972] (explaining that the party seeking probate of a will despite faulty execution of formalities "must first prove positively its genuineness so that there is a complete confidence that the entire document presented as a will is genuine. Any doubt in this regard works against it and prevents its admittance into probate") (*translated in* Langbein, *Defects of Form*, *supra* note 5, at 62). *See* CA 869/77 Brill, IsrSC 32(1) at 101.

162. Menashe, *Validation of Flawed Wills*, *supra* note 40, at 119, 131, n.32; *see* Estate File 42190/06 Fam. Ct. (Jer) Doe v. Association, at para. 16 (May 11, 2009), Takdin (by subscription) (advocating position that the standard of proof of demonstrating the document reflects the true testamentary intent should shift depending upon the circumstances rather than always using a "no doubt" standard of proof, but finding it unnecessary to decide the question given the severity of the procedural flaw). *See* Estate File 42190/06 Fam. Ct. (Jer) Doe v. Association, at para. 16 (May 11, 2009), Takdin (by subscription) (advocating position that the standard of proof of demonstrating the document reflects the true testamentary intent should shift depending upon the circumstances rather than always using a "no doubt" standard of proof, but finding it unnecessary to decide the question given the severity of the procedural flaw).

163. Section 23 of the Israeli Succession Law allows for nuncupative wills when the testator reasonably believes herself to be on the brink of death. *See* 19 LSI 58 § 23(a). In *Bargut*, the testator, an Argentinean citizen of Christian Arab origin, had requested that the witnesses, who were also of Christian Arab descent, to come to her house in Argentina to hear her will read. She died a few days later. CA 8991/04 Bargut at Justice Rubinstein's op. para. 32. The testator stated orally that her brother's children should inherit land she owned in Israel in front of two witnesses. *Id*. at Justice Rubinstein's op. para. 2. However, the witnesses did not submit a written version of the will to an Argentinean notary until almost two years after the testator's death. *Id.* This memorandum stated that even though age had weakened the testator, she had retained command of her mental capacities. The witnesses claimed that the testator said her wishes first in Arabic and then repeated them in Spanish. An Israeli trial judge examined the witnesses in Syrian Arabic, and concluded that their story was trustworthy. *Id.* The will was improperly executed because section 23(b) requires that a nuncupative will be presented in written form before an official as swiftly as possible. The Succession Law § 23(b). Other relatives of the testator challenged the proffered will. After deciding that Israeli law controlled the inheritance of the disputed land, a unanimous court panel probated the document. *Id.* at para. 31. Based on the circumstances, the panel found that there was "no doubt" that the proffered will reflected testamentary intent. *Id.* The Court was able to cure the failure to submit the will to an official as soon as possible because the statute did not list that requirement as a fundamental component of a will. *Id.* Despite the Court's protestations, the failure of the witnesses to submit the nuncupative will to a notary for almost two years must have raised doubt about the will's validity. Nonetheless, the Court probated that will because the evidence supporting the truthfulness of the will was convincing. *Id.*

Nuncupative wills are generally not known in the United States because they are considered to have insufficient safeguards against abuse, even in the best of circumstances. Some American courts have held that attesting witnesses must sign a will during the lifetime of a testator even when the controlling statute does not require that the witnesses sign in the presence of the testator because of the danger of fraud. *See In re* Estate of Saueressig, 136 P.3d 201, 208 (Cal. 2006); *In re* Estate of Royal, 826 P.2d 1236 (Colo. 1992). However, other American courts have probated documents that were

V. A SURVEY OF RECENT SECTION 25 CASE LAW

Shortly after the passage of the 2004 amendment to section 25, one Israeli family court judge warned that the new section 25 "raises many questions."[164] The amendment certainly raised some questions that should interest American lawyers: How would courts interpret the threshold requirement that a document possess the essential components of a will before it could be probated? Would the overarching requirement that the court have no doubt that the document reflects testamentary intent limit the discretion of courts in practice? The essential question is whether a dispensing power bounded by threshold requirements strikes the right balance between forgiving harmless errors and safeguarding testamentary intent from deceit or misunderstanding.

Even though the revised section 25 is still relatively young, a significant amount of evidence on how courts operate under a dispensing power with threshold requirements already exists.[165] In order to draw upon this material, I searched using the Israeli search engine Takdin Online. I sought Israeli Supreme, District, and Family court decisions discussing whether to cure will execution formalities under the current version of the 2004 amendment.[166] Eight relevant cases were discovered. None of these cases have yet been officially translated into English. The analysis of the cases will include accounts of facts that are detailed enough to allow the

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signed by witnesses after the death of the testator. *See In re* Estate of Miller, 149 P.3d 840, 842–43 (Idaho 2006); *In re* Estate of Jung, 109 P.3d 97, 102 (Ariz. App. 2005). *Bargut* may have relevance to jurisdictions following that more liberal rule.

