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# ABOLISHING THE ATTESTATION REQUIREMENT FOR WILLS

JAMES LINDGREN†

*In the United States, formal wills must be witnessed by two or three attesting witnesses. Typed wills lacking proper attestation are invalid, regardless of circumstances demonstrating a document's genuineness and reliability. In this Article Professor Lindgren proposes that states should abolish the attestation requirement, reducing the minimum formalities required for a will to only two—that a will be in writing and that it be signed by the testator. Abolishing the attestation requirement would bring will formalities more in line with the formalities required for other ways of passing property at death, such as trusts, insurance, and holographic wills. This change would also eliminate or lessen some problems with written revocation, holographic wills, and the formalities related to attestation. Professor Lindgren argues that most of the original reasons for the attestation requirement no longer apply; that attestation has been undercut by the erosion of the requirement that witnesses be disinterested; and that substantive doctrines of fraud, duress, undue influence, and incapacity are better suited for separating good wills from bad ones. He does not suggest that attestation be actively discouraged. Rather, attestation should continue to be routine if it is kept as part of a self-proving will, a will executed with an affidavit making admission to probate easier.*

The most characteristic formality of a typical will is the requirement that a will be attested<sup>1</sup> by two (or three<sup>2</sup>) witnesses. The witnesses "attest" the will by signing it.<sup>3</sup> A typed will lacking attestation or with defective attestation is not

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1. Nearly all wills are attested, even in jurisdictions that allow unattested handwritten wills (holographs). See *infra* notes 103-21 and accompanying text. On the other hand, nonprobate transfers (will substitutes) are usually unattested. See *infra* notes 92-102 and accompanying text. Both wills and will substitutes are almost always written and signed.

2. Two witnesses are enough in all but three states. South Carolina and Vermont require three witnesses. S.C. CODE ANN. § 21-7-50 (Law. Co-op 1976); VT. STAT. ANN. tit. 14, § 5 (1974). Louisiana requires two witnesses in addition to the presence and signature of a notary public. LA. REV. STAT. ANN. § 9.2442 (West Supp. 1989).

3. Even where a statute requires only that a will be "witnessed" or "attested" and says nothing about the witnesses signing the will, courts have uniformly held that witnessing or attesting a will requires the witnesses' signatures or subscriptions (signing at the end). See *In re Estate of Watkin*, 75 So. 2d 194 (Fla. 1954) (Statute requiring "attestation and subscription" was replaced by a statute requiring only that a will be executed in the presence of "attesting" witnesses; nevertheless, the court held that the attestation requirement under the new statute included subscription by the witnesses.); *In re Estate of MacVicar*, 251 Iowa 1139, 104 N.W.2d 594 (1960) (statute requiring that a will be

legal in any American jurisdiction, no matter how reliable the circumstances under which the document was executed. The desire to avoid effectuating unwitnessed language also lies behind other oddities of the law of wills, such as the rule against correcting mistakes in their terms.<sup>4</sup>

Nonetheless, this attestation requirement has been undercut by several developments, including the relaxation of the requirement that witnesses be disinterested<sup>5</sup> and the rise of nonprobate transfers<sup>6</sup> and holographic (handwritten) wills.<sup>7</sup> In this Article, I propose that we go much further—abolishing the attestation requirement altogether. It's not that witnessing is an evil to be rooted out wherever it's found. Rather, witnessing is a good that can be routinely secured without the hardship of striking down formal wills just because they may lack witnesses.<sup>8</sup> We should reduce the minimum formalities required for a will to only two—that a will be in writing<sup>9</sup> and that it be signed by the testator. Writing makes an estate plan concrete. Signature indicates a decision, final unless later revoked, and supplies evidence of genuineness.

Problems with the current law are exemplified by the case of *Smith v. Nelson*.<sup>10</sup> There the testator typed his will, signed it, had the county clerk sign it as a witness, and deposited it in the vault of the county clerk's office. The testator then wrote two letters to his wife referring to the will. No question of genuineness or testamentary intent was raised. The Supreme Court of Arkansas, however, denied probate solely because only one person had witnessed the will. Although typed unwitnessed wills (like the one offered in *Nelson*) are inadmissible in every state, this rule strikes litigants as so inequitable that there are still a substantial number of appellate opinions concerning them.<sup>11</sup>

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"witnessed" held to include a requirement that witnesses sign their names on the will); *In re Klein's Estate*, 241 Iowa 1103, 42 N.W.2d 593 (1950) (same); *In re Pike's Will*, 221 Iowa 1102, 267 N.W.2d 680 (1936) (same); *In re Riedlinger's Will*, 37 N.M. 18, 16 P.2d 549 (1932) (statute requiring "attestation" held to include a requirement that witnesses sign their names on the will); *Ryan Estate*, 34 Del. Co. 380 (Pa. Dist. Ct. 1946) (same); *In re Johnson's Will*, 175 Wis. 1, 183 N.W. 888 (1921) (devise to a subscribing witness was purged; other witnesses who saw testator sign could not be counted as witnesses to the will because they did not sign; statute required only witnesses and was silent about the witnesses' signatures).

What witnesses attest to varies from jurisdiction to jurisdiction. See W. BOWE & D. PARKER, 2 PAGE ON WILLS § 19.112 (3d ed. 1960) [hereinafter PAGE ON WILLS] ("Identity of testator"); *id.* § 19.113 ("Signature of testator or acknowledgment thereof"); *id.* § 19.114 ("Acknowledgment of testator's signature by another"); *id.* § 19.115 ("What constitutes acknowledgment by testator"); *id.* § 19.116 ("Attestation of testator's signature, or of instrument"); *id.* § 19.117 ("Effect of failure to sign or acknowledge before witnesses"); *id.* § 19.118 ("Capacity of testator"); *id.* § 19.147 ("Knowledge of contents of will").

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

5. See *infra* notes 122-31 and accompanying text.

6. See *infra* notes 92-102 and accompanying text.

7. See *infra* notes 103-21 and accompanying text.

8. See *infra* notes 184-96 and accompanying text.

9. Writing includes typing, printing, and handwriting.

10. 227 Ark. 512, 299 S.W.2d 645 (1957).

11. See, e.g., *In re Estate of Oravetz*, 204 Cal. App. 2d 717, 22 Cal. Rptr. 624 (1962) (unwitnessed typewritten will denied probate despite a handwritten cover letter); *McNeill v. McNeill*, 261 Ky. 240, 87 S.W.2d 367 (1935) (typed version of earlier holographic will denied probate); *Adams' Executrix v. Beaumont*, 226 Ky. 311, 10 S.W.2d 1106 (1928) (typed will signed by the testator held

Even more common are cases in which wills that are partly handwritten and partly typed or preprinted are offered as holographs.<sup>12</sup> Most of these hybrid wills are denied probate,<sup>13</sup> though case-by-case differences are too wide to discourage litigation.<sup>14</sup> More distressingly, in thousands of appellate cases,<sup>15</sup> the elaborate formalities of the witness requirement have been botched by the testator or his lawyer. For example, courts often strike down wills because one witness signed out of the presence or line of sight of the other witness or the testator.<sup>16</sup> Other wills have been struck down because the witness signed a minute or two before the testator or signed in the margin of the will.<sup>17</sup>

Abolishing the attestation requirement for formal wills would bring their formalities more in line with the formalities required for other ways of passing property at death—trusts, insurance, pensions, joint and survivor bank and brokerage accounts, and holographic wills.<sup>18</sup> Such a change would also lessen other problems with the law of wills, such as inconsistent standards for written and physical revocation, problems with fill-in-the-blanks holographic wills, and complications with the formalities related to attestation.<sup>19</sup>

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invalid); *Dean v. Dickey*, 225 S.W.2d 999 (Tex. Civ. App. 1949) (unattested typewritten will denied probate).

12. See *Estate of Christian*, 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976) (will held invalid because it included preprinted language about the appointment of an executor); *Estate of Helmar*, 33 Cal. App. 3d 109, 109 Cal. Rptr. 6 (1973) (three-page holograph held invalid because it had a typed introductory clause); *Gunn v. Phillips*, 410 S.W.2d 202 (Tex. Civ. App. 1966) (admission of a holograph to probate reversed, because the proponents had not proven that handprinted portions of the will were in testator's handwriting, even though witnesses identified the longhand portions and said that they were not familiar with testator's printing); see also *Blankenship v. Blankenship*, 276 Ky. 707, 124 S.W.2d 1060 (1939) (will with handwritten language altering and supplementing typed form held invalid); *McNeill v. McNeill*, 261 Ky. 240, 87 S.W.2d 367 (1935) (typed letter held invalid as a holograph); *Adams' Executrix v. Beaumont*, 226 Ky. 311, 10 S.W.2d 1106 (1928) (typed will signed by testator held invalid); *Succession of Jones*, 38 So. 2d 797 (La. App. 1949) (holograph held invalid because the place and date were not in the genuine handwriting of the testator); *In re Will of Smith*, 218 N.C. 161, 10 S.E.2d 676 (1940) (court held invalid a will with typed list of assets followed by handwritten disposition of them); *Dean v. Dickey*, 225 S.W.2d 999 (Tex. Civ. App. 1949) (typewritten will denied probate); cf. *Puckett v. Hatcher*, 307 Ky. 160, 209 S.W.2d 742 (1948) (will jointly executed by husband and wife held invalid because parts of the will were written by other spouse); *Seab v. Seab*, 203 So. 2d 478 (Miss. 1967) (same).

13. See *In re Estate of Johnson*, 129 Ariz. 307, 630 P.2d 1039 (Ct. App. 1981) (will held invalid where the testator merely filled in the blanks on a preprinted stationer's form, even though statute only required that material provisions of holograph be in the testator's handwriting); *Estate of Christian*, 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976) (will held invalid because it included preprinted language about executor's appointment); *In re Estate of Bower*, 11 Cal. 2d 180, 78 P.2d 1012 (1938) (will held invalid where the testator merely filled in the blanks on a preprinted stationer's form); *In re Wolcott's Estate*, 54 Utah 165, 180 P. 169 (1919) (proponents of will offered for probate only the handwritten portion of a will written on a stationer's form; will held invalid because the court considered both the preprinted and the handwritten parts of the will as parts of the same document).

14. See *infra* notes 146-64 and accompanying text.

15. *Page on Wills* alone contains citations to about 2,000 appellate opinions in the footnotes on the attestation requirement. Most involve questions of allegedly defective attestation. See 2 *PAGE ON WILLS*, *supra* note 3, §§ 19.73-19.149.

16. See, e.g., *id.* §§ 19.119-19.128.

17. See *id.* §§ 19.137-19.139.

18. See *infra* notes 93-121 and accompanying text.

19. See *infra* notes 132-83 and accompanying text.

## I. FIRST PRINCIPLES: RELATIVISM, PARSIMONY, AND A TWO-TIERED APPROACH TO FORMALITIES

### A. *Relativism*

Most general discussions of will formalities begin with the policies that underlie them: the *evidentiary* function,<sup>20</sup> the *ritual* or *cautionary* function,<sup>21</sup> the *protective* function,<sup>22</sup> and the *channeling* function.<sup>23</sup> First, formalities fulfill the evidentiary function by providing a written document that can be good evidence of how the testator wanted to distribute his property and of his desire to leave a will. Second, the ritual of a will execution cautions the testator to take the execution seriously, reducing the tentativeness of the testator's plans for his death. Third, formalities protect a testator from the fraud, duress, or undue influence of those who would impose their desires on the testator. Last, formalities channel almost all wills into the same patterns, letting well-counseled testators know what they must do to execute a valid will, reducing the administrative costs of determining which documents are wills, and thus increasing the reliability of our system of testation.

The problem with looking at just the advantages of formalities is that it can lull us into thinking that more formalities are better, into thinking that proliferation is good.<sup>24</sup> Nearly any formality that one could imagine would to some extent serve at least one of the accepted purposes. Assume, for example, that we required testators to use a special password or a secret handshake known only to lawyers. Even these nonsensical requirements would serve the ritual function, because they would set wills apart from the other activities of daily life.<sup>25</sup> We shouldn't ask whether this or that formality serves the ritual function? Practically any would. Thus, determining the wisdom of a particular formality such as attestation isn't as simple as asking whether it serves any of the purposes of formalities. It does. The question instead is whether the formality promotes the primary goal of our system of testation—effectuating the intent of the testator at an acceptable administrative cost.<sup>26</sup>

This is not an impossible question. Nor need it be answered in a vacuum. In the United States, we have extensive experience with other ways of passing

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20. Gulliver & Tilson, *The Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6-9 (1941); Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492-93 (1975).

21. Gulliver & Tilson, *supra* note 20, at 5-6 (calling it the "ritual" function); Langbein, *supra* note 20, at 494-96 (calling it the "cautionary" function).

22. Gulliver & Tilson, *supra* note 20, at 9-13; Langbein, *supra* note 20, at 496-97.

23. Langbein, *supra* note 20, at 493-94. Langbein credits Lon Fuller with identifying the channeling function for contract formalities. "One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels . . ." Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941); see also Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 368 (noting the standardization of the methods of transfer of property).

24. See Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 503 (1948) ("The philosophy of all this . . . assumes that the more 'safeguards against fraud' the better.").

25. The only encounter in daily life that is likely to have a special handshake and a special password is a fraternity or sorority initiation. Indeed, this is not a ridiculous comparison. When a required formality is breached, it begins to look as silly as a fraternity ritual must look to an initiate.

