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LEGACIES OF A PANDEMIC: REMOTE ATTESTATION AND ELECTRONIC WILLS

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The coronavirus pandemic has compelled governors and legislatures to fast-track remote attestation laws, a previously prohibited form of witnessing that has largely been left out of the thoughtful, nearly two-decades-long but largely unsuccessful, effort to validate electronic wills. This Article examines the unforeseen problems that have arisen in the rush to institute remote attestation in the current crisis, urges lawmakers to interpret the presence requirement as encompassing remote attestation, and predicts that the current experiment with remote attestation will speed the enactment of electronic-will legislation.

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I. INTRODUCTION

With COVID-19 and its variants now a leading cause of death in the United States and around the world,[1] many feel a new urgency to finalize their estate plans.[2] At the same time, health officials, in their effort to curb the rate of infection with the virus that causes COVID-19, discourage congregating in poorly ventilated indoor spaces.[3] This guidance makes everyday transactions more difficult to complete. Marriage ceremonies,[4] closing ceremonies,[5] and notarizations[6] can feel out of reach. Certainly, will execution ceremonies are now more difficult to conduct.[7] The threat posed by the pandemic and the necessary response to it have made people more eager to finalize their estate plans and simultaneously made achieving that goal elusive at best.[8]

The inability of attorneys to help testators execute their wills in the traditional manner—around a conference table in an office with the help of pre-arranged witnesses—has driven some eager individuals to resort to do-it-yourself will execution ceremonies while masked and observing social distancing guidelines. These ceremonies are conducted with an attorney's written guidance or by following the instructions found on a website or

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[1] Steven H. Woolf, Derek A. Chapman & John Hyung Lee, *COVID-19 as the Leading Cause of Death in the United States,* 325 JAMA 123 (2021); *Covid-19 Has Become One of the Biggest Killers of 2020*, THE ECONOMIST, https://www.economist.com/graphic-detail/2020/05/01/covid-19-has-become-one-of-the-biggest-killers-of-2020 [https://perma.cc/9TFW-UZBY]; Sabrina Tavernise & Abby Goodnough, *A Grim Measure of Covid's Toll: Life Expectancy Drops Sharply in U.S.*, N.Y. TIMES (July 21, 2021), https://www.nytimes.com/2021/02/18/us/covid-life-expectancy.html [https://perma.cc/Q4ME-BQN2].

[2] Benjamin Mueller, *Where There's a Will in England, There's a Way*, N.Y. TIMES (May 4, 2020), https://www.nytimes.com/2020/04/28/world/europe/will-writing-coronavirus.html [https://perma.cc/YST7-XQU3].

[3] *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html [https://perma.cc/8QKX-5F8L].

[4] *See, e.g.*, PROCEDURES FOR VIRTUAL MARRIAGE CEREMONIES CONDUCTED BY NON-CITY CLERK'S OFFICE MARRIAGE OFFICIANTS, OFF. OF THE CITY CLERK OF THE CITY OF NEW YORK, https://static1.squarespace.com/static/5f2954720ae34d61da944f39/t/5f5908ea7a5fea1b72f310e6/1599670563910/Celebrant+Procedures+for+Covid+Virtual+Weddings [https://perma.cc/4PQQ-N9EX].

[5] Ga. Exec. Order No. 03.31.20.01 (Mar. 31, 2020) (authorizing the use of real-time audio-visual communication technology to assist in notarizing real estate documents).

[6] REVISED UNIF. LAW ON NOTARIAL ACTS (UNIF. L. COMM'N 2021).

[7] Leanne Fryer Broyles & Randy Fisher, *Estate Planning in Times of Social Distancing*, 47 EST. PLAN. 9 (2020); David Horton & Reis Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. 18 (2020).

[8] Mueller, *supra* note 2.

contained in a kit purchased at a neighborhood drugstore.[9] Others are putting off estate planning for another day. The problems inherent in either approach are well known to estate planners.[10] Just as putting off medical care can be disastrous,[11] postponed or botched estate planning can have negative consequences. These consequences can range from one's assets being distributed to unintended beneficiaries to lost opportunities to name a guardian for one's children or a decision maker in the event of one's own incapacity. Recognizing the dilemma, on September 4, 2020, the British Lord Chancellor issued an executive order temporarily amending the Wills Act by defining the presence of witnesses to include "presence by means of videoconference or other visual transmission."[12] The amendment applies to wills executed between January 31, 2020, and January 31, 2022.[13] The executive order is similar to the many legislative enactments and executive orders across the United States that have created temporary exceptions to will execution rules as a way of lessening the impact of the coronavirus's disruption of everyday life.[14]