164. Estate File 11632/99 Weizmann Institute, at op. para. 5(h).

165. The Succession Law § 25(a). However, a word of caution is necessary. Any evaluation of the revised section 25 based solely on the reported cases, as this one will be, must be missing a major part of the story. The decisions discussed in this section will certainly not indicate the full impact of the 2004 amendment to section 25. The provision's greatest effect is probably felt during the pre-trial settlement phase of litigation, or in the very absence of suits that are not brought at all on account of the new law. The cases dealt with in the decisions of courts may differ in kind from those that are settled. *See* George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16 (1984). The reporting of the facts found in judicial opinions is also undoubtedly skewed by hindsight bias. A study evaluating the results on the ground produced by the amended section 25, and not only the purported reasoning of the courts, would be very valuable. Nonetheless, while future research may be able to discover the effect of the 2004 amendment on an empirical level, the available decisions are still informative.

166. TAKDIN ONLINE, *available at* http://www.takdin.co.il/searchen/searchForm.aspx (last visited Nov. 21, 2010). Specifically, I conducted the following search: In the full text query box, I placed the key Hebrew phrase of the 2004 amendment of Section 25 that has been translated in this paper as "fundamental parts of a will": "מרכיבי היסוד בצוואה". The search was limited to cases that used that term from March 23, 2005 to October 1, 2010. I chose March 23, 2005 as the starting date because on March 22, 2005 the Israeli Supreme Court discussed the 2004 amendment in extensive and influential dicta. FH 7818/00 Aharon, IsrSC 59(6), 653. I also omit from the following discussion an Israeli Supreme Court case dealing with a nuncupative will, CA 8991/04 Bargut, ISRSC 2006(4), 44, which was discussed above *supra* note 149 and surrounding text, because it is of limited relevance to an American audience. Based on my reading of the cases, I believe that the query conducted produced the relevant case law. The results of this case survey were probably not biased, even if some relevant cases were omitted.

reader to come to her own judgment about the appropriateness of the decisions rendered by the Israeli courts.

The trend of these recent Israeli cases appears to be generally sound. By pruning back the number of indispensable fundamental elements of a will, courts have cured documents that were defective, yet likely authentic. At the same time, the requirement that the court have no doubt about the authenticity of the document has prevented probate in some cases. Caution is necessary. There are hints in the extant cases that some of the defective wills that the courts have probated under the revised section 25 might be the products of trickery. However, it appears that the new section 25 is working well over all. The cases seem to show that the revised statute has encouraged courts to probate incorrectly executed proffered wills as long as the courts did not suspect that their defects were the product of indecisiveness, possible duress, or undue influence.[167] In most of these recent Israeli cases, the new section 25 was applied in the midst of a wills contest in which the proffered will was not only being challenged due to claimed defects or omissions of formalities, but also for substantive reasons. These include a lack of testamentary capacity due to language barriers, undue influence, or fraud. The cases indicate that the parties contesting a will can apparently be relied upon to bring to light doubts about suspicious wills, while still allowing the court to probate documents whose faults are merely formal.

Israeli Courts have put revised section 25 to good use by curing faults in execution formalities when the judges have been convinced that the will did reflect the true testamentary intent of the deceased. In one such case, the Supreme Court refused to accept the appeal of the District Court's probating of a will executed before a notary upon intermediate appellate review, despite the Family Court's initial refusal to probate the will, because the District Court had made the independent factual finding that the true testamentary intent of the testator was reflected in the will.[168] Though the Supreme Court would not have allowed the use of Section 25 to probate a will that had not been translated into a language understood by the testator, it was prepared to allow the curing of the procedural flaw of not translating the will verbatim when the meaning of the will's provisions had been expressed to the testator in a language understood by the testator.[169] Similarly, a Family Court probated a holographic will despite the failure of the testator to sign or date the will, which was handwritten and placed in an envelope upon which the testator placed a date, because the Family Court was "convinced that the document reflects the free true will of the

167. *Cf.* UNIF. PROB. CODE § 2-503, cmt. (claiming that the UPC's harmless error rule "permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery—in other words, that the defect was harmless to the purpose of the formality").