26. See, e.g., UNIFORM PROBATE CODE § 1-102 (1987) [hereinafter U.P.C.].

property at death, including free-market alternatives to the probate system.<sup>27</sup> If trusts and bank accounts can reliably pass property at death without witnesses, then perhaps the protection of witnesses is desirable for wills, but not essential. By looking at alternative methods of passing property, a relativist approach offers some hope for deciding which formalities are necessary for reliable succession. Also, some data from Australia on unwitnessed wills suggests that they are highly reliable.<sup>28</sup>

## B. Parsimony

In determining whether a particular formality increases or decreases the system's reliability, one must remember that these are minimum formalities, not maximums. Every time a legislature or a court adds a new formality, it in effect invalidates a new category of wills. We should not punish a testator just because he did not hire a first-rate attorney—or could not afford one.<sup>29</sup> Certainly, the cases give little support for supposing that wills lacking some of the more arcane formalities are often tainted by fraud or undue influence. In case after case, the problem is the opposite. The testator's intent is clear and the document genuine, but courts can't or won't give it effect.<sup>30</sup> By proliferating formalities, states are

27. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109-15 (1984).

28. See *infra* notes 177-83 and accompanying text. Some Australian jurisdictions allow wills to be admitted to probate with defective formalities if the court is firmly convinced that the document is genuine and was intended to be a will. See Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 22, 52 (1987). In a study of the experience in South Australia, in every reported case in which attestation was absent or missing, the will was nonetheless reliable enough to admit to probate. Other missing formalities were not always excused. See *id.* at 22, 52; *infra* notes 177-83 and accompanying text.

29. See Mechem, *supra* note 24, at 501-03.

It is likewise big-law-office philosophy: every testator must be forced to execute his will just as it would be done if the matter were being handled by a high-powered law firm. This overlooks one very important fact, namely, that the only persons the execution of whose wills are likely to come into question are precisely those persons who do not have the job supervised by a high-powered law firm, but who instead have the matter looked after by some very bad lawyer or by the local J.P. or the local banker or the local real estate man or on the advice of those who happen to be gathered at some lonely deathbed. These persons have the same right to make wills as their more prosperous or sophisticated brothers and sisters who employ good lawyers . . .

*Id.* at 503.

30. "[T]here are numerous decisions interpreting these requirements . . . wholly or partially invalidating wills that do not seem from the opinions to be in any way improper or suspicious." Gulliver & Tilson, *supra* note 20, at 9. "[T]he reported decisions give the impression that the remedies are employed more frequently against innocent parties who have accidentally transgressed the requirement than against deliberate wrongdoers, and this further confirms the imaginary character of the difficulty sought to be prevented." *Id.* at 12.

See, e.g., *Smith v. Nelson*, 227 Ark. 512, 515-16, 299 S.W.2d 645, 646-47 (1957) (typewritten will denied probate because unwitnessed, despite subsequent letters from decedent referring to the will); *Estate of Parsons*, 103 Cal. App. 3d 384, 390-91, 163 Cal. Rptr. 70, 74 (1980) (substantial devise purged because beneficiary was also a witness to the will; one of two other witnesses given \$100 under the will; even though witness disclaimed \$100 bequest, court still purged both interests); *Estate of Christian*, 60 Cal. App. 3d 975, 982, 131 Cal. Rptr. 841, 845 (1976) (will held invalid because it included preprinted language about executor's appointment); *Estate of Helmar*, 33 Cal. App. 3d 109, 113-14, 109 Cal. Rptr. 6, 9 (1973) (three-page holograph held invalid because of typed introductory clause); *In re Estate of Oravetz*, 204 Cal. App. 2d 717, 721, 22 Cal. Rptr. 624, 626 (1962) (unwitnessed typewritten will denied probate despite handwritten cover letter); *Estate of*

forgetting the purpose of our system of wills.

Instead of proliferation, we should turn to the principle of parsimony, a principle more common in the jurisprudence of criminal sentencing<sup>31</sup> than in the jurisprudence of succession. Here parsimony means that states should impose the least restrictive requirements that serve the purposes of formalities without seriously undercutting the policy of free testation.<sup>32</sup> The law should set requirements at a level that tends to enforce the testator's intent, not frustrate it. Determining the proper level of formality for a will isn't easy. Too many required formalities frustrate the wishes of testators who fail to meet them. Too few formalities do not give us reliable enough evidence of what the testator wanted.

### C. A Two-Tiered Approach to Formalities

When legislatures and courts proliferate formalities, it's as if they imagine

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Fegley, 42 Colo. App. 47, 49, 589 P.2d 80, 81-82 (1978) (court denied probate to a handwritten will stating "I, Henrietta Fegley, being of sound mind and disposing memory, declare this instrument to be my last will"; the court said it wasn't signed); *In re Watkin's Estate*, 75 So. 2d 194, 196-98 (Fla. 1954) (statute requiring "attestation and subscription" had been replaced by a statute requiring only that a will be executed in the presence of "attesting" witnesses; nevertheless, court held that the new statute required subscription by the witnesses; will held invalid); *Young v. Young*, 20 Ill. App. 3d 242, 248, 313 N.E.2d 593, 597 (1974) (will held invalid because it contained no attestation clause and attesting witnesses couldn't remember whether execution 27 years earlier included full formalities); *Puckett v. Hatcher*, 307 Ky. 160, 161, 209 S.W.2d 742, 743 (1948) (will jointly executed by husband and wife held invalid because parts of the will were written by the other spouse); *Blankenship v. Blankenship*, 276 Ky. 707, 711, 124 S.W.2d 1060, 1062 (1939) (will with handwritten language altering and supplementing a typed form held invalid); *McNeill v. McNeill*, 261 Ky. 240, 243, 87 S.W.2d 367, 369 (1935) (typed will held invalid); *Adams' Executrix v. Beaumont*, 226 Ky. 311, 318, 10 S.W.2d 1106, 1109 (1928) (typed will signed by the testator held invalid); *Dorfman v. Allen*, 386 Mass. 136, 139, 434 N.E.2d 1012, 1014 (1982) (devise to witness' spouse held void); *Seab v. Seab*, 203 So. 2d 478, 479 (Miss. 1967) (will jointly executed by husband and wife held invalid because parts of the will were written by the other spouse); *Wright v. McDonald*, 361 Mo. 1, 12, 233 S.W.2d 19, 24 (1950) (will is invalid unless the witnesses know that they are signing a will); *In re Will of Smith*, 218 N.C. 161, 162-63, 10 S.E.2d 676, 677-78 (1940) (court held invalid a will with typed list of assets followed by handwritten disposition of them); *Thomas v. Dye*, 70 Ohio L. Abs. 118, 125, 127 N.E.2d 228, 234 (Ct. App. 1954) (letter denied probate despite reciting that it was "my last will"); *Gunn v. Phillips*, 410 S.W.2d 202, 205-06 (Tex. Civ. App. 1966) (admission of holograph to probate reversed, because the proponents had not proven that handprinted portions of the will were in the testator's handwriting, even though the witnesses identified the longhand portions and said that they were not familiar with testator's printing); *Dean v. Dickey*, 225 S.W.2d 999, 1000 (Tex. Civ. App. 1949) (typewritten will denied probate); *Thompson v. Royall*, 163 Va. 492, 495, 175 S.E. 748, 749 (1934) (unambiguous, but unwitnessed, written revocation of a will held invalid, because it was unwitnessed); *Graze v. Klein*, 150 W. Va. 513, 516-17, 147 S.E.2d 288, 291-92 (1966) (letter denied probate despite a court finding that it was testamentary); *In re Johnson's Will*, 175 Wis. 1, 5-10, 183 N.W. 888, 889-92 (1921) (devise to subscribing witness purged; other witnesses who saw testator sign could not be counted as witnesses because they did not sign; statute required only witnesses and was silent about the witnesses' signatures).

31. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 60-62 (1974) (discussing parsimony).

32. [T]he philosophy should be to impose only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through [the] failure of testators to know or comply with the requirements. In making this determination, careful attention should be given to the known habits of testators (particularly untutored ones) as illustrated by the thousands of cases decided since 1677.

Mechem, *supra* note 24, at 503.

"[A]ny requirement of transfer should have a clearly demonstrable affirmative value since it always presents the possibility of invalidating perfectly genuine and equitable transfers that fail to comply with it . . . ." Gulliver & Tilson, *supra* note 20, at 9.

what they would like a testator to do and then set up that aspirational standard as the minimum requirement for validity. This attitude is a confusion of aspirational and mandatory standards. A more sophisticated approach would encourage formalities that courts and legislatures consider desirable, while allowing wills to be admitted to probate even if they lack some of the desired formalities. This two-tiered approach is particularly likely to succeed in the area of wills because of the need to prove a will in probate.<sup>33</sup> If wills executed according to the aspirational standards are made easier to prove, then law firms are likely to follow the standards, without their being part of the legal minimum for validity.<sup>34</sup> Indeed, most states already use a sort of two-tiered approach for wills with affidavits attached. Wills executed with affidavits—so called “self-proved” or “self-proving” wills—are easier to admit in probate than wills without affidavits.<sup>35</sup> In Part VII, I will point out how self-proving affidavits could be adapted to ensure routine attestation without requiring it for formal validity.<sup>36</sup>

## II. HISTORY

### A. Statutory Sources of Formalities

American wills acts are based on two English sources—the Statute of Frauds of 1677<sup>37</sup> and the Wills Act of 1837.<sup>38</sup> Before the Statute of Frauds was passed, testaments conveying personal property could be oral. But they were usually written, unless the testator was on his deathbed.<sup>39</sup> Wills devising real estate, on the other hand, were governed by the Statute of Wills of 1540.<sup>40</sup> The Statute of Wills required that wills be in writing, but did not require a signature or witnesses.

The Statute of Frauds changed all that. Section 19 of the statute required that most testaments conveying personal property be written, but it also did not require a signature or attestation.<sup>41</sup> Section 5 of the Statute of Frauds required

33. See *infra* notes 184-96 and accompanying text.

34. See *infra* notes 184-96 and accompanying text.

35. See U.P.C. § 2-504 (1987).

36. See *id.*; *infra* notes 184-96 and accompanying text.

37. 29 Car. II, ch. 3 (1677); see generally A. REPPY & L. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* (1928); A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF LAND LAW* 164-72 (1973); Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943); Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354 (1983).

38. Statute of Victoria, 7 Wm. IV & 1 Vict., ch. 26 (1837).

39. T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 19 (2d ed. 1953); SWINBURNE, *TESTAMENTS AND LAST WILLS*, pt. 1, § 12 (1640); see also *id.* at 16 (“if a person died, confessed, he usually made a will”).

40. 32 Hen. VIII, ch. 1 (1540). Before this act, it was not possible to devise real estate. However, until the Statute of Uses, 27 Hen. VIII, ch. 10 (1535), was passed five years earlier, testators were allowed to force the inheritor of property to use it for the benefit of another. See 4 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 420-65 (1927).

41. 29 Car. II, ch. 3, § 19 (1677). Estates worth less than 30 pounds could still be passed by oral wills. Also, oral wills that met the stringent requirements of nuncupative and soldiers' and sailors' wills could still pass estates of any size. *Id.* §§ 19-23. A nuncupative will was an oral deathbed will, where the testimony of the witnesses is reduced to writing within six days or given in court within six months. *Id.* §§ 19-22. A soldiers' and sailors' will was an oral will made by a soldier in



that wills devising land

shall be in writing, and signed by the party so devising the same, or by other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.<sup>42</sup>

A last will and testament conveying both real and personal property had to meet the more stringent standards for real estate.<sup>43</sup>

The English Wills Act of 1837<sup>44</sup> influenced American law enormously, even though it was passed long after the American Revolution. It merged the formal requirements for devising real and personal property and set formal standards slightly different from the Statute of Frauds. The English Wills Act required wills to be (1) written, (2) signed at the end ("subscribed") by the testator or by someone at his direction and in his presence, and (3) attested and signed in the testator's presence by two or more witnesses.

These two English statutes proliferated formalities that Parliament thought desirable. They were largely followed by American jurisdictions. Some jurisdictions, for example, adopted the requirement that a will be subscribed, that is, signed at the end of the will. If a testator then signed somewhere else in the will, the will was invalid.<sup>45</sup> Other aspirational formalities not mentioned in the Statute of Frauds or the English Wills Act have been made mandatory by various jurisdictions. Because it might be good if a testator asked that the witnesses attest his will, some states require it.<sup>46</sup> With such a requirement, any will execution lacking a testator's request to witness is in effect deemed so unreliable or so tainted by fraud or undue influence that it can't be admitted to probate.<sup>47</sup> Some states require that the witnesses sign in the testator's line of sight, so that if a desk blocks the testator's view, the will is invalid.<sup>48</sup> Some jurisdictions require the testator to "publish" his will, that is, to indicate to the witnesses by word or

service or a sailor at sea. *Id.* § 23. Both are still allowed in many American jurisdictions, although in practice they are exceptionally rare and are an insignificant part of current will policy.

42. 29 Car. II, ch. 3, § 5 (1677).

43. T. ATKINSON, *supra* note 39, at 20. Atkinson further explains:

It was customary for a single instrument to dispose of both species of property, but two important distinctions were maintained. First it was necessary to secure probate by the church court so as to establish the disposition of the personality but this probate had no effect as to devises made in the same instrument. The validity of a devise was ordinarily tested in a common-law action of ejectment brought by the heir against the devisee or vice versa. The second distinction was that after-acquired personality might pass by the instrument but, in accordance with the earlier rule, devises were limited in their operation to land owned by the testator at the time of execution.