The widespread and keen interest in remote attestation comes at a time when the most prominent proposal for the reform of will-execution law has, for many years, been to permit the use of electronic wills (i.e., wills created and stored in digital form and signed electronically). In contrast to the rapid embrace of digitally-executed business transactions in the past two decades,[15] the move toward electronic wills has been sluggish. Only a few courts and legislatures have considered electronic wills, and unlike digital contracts and other documents that proliferate in the business realm, electronic wills are currently permitted in only a handful of states.[16] Before the pandemic, even

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[9] *Id.*

[10] Gerard G. Brew, *Revised Commentary of ABA Taskforce on Do-It-Yourself Estate Planning,* 30 PROB. & PROP. (Nov. & Dec. 2016) (describing the potential pitfalls of do-it-yourself estate planning).

[11] Saqib Masroor, *Collateral Damage of COVID-19 Pandemic: Delayed Medical Care*, 35 J. CARD. SURG. 1345 (2020) (examining how delays "in seeking care can lead to increased morbidity and mortality").

[12] The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020, 2020 No. 952 art. 2 (UK), https://www.legislation.gov.uk/uksi/2020/952/introduction/made [https://perma.cc/B65F-P3TL].

[13] *Id.*

[14] *Emergency Remote Notarization and Remote Witnessing Orders*, AM. COLL. OF TR. & EST. COUNS. (Dec. 23, 2020), https://actec.org/resources/emergency-remote-notarization-and-witnessing-orders [https://perma.cc/ZY9F-FE67].

[15] Tony Bradley, *2019 Has Been a Very Good Year for Ironclad and Digital Contracting*, FORBES (Dec. 12, 2019), https://www.forbes.com/sites/tonybradley/2019/12/10/2029-has-been-a-very-good-year-for-ironclad-and-digital-contracting/?sh= 7331befe61c8 [https://perma.cc/6G4T-TD3D].

[16] Before the pandemic, courts in three states had admitted electronic wills to probate, namely, Tennessee, Ohio, and Michigan. *See* Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct.

in those progressive states, remote attestation was largely out of the question. Purveyors of "online wills" have appeared on the scene to offer a digital approach to estate planning, but in the prevailing regulatory environment, their services reduce to little more than ink and paper wills. Shortly before the pandemic, the Uniform Laws Commission ("Commission") promulgated the Uniform Electronic Wills Act ("UEWA").[17] Carefully and thoughtfully drafted, the UEWA appears to be gaining momentum, but for reasons and under conditions its drafters could not have anticipated. In short, it has been the exigencies of the pandemic that have sped the entry of the digital ethos of the marketplace into the estate planning sphere.

Now that many states have so rapidly embraced remote attestation, albeit on an emergency basis, there has been a seismic shift in estate planning practice. Estate planners now find themselves experimenting with methods of electronic witnessing in an environment still largely unreceptive to digital wills. This odd and unexpected change of course presents both the difficulties and the opportunities that are the subject of this Article.

This Article first takes a close look at how remote attestation has been largely left out of the nearly two-decades-long discussion of electronic wills and examines the problems and possibilities that have arisen in the rush to institute it in the current crisis. In a review of the current situation, this Article focuses in particular on the problem of interjurisdictional will execution posed by remote attestation and how that problem should be addressed under prevailing choice-of-law norms. This Article also makes two normative and predictive claims. First, although the presence requirement in current legislation was not crafted with remote attestation in mind, judicial decisions that purport to narrow the legally permissible scope of presence to a "single-room" or "through-a-window" standard are unjustifiably restrictive. The purpose of the requirement is ill-served by a physically restrictive conception of what qualifies as presence and well-served by the safeguards of remote attestation. There is thus good reason to