168. Fam. App. 3779/10 Estate of the Deceased Doe v. John Doe IsrSC (3) 2010, 4374 [2010].

169. *Id.*

deceased."[170]

Estate of the Deceased R.C. v. S.B.C., is an example of a court applying the new section 25 to probate a will that lacked a properly executed signature.[171] The case demonstrates the merit of the current version of section 25's threshold requirement that there be no doubt that a will reflects the testamentary intent. The evidence supported the court's decision to probate a document, which suffered from a curable execution error. In *R.C.*, the youngest daughter of nine siblings contested the proffered will of her Moroccan immigrant father. She instead sought to probate an earlier will that bequeathed the father's apartment to her.[172] In July of 2002, the testator had neglected to sign the document proffered by the youngest daughter's sibling during the ceremony in which he presented the document as his will to the attesting witnesses. This ceremony took place on a Thursday. The testator eventually did sign the document on the following Sunday, but not in the presence of witnesses.[173] The daughter who contested that document asserted that her siblings exerted undue influence on their father.[174] The court found that the claim was not credible. The daughter had been present at the signing ceremony, but she had not protested until after her father had died more than a year later in November 2003.[175] Her weak explanation for this delay was that she did not want to parade the family's "dirty laundry' in front of the witnesses.[176] The contesting daughter herself admitted under cross-examination that her father did not sign that document before the witnesses because the people present forgot to ask him to sign.[177] The court credited the evidence that showed that the father signed the will after one of his children pointed out the error.[178] Moreover, the court believed the testimony that claimed that the 2002 will reflected the testator's true testamentary intent.[179] The court's evaluation of the evidence left it with no doubt that the will proffered by the other siblings was authentic, and it therefore allowed the proffered will into probate.[180]

In contrast, the facts of one surveyed case, *Estate of Yrimi v. Vilnsik (Hasia) and Sisters*, suggests that a document there was probated even though there should have been a great deal of doubt about testamentary

170. Estate File 5560/07 Fam. Ct. (Ha) Estate of the Deceased M.C., at para. 22 (June 24, 2010), Takdin (by subscription).

171. Estate File 40180/05, Fam. Ct. (Jer) 40180/05 Estate of the Deceased R.C., (Feb. 19, 2007), Takdin (by subscription).

172. *Id.* at paras. 1–2, 7.

173. *Id.* at paras. 3–4.

174. *Id.* at para. 10.

175. *Id.* at paras. 1, 8.

176. *Id.* at para. 62.

177. *Id.* at paras. 44–45.

178. *Id.* at paras. 45–46.

179. *Id.* at paras. 49–50.

180. *Id.* at para. 66.

intent.[181] In *Estate of Yrimi* the proffered document was a notarized will. The document bequeathed a quarter of the testator's financial property and her apartment to the local Free Mason Lodge. Three daughters received the remainder of the inheritance.[182] Two of the daughters contested the will; they claimed their mother did not understand the nature of her actions. They asserted the director of the Free Mason Lodge had exercised undue influence on their mother.[183] The trial court initially rejected the daughters' claims.[184]

After the judgment was rendered in the Family Court, the daughters contesting the will discovered evidence that the medical certification of the testator's condition at the time of attestation, which had been presented to the trial court, had been forged.[185] The daughters then sought to reopen the case before a District Court that had appellate jurisdiction.[186] The litigating daughters also now argued that the proffered document had a formal fault: the testator did not orally convey her will before the notary, as required by the formal rules of notarized wills. Rather, she instructed the notary to draft a will according to her wishes.[187] Even though an apparently fraudulent signature should have presented grave doubts as to the authenticity of the will, the court was not willing to overturn the earlier decision's ruling that the will reflected the testator's testamentary intent because of the need to protect the finality of judgments.[188] The other threshold requirement necessary to cure the will's faulty execution was fulfilled because the proffered document possessed the essential component of a notarized will: the testator presented the will before a notary.[189] In my opinion, the District Court should have not cured the execution defect because the new evidence certainly cast some doubt on the authenticity of the proffered document. Reassuringly, *Estate of Yrimi* seems to be an exceptional case. The Israeli courts generally appear not to probate proffered documents when the surrounding circumstances indicate that the document probably does not reflect true testamentary intent. The threshold requirement that the court have no doubt about the authenticity of the proffered document seems to largely bar probate when evidence of undue influence or fraud produced during a will contest casts doubt on

181. Assorted Appeals 14394/07 Dist. Ct. (Hi) Estate of Yrimi, at paras. 1-3 (May 5, 2008), Takdin (by subscription).

182. *Id.* at para. 3.

183. *Id.* at para. 4.

184. *Id.*

185. *Id.* para. 6.

186. *Id.*

187. *Id.* at paras. 14, 31.