*Id.* (citations omitted). The rule governing after-acquired realty was changed by the Wills Act, 7 Wm. IV & 1 Vict., ch. 26, § iii (1837). T. ATKINSON, *supra* note 39, at 21-22.

44. Statute of Victoria, 7 Wm. IV & 1 Vict., ch. 26 (1837).

45. See 2 PAGE ON WILLS, *supra* note 3, §§ 19.57-19.67 (subscription); Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 619 (1960). Some states will allow the will to probate but delete the part of the will that follows the testator's signature. See Rees, *supra*, at 619.

46. See 2 PAGE ON WILLS, *supra* note 3, §§ 19.130-19.132.

47. See *id.*

48. See *id.* § 19.122; Gulliver & Tilson, *supra* note 20, at 10.

action that the document is his will.<sup>49</sup> It is not enough that the testator and witnesses sign a document clearly captioned as a will, with their signatures immediately following clauses repeating that the document is a will. Because it might be good if both witnesses were present together, many states make it mandatory.<sup>50</sup> Then every will in which the witnesses sign separately is struck down as inherently unreliable or tainted.<sup>51</sup> Also, wills have been struck down because the witnesses signed before the testator<sup>52</sup> or signed in the margin of the will.<sup>53</sup> So many formalities are required by one jurisdiction or another that it can take two pages just to state the rules for a will execution ceremony valid in all fifty states.<sup>54</sup> These formalities often trip up ignorant, careless, or poorly

49. Rees, *supra* note 45, at 620-21; Annotation, *Sufficiency of Publication of Wills*, 60 A.L.R.2d 124 (1958).

50. See 2 PAGE ON WILLS, *supra* note 3, § 19.128.

51. See, e.g., *Estate of Emart*, 175 Cal. 238, 165 P. 707 (1917). A good example of the harshness of this rule is the English case of *In re Groffman*, 1 W.L.R. 733 (High Ct. Just. 1968). In *Groffman* a testator brought the witnesses into the room one at a time, violating the statute's requirement that they be present together. *Id.* at 733. The court implied that its hands were tied and held the will invalid. *Id.* at 739. The purpose of requiring witnesses to be present together is to protect the testator's wishes from fraud or undue influence. Yet here the formality had more like the opposite effect; a formality meant to protect the testator's intent instead frustrated it.

52. 2 PAGE ON WILLS, *supra* note 3, §§ 19.139.

53. See *id.* § 19.137.

54. Here are the most important parts of that ceremony:

(1) If the will consists of more than one page, the pages are fastened together securely. The will specifies the exact number of pages of which it consists.

(2) The lawyer should be certain that the testator has read the will and understands its contents.

(3) The lawyer, the testator, and three persons having no interest whatsoever in the property disposed of by the will are brought together in a room from which everyone else is excluded. [In Louisiana one of the three must be a notary.] . . . The door to the room is closed. No one enters or leaves the room until the ceremony is finished.

(4) The lawyer asks the testator the following three questions:

(a) "Is this your will?"

(b) "Have you read it and do you understand it?"

(c) "Does it dispose of your property in accordance with your wishes?"

After each question the testator should answer "Yes" in a voice that can be heard by the three witnesses. . . .

(5) The lawyer asks the testator the following question. "Do you request Mrs. \_\_\_\_\_, Ms. \_\_\_\_\_, and Mr. \_\_\_\_\_ (the three witnesses) to witness the signing of your will?" The testator should answer "Yes" in a voice audible to the three witnesses.

(6) The witnesses should be standing or sitting so that all three can see the testator sign. The testator initials or signs on the margin of each page of the will. . . . The testator then signs his or her name at the end of the will.

(7) One of the witnesses reads aloud the attestation clause, which attests that the foregoing things were done. . . .

(8) Each witness then signs and writes his or her address next to the signature. The first witness to sign writes, under the spaces provided for the witnesses' signatures, "The foregoing attestation clause has been read by us and is accurate," and places his or her initials immediately below this line, as do the other witnesses when they sign. The testator and the other two witnesses watch each witness sign.

(9) [An optional self-proving affidavit may be used.] . . .

(10) The ceremony is finished. The door to the room is opened.

J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS AND ESTATES* 205-07 (3d ed. 1984). This particular procedure is based on earlier versions. See *id.* at 205 n.18 (citing W. LEACH, *CASES ON WILLS* 44 (2d ed. 1949); A. CASNER, 1 *ESTATE PLANNING* 134 (4th ed. 1980)).

represented testators.<sup>55</sup>

The Uniform Probate Code has shed the additional formalities and has distilled the main formalities down to their least restrictive alternatives. Table 1 compares the statutory formalities of the three basic approaches.

TABLE 1  
COMPARISON OF STATUTORY FORMALITIES

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<i>Statute of Frauds (1677)</i>	<i>English Wills Act (1837)</i>	<i>Uniform Probate Code</i>
Writing	Writing	Writing
Signature	<i>Subscription</i>	Signature
Attestation & subscription by 3 witnesses	Attestation & signature by 2 witnesses	Attestation & signature by 2 witnesses

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All three schemes require writing—typed, preprinted, or handwritten. The Uniform Probate Code chooses the simpler alternatives: signature over subscription and two witnesses over three. Attestation by witnesses—introduced in 1677 by the Statute of Frauds—is common to all three schemes (with some variations).<sup>56</sup> It's reasonable to ask whether any changes since 1677 have reduced the need for witnesses.

## B. Attestation—A Seventeenth Century Formality

### 1. The Reduction of Fraud

To evaluate the differences between 1677 and today, we must first understand the context in which the Statute of Frauds was passed. As its name implies, fraud was rampant. One contemporary described it as “epidemic” and estimated that two-thirds of all real estate litigation in Westminster Hall involved concealed prior encumbrances.<sup>57</sup> Land was often sold by people who did not own it. And those who did own it often sold it more than once.<sup>58</sup> There was little way for a buyer to know whether he was purchasing enforceable title. As Professor Hamburger explains, “Since the effect and even existence of wills were fruitful sources of dispute, recently inherited land often was of uncertain owner-

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55. See, e.g., Mechem, *supra* note 24, at 501-02; Gulliver & Tilson, *supra* note 20, at 9-12; see also *supra* notes 30, 54 and accompanying text; *infra* notes 83-91 and accompanying text.

56. Of course, the Statute of Frauds required a minimum of three witnesses and required them to subscribe or sign at the end of the will. See Table 1 in text.

57. N. PHILLPOT, 3 HARLEIAN MISCELLANY 302 (1671) (quoted in Hamburger, *supra* note 37, at 364 n.47).

58. Hamburger, *supra* note 37, at 355-64.

Land would be sold, mortgaged, or leased not just once but several times, to different persons, leaving the two or more purchasers, mortgagees, or lessees without their money and at least one of them without the land. Similar problems arose even when fraudulent intent was absent, since many sellers, although honest probably were reluctant to search for flaws in their titles.

*Id.* at 355.

ship, and its purchasers were vulnerable to fraud."<sup>59</sup> The Statute was proposed in an atmosphere of crisis: the Fire of London in 1666 had destroyed land records, forced rebuilding, created many confused estates, and fostered land disputes.<sup>60</sup> In addition, the Plague had generated many more than the usual number of corpses whose estates needed to be sorted out.<sup>61</sup> By imposing writing requirements on real estate transactions and writing and witnessing requirements on wills, the Statute made it easier to determine who actually owned property. In addition, the Statute was designed to induce the voluntary recording of real estate deeds by making recording a practical prerequisite to enforceability.<sup>62</sup>

By all accounts, within a few decades the Statute accomplished its purpose. Fraudulent real estate transactions became rare, the recording of deeds became commonplace, and court cases for fraudulent conveyancing almost disappeared.<sup>63</sup>

Thus, one change since 1677 is that fraudulent wills are seldom a problem. If one judges simply from the cases where wills are denied probate because attestation is botched or absent, extremely few involve the kind of fraud that the Statute of Frauds was designed to prevent. Almost all are defective because of ignorance or mistake.<sup>64</sup> With the current system for conveyancing and for registering deeds operating smoothly, abolishing the attestation requirement for wills would not return us to the chaos of the 1660s and 1670s.

## 2. Attestation as a Substitute for Probate

A second change since 1677 involves the reason for requiring that wills be attested. At first glance it seems strange that wills conveying land were singled out for this special formality. The obvious solution for clearing up uncertainties in title in the months after death would be to subject real estate to probate, a period of court-supervised administration during which the decedent's assets could be gathered up and distributed to the heirs or beneficiaries under the will. A bequest of personal property was already subject to probate, handled by the ecclesiastical courts.<sup>65</sup> But in 1677 there was no probate of land. This obvious reform occurred to the drafter of the Statute of Frauds, Matthew Hale. He thought the probate of land would be an improvement, but he feared that it would cause too great a burden on the common law courts:

I know not how the Case of Wills can be made much safer or better than it is; at least, unless the Insinuation thereof were under the

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59. *Id.* at 366.

60. See M. HALE, TWO TRACTS ON THE BENEFIT OF REGISTERING DEEDS IN ENGLAND 45-46 (1756) (written late 1660s, on file with the *North Carolina Law Review*); 11 *ENCYCLOPEDIA BRITANNICA*, London, 91 (15th ed. 1974).

61. See 11 *ENCYCLOPEDIA BRITANNICA*, London, 91 (15th ed. 1974).

62. See Hamburger, *supra* note 37, at 364-85.

63. *Id.* at 380-81.

64. See *supra* notes 30 & 55; *infra* notes 83-91 and accompanying text.

65. T. ATKINSON, *supra* note 39, at 18-20. If a dispute arose over a devise of land, an heir could sue the devisee for ejectment in the common law courts, or vice versa. *Id.*

Examination of temporal Courts; but that, perchance, would be thought too great a Charge; only it were well, if some greater Solemnity were required by Law in Wills, whereby lands are devised.<sup>66</sup>

Instead of probate for wills, Hale favored attestation.<sup>67</sup>

Today probate is common for real estate. Indeed, the need to clear real estate titles is the single most common trigger for probate. As Professor Langbein argues:

The cautious procedures of probate administration have seemed especially appropriate for realty, because the values tend to be large and the financing complex. In theory, the probate court should exercise a similar title-clearing function for all personalty, down to the sugar bowl and the pajamas, because only a court decree can perfect a successor's title in any item of personalty. Of course, ordinary practice quite belies the theory. Beyond the realm of vehicles and registered securities, which are covered by recording systems and thus resemble realty in some of the mechanics of transfer, formal evidence of title is not required to render personalty usable and marketable.

If a decedent's survivors can agree among themselves on a division of his personalty, they can distribute it without court decree. If a person dies owning just personal property, the decedent's family can often avoid probate.<sup>68</sup>

In 1677 attestation was a substitute for requiring the probate of land. The type of transfer that was subject to probate, a testament conveying personal property, did not have to be attested under the Statute of Frauds. On the other hand, today probate is more common in decedent's estates that include land. Since the law no longer refuses probate for land, we may no longer need the extra formality thought necessary when the protection of probate was unavailable.

### 3. Reversal of the Presumption Against Testacy

A third change since 1677 is the reversal of the common law presumption against testacy. Today courts frequently say that they should interpret wills if possible so as to avoid intestacy.<sup>69</sup> What is sometimes forgotten is that an older opposing maxim was used for real property, in an era when most wealth consisted of real property.<sup>70</sup> In its modern form, this maxim holds:

Every reasonable construction in the will must be made in favor of the

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66. M. HALE, *supra* note 60, at 44-45; see Hamburger, *supra* note 37, at 366-67.

67. See Hamburger, *supra* note 37, at 366-67.

68. See Langbein, *supra* note 27, at 1117. Of course, real estate can avoid probate if it is held in joint tenancy or trust.

69. See, e.g., *Wachovia Bank v. Buchanan*, 346 F. Supp. 665, 669 (D.D.C. 1972), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1973); *American Sec. & Trust Co. v. Garnett*, 81 F. Supp. 21, 22 (D.D.C. 1948); *Lewis v. Cockrell*, 80 F. Supp. 380, 384 (D.D.C. 1948); *Dorfman v. Allen*, 386 Mass. 136, 140, 434 N.E.2d 1012, 1015 (1982); *Estate of Rood*, 41 Mich. App. 405, 416, 200 N.W.2d 728, 738-39 (1972); *Vandergrift's Estate*, 406 Pa. 14, 26, 177 A.2d 432, 438 (1962); see also *Chater v. Carter*, 238 U.S. 572, 585 (1915) ("In construing [the trust], we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed.").

70. See T. ATKINSON, *supra* note 39, at 16; Langbein, *supra* note 27, at 1119.

heir at law; and he can be disinherited only by words which produce that effect clearly and necessarily, either by express terms or by necessary implication.<sup>71</sup>

Earlier statements of the maxim are stronger and more clearly show its origin in land law. In 1671, for example, Chief Justice Vaughan stated:

[T]he testator[']s intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend where the intention of the testator is not apparently, and not ambiguously to the contrary.<sup>72</sup>

Between 1677 and today our maxims have shifted. The rule protecting heirs of land has been largely displaced by the now more familiar rule favoring constructions that avoid intestacy.<sup>73</sup> Whereas earlier most wealth was subject to a rule favoring intestacy, today most wealth is subject to a rule favoring the validity of wills. Formalities should be adjusted to reflect current policy.