App. 2003); *In re* Estate of Castro, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013); *In re* Estate of Horton, 925 N.W.2d 207 (Mich. Ct. App. 2018). The Tennessee court ruled that the electronic will before it complied with the will-execution statute. *Taylor*, 134 S.W.3d at 834. The Ohio and Michigan decisions relied instead on the harmless error rule. *In re* Estate of Castro, No. 2013ES00140; *Horton,* 925 N.W.2d at 214. Arizona, Florida, Illinois, Indiana, Maryland and Nevada recognize electronic wills by statute. ARIZ. REV. STAT. ANN. § 14-2518 (2019); FLA. STAT. § 732.522 (2021); 755 ILL. COMP. STAT. 6/1-1; IND. CODE § 29-1-21-1 (2021); MD. CODE, ESTATES AND TRUSTS LAW § 4-102(b)(3)(ii), (c)-(e) (2020); NEV. REV. STAT. ANN. § 133.085 (2017). In addition, Colorado, North Dakota, Utah, and Washington have enacted the Uniform Electronic Wills Act. *See* ELEC. WILLS ACT (UNIF. L. COMM'N Draft Jan. 22, 2019), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=506a61da-e7cc-9b69-0fe1-8df8df6bf431 [https://perma.cc/H3HC-WTFS]. Georgia, Massachusetts, the District of Columbia, and the United States Virgin Islands are currently considering enacting the Uniform Electronic Wills Act. *Id.*

[17] UNIF. ELEC. WILLS ACT (2019).

advocate for the inclusion of remote attestation within the definition of presence in the absence of express legislative provisions to exclude it.

Second, although remote attestation may seem to some as too radical a proposal that could delay the advent of electronic wills, this Article will instead be the currently widespread use of remote attestation across the country that will ultimately speed the enactment of electronic-will provisions. This Article supports these propositions with a searching exploration of the presence requirement and with the results of experiments in remote attestation conducted by approximately eighty participants in the summer and fall of 2021.

II. WILLS FOR A DIGITAL AGE

A properly executed will is "the best evidence of the intent of the sound-minded, freely acting testator."[18] Thinking about how this ideal might be met in the digital age has preoccupied scholars for decades. Individuals can conduct so much of their business online today, but surprisingly, there is no readily available online or digital manner of executing a will. A common refrain is that wills law is "behind the times" and could do more to "catch up" with technology.[19] Strict judicial interpretation of old legislation is the primary driver of wills law's reputation as hidebound. It is not the purpose of this Article to explore the reasons for this legal lethargy except to point out that there is both judicial and legislative hesitation to expand what counts as due execution. The judicial hesitation stems from a fear that fraud may more readily creep into the proceedings if courts relax their interpretation of will-execution requirements.[20] At the legislative level, there is very little public momentum behind devoting resources to updating an area of the law that appears to be performing more or less adequately.

The problem with digitizing the creation and storage of wills is not that there is a requirement that a will be memorialized with pen and paper. Nonetheless, the leap from physical wills to electronic wills is a difficult one to make. Part of the difficulty is that the idea of an electronic will suffers from imprecision. The Uniform Electronic Wills Act defines an electronic will as a will "executed electronically,"[21] meaning with "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar

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[18] Turano, McKinney Practice Commentary, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (2021).

[19] Kyle B. Gee, *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, The Uniform Law Commission's Work, and Other Recent Developments*, 28 OHIO PROB. L.J. 126, 127 (2018) (urging a broad conception of the movement as one seeking to modernize the law of wills) [hereinafter Gee, *"Electronic Wills" Revolution*]; *Developments in the Law—More Data, More Problems*, 131 HARV. L. REV. 1715, 1716 (2018).

[20] *See In re* Proley's Estate, 422 A.2d 136, 138–39 (Pa. 1980); *In re* Pavlinko's Estate, 148 A.2d 528, 530 (Pa. 1959) (*citing In re* Bryen's Estate, 195 A. 17, 20 (Pa. 1937)).

[21] UNIF. ELEC. WILLS ACT § 2(3) (2019).

capabilities."[22] A conceptualization more in keeping with an electronic will that can be given effect is that an electronic will is a will recorded in an electronic format, executed electronically, and access to which requires a device powered by electricity.[23] It is best exemplified by creating and executing a will with the aid of word processing software and saving it to the hard drive of a computer. If a will is printed out and executed with a pen, the will is no longer considered electronic.[24] The essentials of an electronic will, then, are the underlying electronic writing, the electronic signatures embodied in it, and its safekeeping in electronic storage. For this reason, online wills are by and large not electronic wills, since online wills contemplate the testator's plugging information into the fields of an online form, the generation of an unexecuted will, its reproduction of the electronic document on paper, and its execution and attestation in the usual fashion. Online wills are best described as do-it-yourself wills subject to the same potential defects of any will that is executed outside the supervision of an attorney.[25]

Despite courts' early rejections of videotaped and tape-recorded wills as lacking the character of a "writing,"[26] the statutes describing will execution do not in and of themselves preclude electronic writings from serving as wills. Current enactments require that wills be, at a minimum, "in writing" and "signed," requirements Professor James Lindgren has dubbed the "print paradigm."[27] But because the "signature" and "writing" requirements do not mean that a will's validity depends upon the use of pen and paper,[28] the early decisions found electronic wills to be in alignment with existing provisions.[29] States in favor of electronic wills may thus not feel any urgency

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[22] UNIF. ELEC. WILLS ACT § 2(1) (2019).