188. *Id.* paras. 28, 33, 35. The attorney, who had notarized the will, had authenticated the testator's signature on every page of the document. The notary testified that he drafted the document at the bequest of the testator, that she understood the meaning of her actions, and that she signed the document in his presence. *Id.* at para. 1-2.

189. *Id.* at paras. 33–34.

whether the document reflects testamentary intent. For example, a will was not entered into probate when there was no proof that the will was translated into Hindi, the language of the testator, one of the witnesses had not seen the testator sign the will and had not signed the will before the testator, and there was no proof that the testator had declared to the witnesses that the document was her will.[190] *Estate of the Deceased Blank v. Blank and Siblings* and *Estate of the Deceased Evdalnvi Maier v. Chaim Leah* are additional cases in which the court did not cure the documents' technical faults.[191] The evidence in each of these cases indicated that the proffered document was likely the product of fraud or undue influence.[192] In another surveyed case, a Family Court decided not to probate a document, which had only minor technical flaws when the evidence presented failed to meet the threshold requirement of convincing the Court

190. Estate File 2060/05 Fam. Ct. (BS) T.A. v. A.Y (Jan. 9, 2009), Takdin (by subscription).

191. Estate File 4720/04 Fam. Ct. (Hi) Estate of the Deceased Blank v. Blank and Siblings (Dec. 19, 2007), Takdin (by subscription); Estate File Fam. Ct. 02701/01 (TA) Estate of the Deceased Evdalnvi Maier v. Chaim Leah (Jan. 23, 2007), Takdin (by subscription).

192. In Estate File 4720/04 Estate of the Deceased Blank the elderly testator and his wife were Holocaust survivors and members of the Ger Hasidic community. The testator's first will gave his entire estate to his wife if she survived him, and if she did not, to the Ger seminary and synagogue in exchange for memorial prayers. Estate File 4720/04 Estate of the Deceased Blank, at paras. 1–2. A second will, which was offered by petitioners for probate, was executed while the testator's wife was still alive. It disinherited his aged wife and their religious community and gave the entire estate to a middle-aged man who was not related to the testator. That man had become close to the testator a few years prior to the testator's death at age 86. *Id.* at para. 9. The testator, though mentally sound, had lost the physical ability to care for himself in his last years. The middle-aged man had helped the testator with many activities that otherwise would have been impossible, such as attending the Ger synagogue. The proffered document had two major formal execution errors. First, the testator did not present the document before the witnesses as his will. Second, the purported will's beneficiary admitted that he added the document's date only after it had been signed by the testator. *Id.* at paras. 6, 8. The court refused to probate to the purported will. *Id.* at Judgment. Though Section 25 could have cured these execution faults, the Court suspected that the testator had been the victim of undue influence. The granting of the testator's power of attorney to the middle-aged man the day after the execution of the second will was suspicious. Worse, the middle-aged man then used the testator's bank account for his own benefit. The Family Court Judge stated that she would not probate the will with its faulty formalities because she had some doubt about the authenticity of the will. *Id.* However, this purported will probably would not have been probated under a lesser threshold of proof either.

In Estate of the Deceased Evdalnvi Maier, a similar case, a Court refused to probate the incorrectly executed purported will of a childless 93-year old Arabic speaking Moroccan immigrant. The contested will was executed only two months before the death of the testator. The proffered document suffered from several errors in execution formalities. Though the testator was not fluent in Hebrew, the document was not translated for him until it was already completed. One of the witnesses signed the will before the testator did. The testator never even declared that the document was his will. These formal flaws could have been cured if the Court had no doubt of the authenticity of the will. Nonetheless, it refused to do so because the circumstances suggested a classic case of undue influence. The circumstances, as revealed by the litigation over the contested document, indicated that the beneficiary of the proffered will, a 50-year-old man who was not related to the testator, had exercised undue influence on the testator. Estate File 02701/01, Estate of the Deceased Evdalnvi Maier, at paras. 7–9. The beneficiary of the disputed will had only began visiting the testator and helping him with everyday activities such as cleaning and bathing three months before the testator's death. *Id.* at para. 9(b).

that the document reflected true testamentary intent.[193]

These cases indicate that the revised section 25 allows the probate of authentic documents that have formal flaws, while it generally prevents the probate of suspicious documents.