I do not, however, want to make too much of a pair of silly maxims. More important are societal changes that accompanied the shift in maxims. In 1677 ecclesiastical courts handled bequests of personal property.<sup>74</sup> They strongly favored testacy because they hoped to benefit from the practice. Indeed, clergy encouraged dying people to leave a testament conveying personal property, including a gift to the church.<sup>75</sup> To die without a testament was "scandalous" and a "horror," almost as bad as dying unconfessed.<sup>76</sup> Thus, the ecclesiastical courts encouraged freedom of testation, and the Statute of Frauds required that testaments bequeathing personal property be in writing, but not witnessed.<sup>77</sup>

The Statute of Frauds introduced the attestation requirement only for real property, which was handled by the common-law courts. There the attitude was different. Most wealth was in real estate.<sup>78</sup> Facilitating the inheritance of real

71. 4 PAGE ON WILLS, *supra* note 3, § 30.16; see 2 T. JARMAN ON WILLS 740-44 (1845); Baldwin, *The Interpretation of Wills—Jarman's Fifth Rule*, 1 COLUM. L. REV. 521 (1901); see also Doe v. Dring, 2 M. & S. 448, 452, 105 Eng. Rep. 447, 449 (1814) ("[T]he rule that the heir at law shall not be disinherited but by express words or necessary implication, must prevail."); Gardner v. Sheldon, in Vaughan 259, 268, 124 Eng. Rep. 1064, 1066 (1671) ("[T]he testator[']s intent ought not to be construed to disinherit the heir . . ."); Spirt v. Bence, in Croke, Car. I. 368, 369, 79 Eng. Rep. 921, 922 (1655) ("[T]he words in a will which disinherit the heir at the common law ought to have an apparent intent, and not to be ambiguous and doubtful . . .").

72. Gardner v. Sheldon, in Vaughan 259, 268, 124 Eng. Rep. 1064, 1066 (1671); see also Thomas v. Thomas, 6 T.R. 671, 677 (1796) (Ashurst, J.) ("The heirs at law must recover the possession of this estate, unless some other person be clearly and unequivocally entitled to take under the will.").

73. Compare 4 PAGE ON WILLS, *supra* note 3, § 30.14 with *id.* § 30.16 (many more citations in section favoring testacy than in section favoring heirs). In Jarman's 1845 list of 24 constructional rules for wills, most common rules are stated, including the rule favoring heirs. But the modern rule favoring testacy is not included. See 2 T. JARMAN ON WILLS 740-44 (1845).

74. T. ATKINSON, *supra* note 39, at 18-20.

75. Indeed, making a will and confessing were often combined. See *id.* at 16 ("if a person died, confessed, he usually made a will"). Abuse of this situation led to the Mortmain Act (1736), which voided gifts to churches or charity contained in wills executed too closely before death. See generally G. JONES, HISTORY OF THE LAW OF CHARITY 1532-1827 109-13 (1969) (discussing problems giving rise to Mortmain Act).

76. See 2 PAGE ON WILLS, *supra* note 3, § 19.3.

77. But see *supra* note 41.

78. See T. ATKINSON, *supra* note 39, at 16; Langbein, *supra* note 27, at 1119.

estate by children was an important policy in 1677,<sup>79</sup> and the courts were hostile to attempts to avoid it. After all, the right to convey land away from children had been conferred only a century earlier.<sup>80</sup> But today we would not consider it bizarre to disinherit children by leaving an entire estate to one's spouse.<sup>81</sup> Indeed, Professor Dunham, in his famous study of will-making practices in Illinois in the 1950s, found that every testator in his sample with a spouse and minor children disinherited the children in favor of the surviving spouse.<sup>82</sup> Because we do not consider it wrong to cut out one's children, we do not need an extra formality to protect us from doing it.

#### 4. The Decline of Deathbed Wills and the Protective Function of Attestation

A fourth change since 1677 is in the circumstances of execution. Centuries ago many, if not most, wills were executed on the deathbed.<sup>83</sup> As Matthew Hale explained, wills are "many times made in Extremity."<sup>84</sup> Yet today deathbed wills are rare. Most testators are not so feeble at execution that they need the protection of witnesses. And although attestation serves all the purposes of formalities, the protection of the testator from fraud, duress, and undue influence is accepted as attestation's main purpose.<sup>85</sup> Gulliver and Tilson argued that testa-

79. See *supra* notes 69-73 and accompanying text.

80. Statute of Wills, 32 Hen. VIII, ch. 1 (1540). Before this Act, it was not possible to devise real estate. However, until the Statute of Uses, 27 Hen. VIII, ch. 10 (1535), was passed five years earlier, testators were allowed to force the inheritor of property to use it for the benefit of another. See 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 421-67 (1922).

81. In the United States, no statutory or forced share is given to children that would allow them to take against the will, except in Louisiana. But children are generously provided for in most intestacy statutes, though less generously in many states since the promulgation of the *Uniform Probate Code*. Also, if the will makes no mention of children, they may qualify as pretermitted or omitted children. See, e.g., U.P.C. § 2-302 (1987) (providing an intestate share for some afterborn children omitted from the will).

82. See Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 256-58 (1963). A survey of attitudes toward succession found that 93% of the public thinks that the law should prevent a surviving spouse from disinheriting minor children. J. COHEN, R. ROBSON & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 76-78 (1958). The discrepancy between the two studies is discussed in Friedman, *supra* note 23, at 363 n.63.

83. See Gulliver & Tilson, *supra* note 20, at 10 & n.26; Langbein, *supra* note 20, at 497 & nn.41-42. Langbein points out that the draftsmen of the English Wills Act of 1837, 7 Will. IV & 1 Vict., ch. 26 (1837), still considered it common for wills to be made "in extremis." Langbein, *supra* note 20, at 497 n.42 (quoting 36 PARL. DEB. (3d ser.) 969 (1837) (Lord Langdale, M.R., moving the bill in the House of Lords, Feb. 23, 1837)).

84. M. HALE, *supra* note 60, at 44.

85. See, e.g., Gulliver & Tilson, *supra* note 20, at 9-10; Langbein, *supra* note 20, at 497-98.

Long experience in jurisdictions which permit holographic wills confirms that attestation and the many lesser formalities associated with the attestation ceremony are not essential to the dominant evidentiary, cautionary and channeling purposes of the Wills Act. Only where the protective policy is still valued is it fair to characterize attestation as indispensable to the policies of the Wills Act.

Langbein, *supra* note 20, at 498.

The courts have regularly asserted that the object of the almost uniform requirement that the witnesses attest in the testator's presence is to prevent the witnesses substituting some other paper for the will actually executed by the testator. . . . [I]t seems very improbable that any such substitution would be attempted, or that, if it were attempted, it would avoid detection. Furthermore, assuming the danger is not wholly hypothetical, the re-

tors are not particularly susceptible to pressure from those around them.

In spite of the benevolent paternalism expressed in some of the decisions interpreting these requirements, the makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or inherited, they are likely to be among the more capable and dominant members of our society. . . . [W]ills are probably executed by most testators in the prime of life and in the presence of attorneys. . . . [W]hile the provisions of the statutes of wills seeking to fulfill the protective function must be reckoned with doctrinally as part of our enacted law, this function is not sufficiently important in the present era to justify any more emphasis than these provisions require.<sup>86</sup>

Professor Langbein writes in a similar vein, calling the attestation requirement a "historical anachronism."<sup>87</sup>

Moreover, as Gulliver and Tilson have pointed out, the witnessing requirement gives little protection anyway.<sup>88</sup> Because it is fairly easy to find two agreeable witnesses, very little fraud, duress, or undue influence is prevented.<sup>89</sup> Most crooks are careful enough not to be tripped up by a simple formality. Instead, the witness requirement appears to be mainly a trap for the innocent. As long ago as 1757, Lord Mansfield observed: "In all my experience at the Court of Delegates, I never knew a fraudulent will, but what was legally attested; and I have heard the same from many learned civilians."<sup>90</sup> A will written before the last illness usually forecloses the more extreme forms of duress and undue influence; for if someone were forcing the testator to make a will, the testator could just revoke or revise it after the duress ended. Last, other substantive doctrines are designed to protect the testator—not only the laws against fraud, duress, and undue influence, but also the law of capacity. Tainted wills, whether witnessed

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quirement is not apt to prevent it, because fear of substitution by the witnesses assumes that they are dishonest, and, if that is true, they would be likely to testify that they signed in the presence of the testator, thereby precluding the issue of the violation of the statute being raised unless other witnesses were available. . . . The purpose of the requirement that the attesting witnesses be competent has been stated by various courts to be protection of the testator against imposition at the time of the execution of the will. . . .

Assuming that the postulated evil is serious enough to require attention, both the common law rule and the purging statutes are primarily retroactive, rather than preventive, in operation. They cancel the legacy of any witness who has placed himself in a position where he might conceivably exert improper influence to his own financial gain. But the reported decisions give the impression that the remedies are employed more frequently against innocent parties who have accidentally transgressed the requirement than against deliberate wrongdoers, and this further confirms the imaginary character of the difficulty sought to be prevented.

Gulliver & Tilson, *supra* note 20, at 10-12 (footnotes omitted).

86. Gulliver & Tilson, *supra* note 20, at 9-10.

87. Langbein, *supra* note 20, at 496. Although Langbein, Gulliver, and Tilson all attack the attestation requirement, they stop short of advocating its abolition, favoring instead a more liberal approach to its interpretation.

88. Gulliver & Tilson, *supra* note 20, at 10-12; *see also supra* note 85 (quoting their argument).

89. *See* Gulliver & Tilson, *supra* note 20, at 10-12; U.P.C. § 2-505 commentary (1987); *see also supra* note 85; *infra* notes 122-31 and accompanying text.

90. *Wyndham v. Chetwynd*, 1 Black. W. 95, 100, 96 Eng. Rep. 53 (K.B. 1757). Of course, today that is not strictly true.



or not, can still be attacked under any of these doctrines.<sup>91</sup> These substantive doctrines are much better suited for separating coerced wills from uncoerced wills.

In short, times change. The culture that gave rise to the attestation requirement is gone. Deathbed wills are rare. A policy favoring testation has replaced a policy against it. Attestation is no longer a substitute for the probate of land. Three centuries after the Statute of Frauds, moreover, wills play no significant role in fraudulent real estate transactions—and would not if we dropped the attestation requirement.

### III. WILL SUBSTITUTES

Various types of nonprobate transfers are used to pass property at death. These include insurance, pensions, revocable *inter vivos* trusts, Totten Trusts,<sup>92</sup> and joint bank or brokerage accounts.<sup>93</sup> Like wills, they are revocable gratuitous transfers effective at death. Since they are the functional equivalents of wills, they are often called "will substitutes" or "nonprobate wills."<sup>94</sup>

Most people think of will substitutes as the exception to our probate system, but in fact, it is probate that is the exception. Most property is passed outside probate, and only eight percent to forty percent of deaths in the United States lead to probate.<sup>95</sup> Over the last 150 years financial intermediaries have developed these will substitutes as free-market competitors to the state-run probate system. This change has paralleled a shift in the nature of wealth from real

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91. See U.P.C. § 2-505 commentary (1987); Gulliver & Tilson, *supra* note 20, at 9 ("[T]here are appropriate independent remedies for the various forms of imposition, and these prophylactic provisions [i.e., the attestation requirements] are therefore not, in the long run, of any essential utility except in instances where the imposition might not be detected.").

92. Totten trusts are revocable *inter vivos* trusts operated by banks. They get their name from *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904), which validated them in New York. In a Totten Trust, property is held in the name of the grantor, as trustee for the beneficiary. Typically, the grantor may remove or add money at any time, increasing or decreasing the value of the trust. He may revoke it entirely. The trust also revokes automatically if the beneficiary predeceases the grantor. It is also called a savings account trust, a tentative trust, or a poor man's will. For a general discussion of Totten Trusts, see RESTATEMENT (SECOND) OF TRUSTS § 58 (1959); Note, *Totten Trust as Testamentary Substitute*, 41 ALB. L. REV. 605 (1977); Note, *Savings Account Trusts: A Critical Examination*, 49 NOTRE DAME LAW. 686 (1974).

93. See generally Langbein, *supra* note 27, at 1109-15 (discussing the "four main will substitutes": life insurance, pension accounts, joint accounts, and revocable trusts).

94. See Lindgren, *A Unified Field Theory of Passing Property at Death* (unpublished manuscript) (on file with the *North Carolina Law Review*); Langbein, *supra* note 27, at 1108-09.

The Totten trust is functionally equivalent to a will in every respect. Like a will, it names a beneficiary, but gives him no solid legal interest unless the testator dies without changing his mind. Like a will, the Totten trust can be changed by going through the same formalities as those required for execution.

Friedman, *supra* note 23, at 369.

95. This tendency is discussed in Langbein, *supra* note 27, at 1117-18. Langbein describes various studies that show as few as 8.1% of deaths result in probate. See *id.* at 1118 n.42; see also Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (describing a study of data from a county in Michigan compared with similar records from London, England); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 244 (1963) (85% of deaths do not result in probate); Fletcher, Book Review, 46 WASH. L. REV. 619, 624-25 (1971) (15 to 40% of deaths result in probate); Langbein, *supra* note 20, at 509 n.85.

property to personal property,<sup>96</sup> from land owned outright to personal property held by financial intermediaries. As Roscoe Pound noted in 1922, "Wealth, in a commercial age, is made up largely of promises."<sup>97</sup> To pass property at death reliably, these financial institutions developed their own formalities. Most of these nonprobate transfers require writing and signature, but not attestation by witnesses. Even where the underlying law doesn't require any formalities, the institutions insist on these two formalities.<sup>98</sup> For example, many states still recognize oral trusts of personalty, but very few banks would ever accept a trusteeship over an oral trust. Before accepting a trusteeship, banks routinely require that the trust be in writing and be signed by the settlor.<sup>99</sup>

In the law of wills, the overriding fear is that unattested language will be used to pass property at death.<sup>100</sup> But this happens every day with will substitutes, with few problems or complaints. As the commentary to the *Uniform Probate Code* explains:

The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize.<sup>101</sup>

For these will substitutes, the writing and signature requirements are enough.