[23] *See, e.g.,* FLA. STAT. § 732.521; 755 ILL. COMP. STAT. 6/1-20; NEV. REV. STAT. ANN. § 133.085.

[24] UNIF. ELEC. WILLS ACT pref. n. (2019) (describing the act's concern as wills executed electronically rather than on "something tangible (usually paper)").

[25] Will execution ceremonies conducted by testators using instructions written by their attorneys are not a best practice. *See In re* Estate of Falk, 47 A.D.3d 21, 28 (N.Y. App. Div. 2007); *In re* Estate of Rimerman, 139 Misc. 2d 506, 509 (N.Y. Sup. Ct. 1988).

[26] *See, e.g., In re* Estate of Reed, 672 P.2d 829, 833 (Wyo. 1983) (tape-recorded will) ("The use of a tape recording or other type of voice print as a testamentary instrument is a decision for the legislature to make. We will not enlarge, stretch, expand or extend the holographic will statute to include a testamentary device not falling within the express provisions of the statute."); *see also* UNIF. PROB. CODE § 2-502 cmt. a (2019). Videotapes of the will execution ceremony may be used as evidence of the genuineness of the will, however. *See, e.g.*, IND. CODE § 29-1-5-3.2. A videotape of a will execution ceremony could be useful evidence in defending against a claim that a will was not properly executed or was the product of testamentary incapacity or undue influence; Gerry Beyer & William R. Buckley, *Videotape and the Probate Process: The Nexus Grows,* 42 OKLA. L. REV. 43, 48–49, 74 (1989).

[27] James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1021 (1992).

[28] JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 273-74 (8th ed. 2009) (listing a tractor fender, undergarments, a chest of drawers, a wall, etc.).

[29] *See, e.g.*, Taylor v. Holt, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003).

to make explicit provision for them in their wills acts. Other courts have admitted electronic wills to probate based on the harmless error doctrine,[30] which excuses mistakes in the execution of wills and is discussed in more detail below in connection with the presence requirement.[31] In addition, a few states have amended their statutes to make explicit their inclusion of electronic wills.[32]

A more difficult leap to make in the age of digitization is in introducing any element of remoteness into the will-execution equation. The risk is that remoteness would undermine the belief that the witnessing feature of a will's execution requires the physical presence of the testator with the witnesses. Holographic wills, wholly in the testator's handwriting and signed by the testator,[33] are obviously one solution in that they do not require witnesses, but only a bit more than half of the states allow them.[34] Moreover, their informality and indelible association with litigation about testamentary intent make holographic wills undesirable in matters of estate planning.[35] The Uniform Probate Code's signature harmless-error rule might be useful for excusing the lack of witnesses, but it is available in even fewer states than are holographic wills, some twelve as of this writing,[36] one having enacted it in response to the coronavirus pandemic.[37]

The direction in the uniform laws realm has been toward promoting electronic wills and, albeit less enthusiastically, remote attestation. As mentioned above, in 2019 the Commission promulgated the UEWA, emphasizing electronic documents and signatures.[38] The comments to the UEWA reveal that the drafters did not consider the execution of wills via Zoom, WebEx, or other providers of virtual meeting spaces to be a viable

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[30] *In re* Estate of Castro, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013), for example, relies on the harmless error doctrine suggesting that the electronic execution was not in conformity with the rules of due execution but could be excused as harmless given the clear and convincing evidence that the testator intended the document to be his will. Kyle B. Gee, *Beyond Castro's Tablet Will: Electronic Wills Around the World and Re-Visiting Ohio's Harmless Error Statute*, 26 OHIO PROB. L.J. 149, 151 (2016).

[31] *See infra* notes 98–99 and accompanying text.

[32] *See supra* text accompanying note 16.

[33] NEB. REV. STAT. § 30-2328.

[34] JESSE DUKEMINIER & ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 269 (8th ed. 2009) (listing twenty-seven states).