There should be some concern from another front. Some Israeli judges might be moving in the dangerous direction of probating documents in which the deceased indicates that she wished to devise property to an individual, even though the testator did not intend the proffered document itself to be a will. A prominent American misapplication of the Harmless Error Rule by an American Court is seen in *In re Estate of Kuralt*, in which the Supreme Court of Montana upheld the finding of a trial court that a document was a holographic will based upon extrinsic evidence.[194] In *Kuralt* there was convincing evidence that the testator wanted his girlfriend to inherit the property.[195] Still, the testator likely did not intend the proffered document, a letter, to be a will.[196]

One Israeli judge, a member of a District Court panel, seems to have made a similar mistake in the case of *Plonit v. Almonit*.[197] In that case, the testator was a widower who had lived with his girlfriend for 15 years.[198] Section 55 of Israel's Succession Law provides that an unmarried couple who is living publicly together shall inherit from each other, except as provided in a will implicitly or explicitly.[199] The widower and his girlfriend entered into a contract with each other that neither would inherit from each other except as provided by will.[200] When the widower died without a will, the girlfriend claimed a share of the estate upon the basis of intestacy.[201] Three of the decedent's daughters claimed that the contract was an effective will.[202] Chief Judge Shtemer observed that the contract possessed the fundamental elements of a will—there were two witnesses (the girlfriend and the lawyer) and it was a written document.[203] Moreover, there could be no doubt that the document reflected the testator's intent to disinherit the girlfriend.[204] The purported will, however, had a formal fault because the testator did not present the document as his will.[205] Chief Judge Shtemer would have cured that formal fault, because a testator's presentation of a

193. Estate File 42190/06 Fam. Ct. (Jer) 42190/06 Doe v. Association, at paras. 14, 15, 39 (Nov. 5, 2009), Takdin (by subscription).

194. *In re* Estate of Kuralt, 2000 MT 359, 303 Mont. 335, para. 17, 15 P.3d 931, para. 17.

195. *Id.*

196. DUKEMINIER ET AL., *supra* note 53, at 250.

197. Fam. App. 306/06 Dist. Ct. (Hi.) Plonit v. Almonit (June 16, 2007), Takdin (by subscription).

198. *Id.* at Chief Judge Shtemer's op. para. 3.

199. The Succession Law § 55.

200. Fam. App. 306/06 at Chief Judge Shtemer's op. at para. 3.

201. *Id.* at Chief Judge Shtemer's op. para. 4.

202. *Id.* at Chief Judge Shtemer's op. para. 6.

203. *Id.* at Chief Judge Shtemer's op. para. 25.

204. *Id.*

205. *Id.*

document is not a fundamental element of a will.[206] Shtemer's approach would have jettisoned the wise requirement that the testator intend the proffered document to be a will. Two other judges on the panel disagreed with that approach. They felt, soundly, that the contract could not be probated as a will under section 25, because the parties intended to create a contract, and not a type of will recognized by the statute.[207] Fortunately for the daughters, one of those judges concurred with the Chief Judge Shtemer's decision to disinherit the girlfriend because he thought the contract was intended to be an implicit will under the specific statutory terms of section 55.[208] The parties reached a settlement in which the disputed portion of the estate was split in half between the daughters and the girlfriend before the Israeli Supreme Court could adjudicate the case.[209] This doctrinally inconclusive result means that *Kuralt*'s ghost may yet haunt the Holy Land. If they are not wary, Israeli courts might eventually attempt to enforce the testator's true testamentary intent even when the proffered document was not intended to be a will.

VI. CONCLUSION

Section 25 of Israel's Succession Law plays a major role in the world-wide debate over the wisdom of empowering courts to cure failings in the formal execution of wills. However, in the past, language barriers have hampered American literature's discussion of the curing of execution errors in Israel. This paper has sought to clarify the origins and application of the original Israeli statute. Most importantly, the paper brings the English speaking audience up-to-date on a major emendation of section 25 and its preliminary aftermath in the courts. A major American textbook describes the amendment to be a retreat from a Harmless Error Rule.[210] However, though the 2004 Amendment officially ended Israel's experiment with a statutory dispensing power, the new law actually gave courts more power to cure incorrectly executed will formalities. The revised section 25 embodies a dispensing power with a threshold requirements provision. The preliminary results from the Israeli courts appear to show that the revised section 25 is a reasonable compromise between the extremes of senseless formalism and unbounded and unpredictable judicial discretion. The recent Israeli cases indicate that judges applying a dispensing power with a threshold requirement will, in most cases, arrive at results that reasonably protect the authentic testamentary intent of the testator. American reformers who have frustration with strict compliance of the Wills Act

206. *Id.*
207. *See id.* at Judge Cohen's op at para 6; *id.* at Judge Wilner's op. at para. 8.
208. *Id.* at Judge Wilner's op. at para. 10.
209. *See* CA 9057/07 Blank v. Blank IsrSC 2008(3), 7861 [2008].
210. DUKEMINIER ET AL., *supra* note 53, at 263.

formalities, but fear the possible abuses of a Harmless Error Rule, should follow Israel's lead.