The main purpose of the attestation requirement is to protect the testator against fraud, duress, and undue influence. Yet we know from experience with will substitutes that witnessing isn't necessary to prevent these harms. If these evils were common and if witnessing could effectively prevent them, insurance companies and banks would probably insist on witnessing—both to make their financial products more attractive and to reduce their litigation costs.<sup>102</sup> Thus, among the ways of passing property at death, wills are exceptional in that they require attestation by two or three witnesses.

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96. Bostick, *The Revocable Trust: A Means of Avoiding Probate in the Small Estate?*, 21 U. FLA. L. REV. 44, 47 (1968).

97. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922) (quoted in Langbein, *supra* note 27, at 1119).

98. The formal requisites of wills serve two main purposes: to insure that dispositions are carefully and seriously made, and to provide reliable evidence of the dispositions. Those purposes are adequately served by the institutional setting and the signed writing normally involved in taking out insurance, opening a bank account, buying United States Savings Bonds, or entering a governmental pension system.

1951 REPORT OF NEW YORK LAW REFORM COMMISSION 587, 597.

99. Similarly, before there was a writing requirement for testaments conveying personalty, most testaments were still written. SWINBURNE, TESTAMENTS AND LAST WILLS, pt. 1, § 12 (1640); T. ATKINSON, *supra* note 39, at 19. Also, even in jurisdictions that allow holographs, most testators or their lawyers still use formal attested wills.

100. See Langbein, *supra* note 27, at 1139-40; Langbein & Waggoner, *supra* note 4, at 528; *infra* notes 165-67 and accompanying text; see also *McFarland v. Chase Manhattan Bank*, 32 Conn. Supp. 20, 337 A.2d 1 (1973) (court refuses to read "unattested language" into a will).

101. U.P.C. § 6-201 commentary (1987).

102. A few banks or insurance companies do require witnessing, but most don't. Among those that do, very few require two witnesses, the minimum formality for wills.

## IV. HOLOGRAPHIC WILLS

Requiring attestation for formal wills is difficult to reconcile with the increasing acceptance of holographic (handwritten) wills. Although some states have allowed holographic wills for centuries,<sup>103</sup> many states have adopted holographic will statutes under the influence of the *Uniform Probate Code*.<sup>104</sup> The *Code* provides that "[a] will . . . is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator."<sup>105</sup> Other approaches require that a holographic will be "entirely written, dated and signed by the hand of the testator"<sup>106</sup> or "wholly in the handwriting of the testator."<sup>107</sup>

Over half of American jurisdictions now allow holographic wills.<sup>108</sup> In essence, handwriting substitutes for attestation by witnesses. But handwriting is a poor substitute. The main purpose of attestation is protecting the testator, but handwriting gives little protection. As Gulliver and Tilson noted, "A holographic will is obtainable by compulsion as easily as a ransom note."<sup>109</sup> That is, someone could be pointing a gun at the head of the testator. We don't necessarily know anything about the circumstances of the execution of a holographic will. Handwriting merely provides a larger handwriting sample, which reduces the chance of forgery.<sup>110</sup> But forged wills are rare.<sup>111</sup>

Moreover, holographic wills seriously undercut the ritual or cautionary function, since a holographic will is sometimes no more formal than a letter.<sup>112</sup>

103. Virginia's statute dates back to 1751; Louisiana's derives from its French civil-law heritage. J. DUKEMINIER & S. JOHANSON, *supra* note 54, at 230. As to the origin of holographs, see Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 606-07 (1981); Parker, *History of the Holograph Testament in the Civil Law*, 3 JURIST 1 (1943); Comment, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. L.J. 293 (1967).

104. Professors Dukeminier and Johanson assert that 26 states now allow holographic wills: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. J. DUKEMINIER & S. JOHANSON, *supra* note 54, at 230 n.28.

105. U.P.C. § 2-503 (1987).

106. See, e.g., OKLA. STAT. tit. 84, § 54 (1981).

107. See, e.g., VA. CODE ANN. § 64-1-49 (1987); MISS. CODE ANN. § 91-5-1 (Supp. 1989) ("wholly written and subscribed").

108. See *supra* note 104 (list of 26 holographic states). The rest of the states should allow a holographic will in some choice of law situations, for example, if the will was valid in the state where executed or if the will was valid in the state where the testator was domiciled at the date of execution. See, e.g., *In re Marques' Will*, 123 N.Y.S.2d 877 (N.Y. Sup. Ct. 1953) (holographic will executed in California, a state allowing holographs, admitted to probate in New York, a state not allowing holographs); CONN. GEN. STAT. § 45-161 (1983) ("any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state").

109. Gulliver & Tilson, *supra* note 20, at 14.

110. See *id.* at 13. The only protection that handwriting gives us is this: If language is handwritten by the testator, we know that someone has not slipped in language the testator never saw. However, this concern is not important enough for us to disallow typed unattested wills or unattested wills prepared by lawyers. See *supra* notes 83-91 and accompanying text.

111. See, e.g., Gulliver & Tilson, *supra* note 20, at 10; Langbein, *supra* note 20, at 496; see *infra* note 193.

112. "A principal objection to holographic wills is that they serve the cautionary function poorly. A particular writing may be casual and offhand . . ." Langbein, *supra* note 20, at 495.

Indeed, letters written by the decedent to his family or friends are sometimes admitted to probate as holographic wills.<sup>113</sup>

In *Appeal of Thompson*,<sup>114</sup> for example, the testator left a letter thanking his niece for his recent visit and then wrote: "Catherine, I want you to know you are to get *all* I have when I die."<sup>115</sup> When asked later whether he had made a will, the testator said, "not exactly."<sup>116</sup> Nonetheless, the letter to the niece was admitted to probate as a valid holograph.<sup>117</sup>

Even more striking is the will in *In re Kimmel's Estate*.<sup>118</sup> In this case, a semi-literate letter with creative spelling was admitted to probate, even though most of the letter was about the cold winter, the possibility of a visit, and the advantages of pickling pork. Here are two sentences from the letter—one indicating its informality, the other containing its only testamentary language:

"I received you kind & welcome letter from Geo & Irvin all OK glad you poot your Pork down in Pickle it is the true way to keep meet every piece gets the same, now always poot it down that way & you will not miss it & you will have good pork fore smoking you can keep it from butchern to butchern the hole year round. . . . I will wright in my next letter it may be to ruff we will see in the next letter if I come I have some very valuable papers I want you to keep fore me so if enny thing hapens all the scock money in the 3 Bank liberty lones Post office stamps and my home on Horner St goes to George Darl & Irvin Kepp this letter lock it up it may help you out. . . .

Father"<sup>119</sup>

As rambling as this will is, nothing else could speak as eloquently about the failure of many valid holographs to serve the cautionary function. In *Kimmel*, "Father" was not cautioned that he was doing anything more than writing a letter.

Even a testator who sits down to write his own will would show more evi-

113. See *Estate of Blake v. Benza*, 120 Ariz. 552, 587 P.2d 271 (Ct. App. 1978) (letter held to be a valid holograph); *In re Estate of Button*, 209 Cal. 325, 287 P. 964 (1930) (suicide letter admitted to probate); *In re Estate of Morris*, 268 Cal. App. 2d 638, 74 Cal. Rptr. 32 (1969) (letter to financial consultants admitted to probate as a will); *In re Estate of Wolfe*, 260 Cal. App. 2d 587, 590, 67 Cal. Rptr. 297, 298 (1968) (court admitted to probate a letter that said, "I am leaveing [sic] my place . . . for you if I never call for it the place is yours"); *In re Estate of Crick*, 230 Cal. App. 2d 513, 41 Cal. Rptr. 120 (1964) (letters admitted to probate); *Succession of Cordaro*, 126 So. 2d 809 (La. Ct. App. 1961) (letter to testator's sister admitted to probate); *Estate of Hall*, 193 So. 2d 587 (two long, confusing letters admitted to probate), *modified on other grounds*, 195 So. 2d 94 (Miss. 1967); *In re Estate of Mey*, 200 Miss. 548, 28 So. 2d 125 (1946) (letter to three beneficiaries treated as a will); *In re Steiner's Will*, 142 Misc. 710, 255 N.Y.S. 397 (N.Y. Sup. Ct. 1932) (postcard held to be valid holograph); *Manikowske v. Manikowske*, 136 N.W.2d 465 (N.D. 1965) (letter to testator's attorney admitted to probate); *Appeal of Thompson*, 375 Pa. 193, 100 A.2d 69 (1953) (letter to niece admitted to probate); *In re Estate of Wenz*, 345 Pa. 393, 29 A.2d 13 (1942) (court admitted to probate a letter instructing a collecting agent how to dispose of testator's gas royalties if testator died without leaving a will); *Ingram's Estate v. Ingram*, 6 Utah 2d 149, 307 P.2d 903 (1957) (letter to niece admitted to probate).

114. 375 Pa. 193, 100 A.2d 69 (1953).

115. *Id.* at 195, 100 A.2d at 70.

116. *Id.* at 199, 100 A.2d at 72.

117. *Id.*

118. 278 Pa. 435, 123 A. 405 (1924).

119. *Id.* at 457, 123 A. at 405.

dence of formality and a cautionary approach to will drafting if he typed his will, rather than wrote it out longhand. In *McNeill v. McNeill*,<sup>120</sup> the testator executed a typed version of a handwritten will, mistakenly believing that the typed version was more formal. The Kentucky Court of Appeals refused to permit the typed will to be admitted to probate.<sup>121</sup>

It seems odd for a jurisdiction that allows holographs—and most do—to strike down an unwitnessed typed will, while admitting to probate a handwritten letter to a family member. Our current law even prefers handwritten letters to unwitnessed wills drafted by attorneys at the testator's request. A state that allows unwitnessed handwritten wills ought to allow unwitnessed typed wills.

## V. THE DILUTION OF THE ATTESTATION REQUIREMENT

When the Statute of Frauds was enacted, witnesses to a will had to be disinterested.<sup>122</sup> Imagine a will that leaves the entire estate to *A* and *B*, witnessed by *A* and *B*. Here *A* and *B* don't provide any protection against witnesses imposing their wishes on the testator. Thus, originally a will could not be proved if a witness took under the will. Nor could it be proved if the spouse of a witness was a beneficiary.<sup>123</sup>

But this harsh rule caused the invalidation of many good wills leaving property to family and friends.<sup>124</sup> Thus, following Parliament,<sup>125</sup> American jurisdictions adopted "purging statutes,"<sup>126</sup> which purge the interest of the attesting witness. In essence, these statutes provide that one can't be both a witness and a beneficiary. By making one be a witness, they favor the validity of the will over the validity of the witness's beneficial interest. Other, more clever statutes purge only the beneficiary's interest exceeding the amount he would have received in intestacy or under an earlier will.<sup>127</sup> Under this approach, a devise can still be completely purged, if the witness would take nothing under intestacy or an earlier will. And there are other variations on the purging statutes as well.<sup>128</sup> Yet even the purging statutes work a hardship, especially when an entire interest is

120. 261 Ky. 240, 87 S.W.2d 367 (1935).

121. *Id.* at 245, 87 S.W.2d at 369-70.

122. The Statute of Frauds required that witnesses be "credible." 29 Car. II, ch. 3, § 5 (1677). This was interpreted to mean disinterested. T. ATKINSON, *supra* note 39, at 309.

123. T. ATKINSON, *supra* note 39, at 309; *see also, e.g.,* Dorfman v. Allen, 386 Mass. 136, 434 N.E.2d 1012 (1982) (a devise to the spouse of a witness was held void); MASS. GEN. LAWS ch. 191, § 2 (1981) (any devise to a witness or a spouse of a witness is void); *see also* CONN. STAT. § 45-172 (1983) (text of this statute is provided *infra* note 128).

124. *See* Gulliver & Tilson, *supra* note 20, at 9, 12.

125. 25 Geo. II, ch. 6, § 1 (1752); *see* Rees, *supra* note 45, at 629-34.

126. For discussions of purging statutes, *see* 2 PAGE ON WILLS, *supra* note 3, §§ 19.73-19.110; Evans, *The Competency of Testamentary Witnesses*, 25 MICH. L. REV. 238 (1927); Rees, *supra* note 45, at 629-33.

127. For example, a California statute provides that if purging is necessary: "[T]he interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established." CAL. PROB. CODE § 6112 (West Supp. 1989).

128. A Connecticut statute provides:

Every devise or bequest given in any will or codicil to a subscribing witness, or to the husband or wife of such subscribing witness, shall be void unless such will or codicil is

purged. In some cases, gifts to churches or charities were purged because a member, officer, or creditor of the organization served as a witness.<sup>129</sup>

To prevent such unfortunate consequences, the *Uniform Probate Code* scrapped the requirement that witnesses be disinterested in the will.<sup>130</sup> Even if a witness takes most of the estate, the will is still valid. Since the witness requirement provides little protection when the witnesses can take under the will, the *Code's* gutting of the attestation requirement makes one wonder why we need it at all. The best explanation for the *Uniform Probate Code's* approach is that testators seldom need protection—and if they do, the attestation requirement doesn't provide enough protection to offset the damage it does to freedom of testation.

The official comments to this section of the *Code* are quite revealing:

Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.<sup>131</sup>

These arguments make sense. They explain why we don't need disinterested witnesses. But they also explain why we don't need witnesses at all. Indeed, the arguments in the comments apply nearly as well to abolishing the attestation requirement itself as to abolishing the disinterest requirement.

By introducing only minor variations, I can make the *Uniform Probate Code's* language support my position. The purpose of abolishing the witness requirement would not be to discourage the use of witnesses. We could ensure that witnesses would still be routinely used at executions. The innocent failure to use a witness on a home-drawn will would no longer be penalized, but the

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legally attested without the signature of such witness, or unless such devisee or legatee is an heir to the testator.

CONN. GEN. STAT. § 45-172 (1983).

129. See, e.g., *Crowell v. Tuttle*, 218 Mass. 445, 105 N.E. 980 (1914) (attesting witness had disqualifying interest under a will leaving \$300 to a church on the condition that the money be applied to the church's mortgage because the witness was the guarantor of that mortgage); T. ATKINSON, *supra* note 39, at 313-14; 2 PAGE ON WILLS, *supra* note 3, §§ 19.97-19.100.

130. The *Uniform Probate Code* provides:

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

U.P.C. § 2-505 (1987).

131. *Id.* § 2-505 commentary.

failure to use witnesses would itself be a suspicious circumstance. The will could still be challenged on grounds of undue influence (as well as fraud, forgery, duress, or lack of capacity). Last, most people who exercise undue influence over testators are careful to ensure that all the proper formalities are complied with.

The official comments are almost too persuasive for their purpose. In undercutting the disinterested witness requirement, they have unwittingly undercut the witness requirement altogether. Once the attestation requirement has been gutted, it should no longer be mandatory.

## VI. THE EFFECT ON ANCILLARY RULES OF LAW

### A. *Written Revocation*

Dropping the attestation requirement would also have a salutary effect on other rules of law. Chief among these is revocation. A testator can revoke her will in two ways—by a writing (a later will),<sup>132</sup> or by physical act (burning, tearing, obliterating, destroying, or canceling).<sup>133</sup> The written revocation of a will must meet the same formalities as required for an original execution of a will.<sup>134</sup> Thus, if we reduce the minimum formalities for executing a will, we also reduce the minimum formalities for revoking a will by writing. The advantage of this change might not seem obvious, but the problem should become clear when I contrast two examples.

In *Estate of Travers*<sup>135</sup> the testator's will was not found after death, and it was not known what had become of it. Even though an heir had had the opportunity to destroy it after the testator's death, the court presumed that the testator himself had destroyed it with the intent to revoke.<sup>136</sup> This reflects the law in most states.<sup>137</sup> Effective physical revocation can be done in private—without witnesses and without evidence about the circumstances of revocation. That is because the law presumes that, when a will is found in the possession of the testator in a mutilated condition, it was revoked by the testator himself.<sup>138</sup> And

132. *Id.* § 2-507 (1) ("A will or any part thereof is revoked (1) by a subsequent will which revokes the prior will or part expressly or by inconsistency . . .").

133. *Id.* § 2-507 (2) ("A will or any part thereof is revoked . . . (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.").

A will or a provision in the will can also be revoked by operation of law if after the will there is a change in circumstances—marriage, divorce, or the birth of a child not named in the will. *See, e.g., id.* § 2-301 (marriage); *id.* § 2-302 (pretermitted children); *id.* § 2-508 (divorce).

134. *See* U.P.C. § 2-507(1) commentary (1987); *supra* note 132.

135. 121 Ariz. 282, 589 P.2d 1314 (1978).

136. *Id.* at 283, 589 P.2d at 1315.

137. *See* T. ATKINSON, *supra* note 39, at 441-42.

138. *See, e.g., Stiles v. Brown*, 380 So. 2d 792 (Ala. 1980) (mutilated duplicate of will presumed revoked and evidence of decedent's oral declarations to the contrary is inadmissible):

More often than not there is no direct evidence of the testator's intent, or even whether it was he who destroyed or mutilated the will. In this situation the courts usually apply a rebuttable presumption of revocation. When the mutilated will is found among the testator's effects the presumption is that the mutilation was done by the testator and within the intent to revoke.

T. ATKINSON, *supra* note 39, at 442.

if a will known to have been in the testator's possession is never found, the law presumes that the testator himself destroyed the will, thereby revoking it.<sup>139</sup> Even though the circumstances are fully ambiguous, the law presumes revocation.

Allowing physical revocation in private is difficult to reconcile with requiring written revocation to meet all the wills act formalities. A good example was *Thompson v. Royall*.<sup>140</sup> In *Thompson*, the testator's attorney was or had been a judge. Mrs. Kroll, the testator, asked the judge to destroy her will. But instead he wrote the following on the back of the manuscript cover attached to the will and had her sign it:

"This will null and void and to be only held by H. P. Brittain, [a witness] instead of being destroyed as a memorandum for another will if I desire to make same. This 19 Sept. 1932.

'M. Lou Bowen Kroll' "<sup>141</sup>

Since only the signature was in Mrs. Kroll's handwriting, the document was not a valid holograph.<sup>142</sup> Since the document was not witnessed, it was not a valid formal will. And since her earlier will was not destroyed as she had requested, that earlier will was not validly revoked either by physical act or by writing.<sup>143</sup>

Even though Mrs. Kroll's attempted revocation was completely clear, the court did not give it effect. But if in ambiguous circumstances the will had been found ripped in half or not found at all, the court would have presumed that the will was revoked. When we clearly know the testator's wish to revoke, we ignore it. When we do not know what the testator wanted, we revoke. This doesn't make sense.

The purpose of requiring written revocation to meet full wills act formalities is to prevent an open-ended inquiry into the ambiguities of revocation. Yet for physical revocation, the law tolerates that kind of inquiry, even encourages it.<sup>144</sup> Thus, reducing the execution formalities would automatically have the ancillary effect of reducing the formalities for written revocation.<sup>145</sup> A signed

139. T. ATKINSON, *supra* note 39, at 442 ("The same presumption [as that applying to mutilated wills] is indulged if the will had been last heard of in the testator's possession and is not found at his death"); see, e.g., *In re Estate of Millsap*, 55 Ill. App. 3d 749, 371 N.E.2d 185 (1977) (lost original of will presumed revoked); *Bonner v. Borst*, 17 N.Y.2d 9, 214 N.E.2d 154 (1966) (lost will presumed revoked).

140. 163 Va. 492, 175 S.E. 748 (1934). The handling of the will discussed in the text paralleled the handling of a codicil, with the same disastrous consequences.

141. *Id.* at 494, 175 S.E. at 748-49.

142. Under the *U.P.C.*, it is clear that a document need not convey property to be a will. *U.P.C.* § 1-201(47) (1987) ("Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.").

143. *Thompson*, 163 Va. at 494-95, 175 S.E. at 749.

144. I say that the inquiry is encouraged because the presumption of revocation is rebuttable in physical revocation, while the presumption (if one wants to call it a presumption) that written revocation lacking attestation is invalid is irrebuttable.

145. This would not necessarily solve all problems with written revocation. Some courts require that a will be revoked by an instrument of equal formality, not allowing holographic wills to revoke formal attested wills. If attestation were made optional, would an unattested will be a document of equal formality with an attested will? I hope so. At least eliminating the attestation requirement



letter of revocation would be enough to revoke a will. Although we would still treat written and physical revocation differently, the disparity would be reduced.

### B. Holographic Wills

A second beneficial effect of abolishing the attestation requirement would be the cleaning up of problems arising in holographic wills. Courts have long had trouble with wills that are partly in the handwriting of the testator and partly typed, preprinted, or in the handwriting of someone else.<sup>146</sup> In *In re Estate of Thorn*,<sup>147</sup> the California Supreme Court struck down a handwritten will because the testator had stamped the name of his country home, "Cragthorn," several times in the body of the will. Thus, the will was not entirely in the testator's handwriting. In *In re Estate of Baker*,<sup>148</sup> on the other hand, the same court admitted to probate a holographic will handwritten on hotel stationery, even though the testator apparently tried to make the preprinted words, "Modesto, California," part of his will.<sup>149</sup> These early cases led many states to enact more lenient statutes, requiring only that the "material provisions"<sup>150</sup> of a holographic will be handwritten by the testator. But even these were not enough.

In *Johnson v. Johnson*,<sup>151</sup> the testator (a lawyer) typed nearly all of a will, but wrote out the end in longhand. He signed it, but there were no witnesses.<sup>152</sup> Since most of the will was typed, it did not qualify as a valid holograph. Nonetheless, the court validated the will, twisting doctrine to come up with a re-

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would make a sensible result more likely, because the distinction between formal and holographic wills would disappear.

146. See *Estate of Christian*, 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976) (will held invalid because it included preprinted language about executor's appointment); *Estate of Helmar*, 33 Cal. App. 3d 109, 109 Cal. Rptr. 6 (1973) (three-page holograph held invalid because of typed introductory clause); *Gunn v. Phillips*, 410 S.W.2d 202 (Tex. Civ. App. 1966) (admission of holograph to probate reversed because proponents had not proven that handprinted portions of the will were in testator's handwriting, even though the witnesses identified the longhand portions and said that they were not familiar with testator's printing); see also *Blankenship v. Blankenship*, 276 Ky. 707, 124 S.W.2d 1060 (1939) (will with handwritten language altering and supplementing a typed form held invalid); *McNeill v. McNeill*, 261 Ky. 240, 87 S.W.2d 367 (1935) (typed letter held invalid as a holograph); *Adams' Executrix v. Beaumont*, 226 Ky. 311, 10 S.W.2d 1106 (1928) (typed will signed by testator held invalid); *Succession of Jones*, 38 So. 2d 797 (La. Ct. App. 1949) (holograph held invalid because the date was not in the genuine handwriting of testator); *In re Smith's Will*, 218 N.C. 161, 10 S.E.2d 676 (1940) (typed list of assets followed by a handwritten disposition of them held invalid); *Dean v. Dickey*, 225 S.W.2d 999 (Tex. Civ. App. 1949) (typewritten will denied probate); cf. *Puckett v. Hatcher*, 307 Ky. 160, 209 S.W.2d 742 (1948) (will jointly executed by husband and wife held invalid because parts were written by the other spouse); *Seab v. Seab*, 203 So. 2d 478 (Miss. 1967) (same).

147. 183 Cal. 512, 192 P. 19 (1920).

148. 59 Cal.2d 680, 381 P.2d 913 (1963).

149. *Id.* at 683-84, 381 P.2d at 915. The *Baker* court said that the testator did not try to make "Modesto" part of his will, but here they were stretching the facts. The testator wrote his will on hotel stationery, crossing out the name of the hotel but leaving "Modesto." See *id.* at 684-85, 381 P.2d at 915-16. In addition, his earlier attested will and codicil had the words "Modesto, California" as a heading. *Id.* Thus, it is likely that he thought it necessary or desirable to leave the location on his holographic will.

150. U.P.C. § 2-503 (1987).

151. 279 P.2d 928 (Okla. 1954).

152. *Id.* at 929-30.

sult.<sup>153</sup> It said that the beginning and the end of the will were really two separate documents—a will and a codicil.<sup>154</sup> Then the court held that the handwritten end of the will, the supposed codicil, incorporated the earlier invalid typed will and gave legal effect to its terms.<sup>155</sup> This, of course, is nonsense, but it indicates the lies that courts will sometimes tell to get around a harsh and unnecessary rule of law, the attestation requirement.

Similar problems have arisen with recent cases using preprinted will forms. Is filling in the blanks enough to make the will entirely<sup>156</sup> or materially<sup>157</sup> in the handwriting of the testator? Some courts have allowed these as holographs,<sup>158</sup> while others have not.<sup>159</sup>

Arizona experienced a particularly strange progression that illustrates the confusion over partly handwritten wills. In 1972 in *In re Estate of Mulkins*,<sup>160</sup> the Arizona Court of Appeals held a fill-in-the-blanks holograph valid, despite a statute that required that a holographic will be entirely handwritten.<sup>161</sup> The Arizona legislature then passed a more generous holographic will statute, which required only that the will's material provisions be handwritten.<sup>162</sup> What happened next was odd; in 1981 in *In re Estate of Johnson*,<sup>163</sup> the Arizona Court of Appeals invalidated a fill-in-the-blanks holograph.<sup>164</sup> Thus, as the will statutes became more lenient, the Arizona courts became less forgiving.

153. See *id.* at 930-32.

154. *Id.* at 931-32.

155. *Id.*

156. See, e.g., OKLA. STAT. tit. 84, § 54 (1981) ("entirely written, dated and signed by the hand of the testator"). For other variations, see MISS. CODE ANN. § 91-5-1 (Supp. 1988); VA. CODE ANN. § 64.1-49 (1987).

157. U.P.C. § 2-503 (1987).

158. See *In re Estate of Mulkins*, 17 Ariz. App. 179, 496 P.2d 605 (1972) (testator wrote his will on a preprinted stationer's form, including much handwritten language; will held valid despite a statute requiring that the will be entirely handwritten); *Estate of Black*, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982) (testator wrote her will on three preprinted stationer's forms, including much handwritten language; will held valid despite a statute requiring that the will be entirely handwritten); *Fairweather v. Nord*, 388 S.W.2d 122 (Ky. 1965) (will written on stationer's form, including much handwritten language, admitted to probate); *Succession of Burke*, 365 So. 2d 858 (La. Ct. App. 1978) (will held valid even though testator merely filled in the blanks on a preprinted form).

159. See *In re Estate of Johnson*, 129 Ariz. 307, 630 P.2d 1039 (Ct. App. 1981) (even though statute only required that material provisions of a holograph be in testator's handwriting, will held invalid where testator merely filled in the blanks on a preprinted stationer's form because court did not find testamentary intent); *Estate of Christian*, 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976) (will held invalid because handwritten language incorporated preprinted language about executor's appointment); *In re Bower's Estate*, 11 Cal. 2d 180, 78 P.2d 1012 (1938) (will held invalid where testator merely filled in the blanks on a preprinted stationer's form); *In re Wolcott's Estate*, 54 Utah 165, 180 P. 169 (1919) (proponents offered for probate only the handwritten portion of a will written on a stationer's form; will held invalid because the court considered both the preprinted and the handwritten parts of the will as part of the same document); cf. *Estate of Baker*, 59 Cal. 2d 680, 381 P.2d 916, 31 Cal. Rptr. 36 (1963) (with holographic will written on hotel letterhead, court held that preprinted material did not invalidate will because testator did not incorporate it into the will).

160. 17 Ariz. App. 179, 496 P.2d 605 (1972).

161. *Id.* at 181, 496 P.2d at 607 (handwritten parts of will evidenced testamentary intent).

162. Act of Apr. 24, 1973, 1973 Ariz. Sess. Laws ch. 75, § 4 (codified at ARIZ. REV. STAT. ANN. § 14-2503 (1975)); cf. U.P.C. § 2-503 (1987) (similar provision).

163. 129 Ariz. 307, 630 P.2d 1039 (Ct. App. 1981).

164. *Id.* at 311, 630 P.2d at 1043 (handwritten portions of will did not indicate testamentary intent).

If the attestation requirement were dropped, the distinctions between holographic wills and formal wills would disappear, along with any need to characterize wills that are partly typed and partly handwritten.

### C. Correcting Mistakes

Abolishing the attestation requirement for wills may relax the current law against correcting mistakes in their terms. In *inter vivos* trusts, insurance, deeds, and contracts, a mistake in a written document may generally be corrected on a showing of "clear and convincing evidence."<sup>165</sup> But in wills, a mistake is almost never corrected.<sup>166</sup> Courts reason that to correct a mistake would in effect insert unattested language into the will.<sup>167</sup> Thus in *Connecticut Junior Republic v. Sharon Hospital*,<sup>168</sup> the Connecticut Supreme Court refused to allow evidence

165. Langbein and Waggoner wrote:

[I]n nonprobate transfers when the clear-and-convincing evidence standard has been satisfied, clauses omitted by mistake have been inserted; mistaken designations of the beneficiaries, of the property intended to have been the subject matter of the gift, and of the extent of the interest intended to have been granted to the beneficiary have been corrected.

Langbein & Waggoner, *supra* note 4, at 526 & n.14 (citing *Bosse v. Bosse*, 248 Ky. 11, 57 S.W.2d 995 (1933); *Mattingly v. Speak*, 67 Ky. (4 Bush) 316 (1867); *Merriam v. National Life & Accident Ins. Co.*, 169 Tenn. 291, 86 S.W.2d 566 (1935); *Griffin v. Stewart*, 101 Ga. 720, 29 S.E. 29 (1897)).

166. See Langbein & Waggoner, *supra* note 4, at 524-28. In that article, Langbein and Waggoner point out that some courts are willing to find ways around the no-relief rule. California and New Jersey permit extrinsic evidence to vary, not just supplement or interpret, language in the will. See *id.* at 555-66; see, e.g., *Estate of Taff*, 63 Cal. App. 3d 319, 133 Cal. Rptr. 737 (1976) (devise to "heirs" held to mean some heirs and not others); *Engle v. Siegel*, 74 N.J. 287, 377 A.2d 892 (1977) (devise to mother-in-law treated as devise to the mother-in-law's family, despite statutes specifying disposition in the event of lapse); see also *In re Snide*, 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981) (husband and wife mistakenly executed each other's wills in joint ceremony; court reformed mistake in belief that the testamentary scheme evidenced the testators' intent). In addition, several long-accepted doctrines can be understood as limited mistake doctrines—dependent relative revocation, pretermitted child statutes, omitted spouse statutes, relief for fraud, and so on. See Langbein & Waggoner, *supra* note 4, at 528-554.

167. See Langbein, *supra* note 27, at 1139-40; Langbein & Waggoner, *supra* note 4, at 528. Langbein and Waggoner explain:

The great obstacle to reformation in the law of wills has been remedial rather than evidentiary. The real problem has not been proving the mistake with adequate certainty, but remedying it in a fashion consistent with the requirements of Wills Act formality. When the particular mistake that has affected a will is one that would require a court to supply an omitted term or to substitute language outside the will in place of a mistaken term, the objection arises that the language to be supplied was not written, signed, and attested as required by the Wills Act. In these cases reformation would appear to have the courts interpolating unattested language into the will.

*Id.* (citations omitted). See also *McFarland v. Chase Manhattan Bank*, 32 Conn. Supp. 20, 337 A.2d 1 (1973) (court refused to read "unattested language" into will), *aff'd*, 168 Conn. 411, 362 A.2d 834 (1975).

168. 188 Conn. 1, 448 A.2d 190 (1982). The testator had made a 1960 will, followed by a 1969 codicil that deleted six of seven charities who were remainder beneficiaries of a trust and substituted eleven different charities for the deleted six. In 1975, the testator authorized his attorney to amend the will and codicil to bring his trust into compliance under the Tax Reform Act of 1969. The attorney drafted a 1975 codicil that made the requested changes but also mistakenly reinserted the original six charities in place of the eleven the testator wanted to benefit. *Id.* at 3-4, 448 A.2d at 192. The Connecticut courts declined to accept extrinsic evidence to vary the terms of the will. *Id.* at 9-12, 448 A.2d at 194-95. Justice Healy quoted language asserting that the rule against correcting mistakes in wills was "a sacred rule of property not to be departed from." *Id.* at 12, 448 A.2d at 195 (quoting *Comstock v. Hadlyme Ecclesiastical Soc'y*, 8 Conn. 254, 265-66 (1830), which itself was paraphrasing Lord Kenyon in *Goodtitle d. Richardson v. Edmonds*, 7 Term Rep. 633, 635, 640 (1798)).

that the drafter of a will had mistakenly typed the names of the wrong set of beneficiaries into a will. The court would not allow the evidence, because wills could not be reformed for mistake.<sup>169</sup> But in most jurisdictions, similar mistakes in a deed or an insurance beneficiary designation would have been corrected.<sup>170</sup> The reason for the difference in approach is inexplicable. Usually by the time the mistake is discovered, the signer of a life insurance beneficiary designation will be just as dead as the testator of a will. If the attestation requirement disappeared, perhaps mistakes in wills might become easier to correct.

#### D. Transfers That Are Testamentary and Void

The fourth problem that eliminating attestation might reduce is one that is fast disappearing on its own.<sup>171</sup> Some nonprobate transfers have been struck down as "testamentary and void."<sup>172</sup> That is, a transfer that was too much like a will but did not meet the formalities for a will would be invalidated by a court. As a theoretical matter, most will substitutes are the functional equivalents of a will and thus should be invalidated if this reasoning were generally followed. In the past, some bank accounts owned by the decedent but payable on death to another were held testamentary and void.<sup>173</sup> Occasionally, some unconventional will substitutes have been held testamentary and void.<sup>174</sup> But life insurance, trusts, and the other main will substitutes long ago jumped the hurdle when courts held them valid—mostly for specious reasons.<sup>175</sup> Removing the attestation requirement should lessen any jurisdiction's lingering doubts about particular transfers that might seem too will-like to be valid without attestation.

169. *Id.* at 14, 448 A.2d at 196.

170. Langbein, *supra* note 20, at 526-30.

171. It is not gone. In a 1985 case, a joint and survivor ownership of accounts and stock was struck down as testamentary and void. *Neuschafer v. McHale*, 76 Or. App. 360, 369, 709 P.2d 734, 739 (1985).

172. See Langbein, *supra* note 27, at 1125-34.

173. See McGovern, *The Payable on Death Account and Other Will Substitutes*, 67 NW. U.L. REV. 7, 9 & n.17 (1972). These payable-on-death accounts are now allowed by the *Uniform Probate Code*. U.P.C. § 6-201 (1987).

174. See, e.g., *Wilhoit v. Peoples Life Ins. Co.*, 218 F.2d 887 (7th Cir. 1955) (contract with life insurance company to reinvest proceeds held testamentary and void); *Thorpe v. Daniel*, 339 Mo. 763, 99 S.W.2d 42 (1936) (deed effective at death held testamentary and void); *Kanan v. Hogan*, 307 Mo. 269, 270 S.W. 646 (1925) (quitclaim deed "to take effect at and after my death" held testamentary and void); *Butler v. Sherwood*, 196 A.D. 603, 188 N.Y.S.2d 242 (1921) (a revocable quitclaim deed from a wife to her husband, on condition that he survive her, held testamentary and void), *aff'd*, 233 N.Y. 655, 135 N.E. 957 (1922); *In re Estate of Humphrey*, 191 A.D. 291, 181 N.Y.S. 169 (1920) (revocable gift of stock held testamentary and void); *Neuschafer v. McHale*, 76 Or. App. 360, 709 P.2d 734 (1985) (joint and survivor ownership of stock and accounts held testamentary and void); *Grace v. Klein*, 150 W. Va. 513, 147 S.E.2d 288 (1966) (letter held testamentary and void).

175. See Friedman, *supra* note 23, at 365-70; Langbein, *supra* note 27, at 1125-34. "Despite some trouble in fitting the Totten trust into accepted doctrine, the courts have found ways to legitimize this mode of bypassing the Statute of Wills." Friedman, *supra* note 23, at 369 (citations omitted); see also *Richards v. Worthen Bank & Trust Co.*, 261 Ark. 890, 552 S.W.2d 228 (1977) (trust not testamentary and void); *Denver Nat'l Bank v. Von Brecht*, 137 Colo. 88, 322 P.2d 667 (1958) (same); *Blanchette v. Blanchette*, 362 Mass. 518, 287 N.E.2d 459 (1972) (joint estate in stock not testamentary and void); *Pinckney v. City Bank Farmers Trust Co.*, 249 A.D. 375, 292 N.Y.S.2d 835 (1937).

If in the future wills could be unwitnessed, why worry about a nonprobate transfer that is also unwitnessed?

### *E. Formalities Related to the Attestation Requirement*

Abolishing the attestation requirement would also have a beneficial ancillary effect by abolishing those formalities related to the attestation requirement. In one fell swoop, not only the witness requirement would go, but also all those odd technicalities related to witnessing—the line of sight rules, the various presence requirements, the publication requirement, the request to witness, the disinterested witness requirement, the subscription requirement, and the order of signing rules.<sup>176</sup> These arguably nonpurposive rules can easily derail an innocent testator and should be eliminated even if the attestation requirement were retained.

### *F. The Dispensing Power and Substantial Compliance*

Last, abolishing the attestation requirement would solve some of the problems addressed by two closely related reform proposals, Professor Langbein's "substantial compliance" doctrine<sup>177</sup> and the "dispensing power" used in Israel, Manitoba, and several Australian jurisdictions.<sup>178</sup> Professor Langbein has argued that current law requiring *strict* compliance with will formalities should be replaced with a doctrine that would allow defectively executed wills to be admitted to probate if the formalities have been *substantially* complied with. The dispensing approach, on the other hand, allows a court to dispense with any formality in a particular case if it is proven that the testator intended the document to be his will. Thus, substantial compliance looks to whether formal compliance, though deficient, is sufficient to serve the policies of formalities. The dispensing doctrine looks instead to whether a defect or absence of a particular formality may be completely excused if the court is certain that the document was intended to be a will. Although these approaches make sense, no American state has yet adopted them, but proposed revisions to the *Uniform Probate Code* may open the door for the dispensing power in America.<sup>179</sup>

Many, if not most, execution defects involve the attestation requirement or the related formalities concerning the interaction between the testator and the witnesses. Thus, dropping the attestation requirement would automatically eliminate most of the defects that the substantial compliance and dispensing doctrines are designed to cure.<sup>180</sup> Interestingly, in a Canadian report on the problems that might arise under substantial compliance, the authors conclude

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176. For a discussion of these rules, see 2 PAGE ON WILLS, *supra* note 3, §§ 19.73-19.149.

177. See Langbein, *supra* note 20, at 489.

178. Langbein, *supra* note 28, at 45-51; see S. AUSTL. WILLS ACT AMEND. ACT (No. 2), § 9 (1975); Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A.J. 1192, 1195 (1979); Palk, *Informal Wills: From Soldiers to Citizens*, 5 ADEL. L. REV. 382, 384 (1976).

179. Joint Editorial Board for the Uniform Probate Code, U.P.C. § 2-503 (Dec. 1989 Draft).

180. Langbein, *supra* note 20, at 521.

that courts should be allowed to probate wills with seriously defective attestation, but not with seriously defective writing or signature.<sup>181</sup>

Professor Langbein's study of the experience with the dispensing power in South Australia found that in every reported case where attestation was defective or absent, the will was nonetheless reliable enough to admit to probate.<sup>182</sup> On the other hand, wills lacking writing or signature were not universally admitted to probate. Langbein concluded:

Implicitly, this case law has produced a ranking of Wills Act formalities. Of the three main formalities—writing, signature, and attestation—writing turns out to be indispensable. Because [the Wills Act] . . . requires a "document," nobody has tried to use the dispensing power to enforce an oral will. Failure to give permanence to the terms of your will is not harmless. Signature ranks next in importance. If you leave your will unsigned, you raise a grievous doubt about the finality and genuineness of the instrument. An unsigned will is presumptively only a draft . . . . By contrast, attestation makes a more modest contribution, primarily of a protective character, to the Wills Act policies. But the truth is that most people do not need protecting, and there is usually strong evidence that want of attestation did not result in imposition. The South Australian courts have been quick to find such evidence and to excuse attestation defects under the dispensing power.<sup>183</sup>

Forgiving attestation mistakes is the chief goal of the substantial compliance doctrine and a chief effect of the dispensing power, results that would be more easily won by eliminating the attestation requirement altogether.

## VII. ENSURING ATTESTATION WITHOUT REQUIRING IT FOR VALIDITY

The law could ensure routine attestation by witnesses without making it mandatory, without in effect conclusively presuming that unwitnessed wills are tainted by fraud or undue influence. In my view, the best way to ensure routine attestation is to make it part of a "self-proving will."<sup>184</sup>

Under current law, the attesting witnesses are part of the substantive law of wills, part of the formal requirements for a valid will. No matter how many witnesses were actually present at execution, at least two must have signed the will.<sup>185</sup> If they do not sign, the will isn't valid. It's not essential that the witnesses ever give testimony in court. If when probate is begun the attesting wit-

181. Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills 34-56 (1981); see MILLER, THE MACHINERY OF SUCCESSION 152 (1977); LAW REFORM COMMISSION OF MANITOBA, REPORT ON "THE WILLS ACT" AND THE DOCTRINE OF SUBSTANTIAL COMPLIANCE (1980).

182. See Langbein, *supra* note 28, at 22, 52.

183. *Id.* at 52 (footnotes omitted).

184. For a good discussion of problems with self-proved wills, see Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U.L.Q. 39 (1985).

185. See 2 PAGE ON WILLS, *supra* note 3, § 19.75. Even where a statute requires only that a will be "witnessed" or "attested" and says nothing about the witnesses signing the will, courts have uniformly held that witnessing or attesting a will requires the witnesses' signature or subscription. See *supra* note 3.

nesses are absent or unavailable, the will may be proved by other testimony.<sup>186</sup> Furthermore, the competency or credibility of the attesting witnesses is measured at the time the will is executed, not at the time it is to be admitted to probate.<sup>187</sup> Accordingly, witnesses to a will are not necessarily witnesses in court, and witnesses in court are not necessarily witnesses to a will.

The easiest way to prove a will in probate is to offer an affidavit of the attesting witnesses, swearing that they witnessed the execution of the will and that the testator was of sound mind and free from undue influence. In most jurisdictions, this affidavit may be executed at the same time the will is executed and made part of the will itself. This procedure is called a self-proved or self-proving will.<sup>188</sup> It contains not only the signatures of the testator and the attesting witnesses needed for formal validity, but also the sworn, notarized<sup>189</sup> testimony of the testator and the witnesses used to prove the will in court.<sup>190</sup> Self-proving wills are optional. The affidavit isn't necessary for formal validity. It simply makes the will easier to prove after death.

We could keep attestation routine by retaining witnesses for a self-proving will while eliminating the attestation requirement for the validity of wills. Law firms do not want to have to track down witnesses years after the execution of a will. Thus, they may get the witnesses' testimony made part of the will. Even if my proposal were adopted and witnesses were no longer required for a valid will, under current law the will would still need to be proved in probate.<sup>191</sup> The easiest way to prove a will is with witnesses who sign self-proving affidavits, but it need not be the only way.

A second approach ensuring attestation would require by statute that wills be attested by witnesses, but would not invalidate wills lacking that formality. This less desirable alternative may seem like an empty gesture, but most people, particularly lawyers, would abide by such a toothless provision. As an example of this approach to formalities, the New York wills act requires that witnesses write their addresses on the will, but it also provides that violating the requirement would not invalidate the will.<sup>192</sup> A variant of this approach would make

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186. See 2 PAGE ON WILLS, *supra* note 3, § 19.75.

187. See Estate of Parsons, 103 Cal. App. 3d 384, 390, 163 Cal. Rptr. 70, 74 (1980); see also 2 PAGE ON WILLS, *supra* note 3, §§ 19.85 & 19.102 (discussing competency); Evans, *The Competency of Testamentary Witnesses*, 25 MICH. L. REV. 238, 238 (1927) (same).

188. See U.P.C. § 2-504 (1987).

189. The signature of a notary public is required for a self-proving will. See *id.* § 2-504.

190. There are two common types of self-proving wills permitted by various states. A two-step self-proving will ends with the signatures of the testator and the attesting witnesses, followed by an affidavit signed by the testator, the witnesses, and a notary public. See, e.g., *id.* § 2-504(b). A one-step self-proving will simply removes the redundancy of making the testator and witnesses sign twice. The affidavit is merged into the end of the will and the testator, witnesses, and notary public each sign only once. See, e.g., *id.* § 2-504(a).

191. But see *id.* § 3-406 (initial proof of a self-proved will is nearly automatic and is conclusive for some purposes). I favor dispensing in most cases with the need to prove wills and with probate itself. After all, we don't require probate for will substitutes. But that's another story. See *id.* §§ 3-312 to 3-322 (succession without administration); Lindgren, *A Unified Field Theory of Passing Property at Death* (unpublished manuscript) (on file with the North Carolina Law Review).

192. N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(4) (McKinney Supp. 1981) ("[T]wo attesting witnesses . . . shall . . . affix their residence addresses at the end of the will. . . . The failure of a witness to affix his address shall not affect the validity of the will."); see *In re Wallace's Will*, 148

attestation a duty of the scrivener. Drafting a will for someone else without witness provisions or supervising a will execution other than one's own without using witnesses could subject the lawyer or other professional to a fine—say 200 dollars. Or the law could make him liable for all litigation expenses incurred in proving the will in probate. But the will itself would not be invalidated by the drafter's ignorance or carelessness.

A third way to handle unwitnessed wills would be to require some special proof to establish them. Those more concerned about forgery<sup>193</sup> than I am might find this approach superior to relying on a voluntary system of self-proved wills. Perhaps the proponents of an unwitnessed will could be forced to overcome a presumption that an unattested will was not genuine. Or perhaps we could raise the standard of proof to establish an unattested will. Instead of making the proponents of an unattested will prove its genuineness by a preponderance of the evidence, perhaps they should have to prove it by "clear and convincing evidence."<sup>194</sup> Or perhaps a mere handwriting analysis trying to establish that the testator's signature was not a forgery should be considered insufficient as a matter of law to establish an unattested will. Something more could be required to establish a will's genuineness, such as that it was found in the testator's safety deposit box, that a lawyer drafted it at the testator's request, that the testator spoke approvingly of the will to disinterested friends, or that there was a large handwriting sample in the will itself so that the threat of forgery is greatly reduced.

All these approaches reflect the observation that the best way to prove the validity of a will is to have witnesses present at execution. If there are no witnesses, the will is suspect, but not necessarily invalid. Much as under the current *Uniform Probate Code*, the use of interested witnesses is cause for scrutiny but not invalidity, so under my proposal an unwitnessed will would call for a closer look. Witnessed wills should be admitted to probate without any trouble. Unwitnessed wills, on the other hand, might trigger a judicial inquiry into their validity, if anyone wants to contest them. We can still serve the channeling function of attestation. Any decent law firm will routinely use the method designed to reduce litigation, just as they now use self-proved wills to reduce the cost and trouble of proving a will.

One remaining question is: If we abolished the attestation requirement, what would happen to the character and frequency of litigation? First, one should not be too sanguine about the success of the current seemingly rigid at-

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Misc. 867, 869, 265 N.Y.S. 898, 900 (1933) (failure to include address as required by statute not fatal to the will); *In re Phillips*, 98 N.Y. 267, 271 (1885) (same); *In re Estate of Johnson*, 75 N.W.2d 313, 316 (N.D. 1956) (failure to include address as required by statute not fatal to will); *Wattenbarger v. Wattenbarger*, 39 Okla. 531, 534, 135 P. 1141, 1142-43 (1913) (will validly executed, despite omission of witnesses' addresses as required by statute); *In re Estate of Anders*, 88 S.D. 631, 635, 226 N.W.2d 170, 172 (1975) (witnesses' failure to print their names and addresses on will "does not affect the validity of the will" even though state statute required this formality).

193. See Harris, *Genuine or Forged?*, 32 CAL. ST. B.J. 658, 660 (1957) ("Most forged wills are holographic."). Harris's attitude conflicts with the prevailing view of scholars that forgery is rare and that attestation provides little protection. See, e.g., Gulliver & Tilson, *supra* note 20, at 10; Langbein, *supra* note 20, at 496; *supra* notes 30, 55, 83-91 and accompanying texts.

194. Cf. Langbein, *supra* note 20, at 521.



testation rules in discouraging litigation. There have been several thousand American appellate opinions on the attestation requirement alone<sup>195</sup>—case reports that should leave any neutral observer wondering whether anything worthwhile is being accomplished. Courts, moreover, often decide like cases dissimilarly because some courts will strain to avoid the unduly harsh rules for formal validity. Thus, even where the case or statutory law seems to be clear, disappointed beneficiaries will still litigate to try to win their devises. Second, it is not clear whether litigation would increase or decrease without an attestation requirement. Nearly all of the Australian cases allowing unattested wills were not actually contested, but were litigated because of procedural rules special to Australia.<sup>196</sup> Third—and most important—the issues litigated would change for the better. Litigation about formalities would largely disappear; litigation about testamentary intent would increase. In other words, instead of judging litigation over whether there was adequate publication or whether the witnesses signed before the testator, the courts would try to decide whether a signed writing disposing of the testator's property was actually intended to be his will. The efficiency of any system of litigation isn't measured only by how many lawsuits are brought, but also by how successfully the disputes are settled. As the system stands now, the law denies probate to many wills that are untainted by fraud. This outcome is not efficient.

State legislatures have required attestation for making wills primarily because they believe that it would be a good thing to encourage attestation. One can induce desired behavior by the carrot or the stick—by giving some benefit to those who comply or by punishing those who fail. Legislatures have chosen the stick. I propose that we use a carrot, easier proof in court for attested wills. It is particularly cruel to punish testators who fail because of the ignorance or incompetence of their attorneys. If anyone needs to be punished, let it be the attorneys. To my mind, the most efficient system of testation is one that reduces formalities to a minimum, yet encourages testators to take additional precautions. We can secure the benefits of the attestation requirement for almost all wills without punishing those few testators who stumble along the way.

### VIII. CONCLUSION—"LESS IS MORE"

Attestation by witnesses is a poor means to an end. It's supposed to protect testators from the imposition of others, but it's mainly a trap for the unwary. Wills lacking attestation are not usually tainted by fraud or undue influence. And wills with attestation are not necessarily freely made. That is why the law has developed doctrines better suited to separating bad wills from good ones—doctrines that invalidate properly executed wills if they are tainted by fraud, duress, undue influence, or lack of capacity.

It is increasingly anomalous to require witnesses for wills, while allowing property to be passed at death through nonprobate transfers, which need not be

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195. *Page on Wills* cites about 2,000 attestation cases in its sections on attestation. See 2 *PAGE ON WILLS*, *supra* note 3, §§ 19.73-19.149.

196. Langbein, *supra* note 28, at 38.

witnessed. Most states also allow unattested handwritten wills.<sup>197</sup> The attestation requirement, moreover, has been so diluted that wills are now valid even if the witnesses are named as beneficiaries under the will.<sup>198</sup>

When Parliament introduced attestation for wills in 1677, times were different. Fraud was rampant. Deathbed wills were common.<sup>199</sup> Since will-making interfered with the right of children to inherit, the presumption for most property was in favor of intestacy.<sup>200</sup> As an extra formality for devising land, the attestation requirement was intended to compensate for the absence of probate.<sup>201</sup>

All this has changed. Fraud is rare—nor is attestation likely to prevent it.<sup>202</sup> Today few wills are made on deathbeds.<sup>203</sup> The current presumption favors testation and disfavors intestacy. Not only is land subject to probate, but the need for clearing title to real estate is the situation most likely to lead to probate.<sup>204</sup> When we consider these changes along with the rise of will substitutes and holographic wills, the attestation requirement begins to look strangely isolated and unprincipled. Attestation is a crude tool of social engineering designed for a period of chaos in conveyancing. By continuing to insist on attestation, our current legal system does not protect testators from others. Instead, it protects many testators from effectuating their own estate plans.

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197. *See supra* notes 103-21 and accompanying text.

198. *See supra* notes 122-31 and accompanying text.

199. *See supra* notes 83-90 and accompanying text.

200. *See supra* notes 69-73 and accompanying text.

201. *See supra* notes 65-68 and accompanying text.

202. *See supra* notes 30, 55, 83-91 and accompanying text.

203. *See supra* notes 84-87 and accompanying text.

204. *See supra* note 68 and accompanying text.