[35] Edward A. Haman, *Holographic Will: Is a Handwritten Will Valid?*, LEGALZOOM (June 28, 2021), http://www.legalzoom.com/articles/holographic-will-is-a-handwritten-will-valid [https://perma.cc/C7H9-469P] (describing holographic wills as recommendable only "in an emergency situation as a last resort").

[36] JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 643-46 (10th ed. 2017) (listing the eleven states that have adopted a version of the Uniform Probate Code's harmless error rule: California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, Oregon, South Dakota, Utah, and Virginia).

[37] MINN. STAT. § 524.2-503 (2020).

[38] UNIF. ELEC. WILLS ACT § 5(a)(3) (2019).

concept in the absence of a legislative sea change.[39] In addition to validating electronic wills, the Act offers remote attestation.[40] Recognizing that remote attestation cannot satisfy judicial interpretations of the presence requirement that accept nothing short of physical presence, the UEWA's remote-attestation provisions invent the concept of "electronic presence." Electronic presence is defined as "the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location."[41] Taken to its logical extreme, electronic presence eliminates the requirement of physical presence and substitutes the requirement of presence in real time. As an alternative to witnessing altogether, the UEWA offers legislatures the option of allowing wills to be notarized *instead of* witnessed. The provision is consistent with a 2008 amendment to the Uniform Probate Code that to date has had little success.[42]

The UEWA de-emphasizes remote attestation by stating its intent not to alter the witnessing requirements for wills established by each state but instead to make remote attestation optional for electronic wills.[43] By bracketing a provision that is itself more controversial than electronic wills, the Commission likely believed the UEWA would be more palatable to legislatures that were on the fence about introducing digital elements into will executions. The drafters of the UEWA shrewdly recognized that many states would not be willing to embrace electronic wills and electronic presence all at once but would prefer that the execution of an electronic will take place with the testator and the witnesses in the physical presence of each other.[44] The Commission thus made remote attestation an "option," a mechanism it employs for controversial provisions it believes states may disfavor.[45] As discussed in more detail in Part IV.C., to date a few states have enacted or are considering the UEWA or have enacted similar legislation, but it has to be admitted that there is no discernible legislative trend

[39] Gee, *"Electronic Wills" Revolution*, *supra* note 19.

[40] UNIF. ELEC. WILLS ACT § 5(a)(3).

[41] *Id.* § 2(2).

[42] UNIF. PROB. CODE § 2-502(a)(3)(B) & cmt.

[43] *Id.*

[44] UNIF. ELEC. WILLS ACT §§ 5 legis. n. (2019).

[45] A similar bracketing device has been employed in recent iterations of the Uniform Parentage Act, wherein provisions relating to the parentage ramifications of surrogacy agreements are made optional in case legislatures are unprepared to venture quite so far in the direction of approving new reproductive technologies. UNIF. PARENTAGE ACT art. 8 & cmt. (2002); UNIF. PARENTAGE ACT art. 8 & cmt. (2017). Professor Anne-Marie Rhodes has suggested that "progressive" options offered by proposed uniform laws may undermine their adoption by state legislatures. Anne-Marie Rhodes, Notarized Wills, 27 QUINNIPIAC PROB. L.J. 419, 419, 431, 434 (2014) (describing the inclusion of notarized wills in the 2008 amendments to the Uniform Probate Code ("UPC") as "a totally new concept that may undermine the progressive reach of the UPC," "lessen [its] desirability," and "jeopardize future considerations and enactments").

regarding remote attestation. Time will tell whether the option to reject remote attestation can help persuade states to fulfill the primary objective of the UEWA—electronic wills—in the spirit of "keep[ing] pace with the digital age."[46]

In sum, before the pandemic, the primary efforts of policymakers to bring wills into the digital age were very much limited to proposals to validate electronic wills. Keeping remote attestation off the table in these efforts did little to convince legislatures to approve of electronic wills. Thus, the progress of wills law into the digital age has been sluggish and ineffective. The concept of electronic presence in the UEWA's bracketed remote-attestation option presaged the rush of states in early 2020 to adopt remote attestation measures in order to make estate planning viable during the coronavirus lockdown. As the next section will reveal, these emergency measures have had the effect of promoting the UEWA's goals, albeit in reverse. The experiment with remote attestation has spurred a nationwide discussion about making remote attestation and electronic wills permanent features of probate law.

III. THE PRESENCE REQUIREMENT

The formalities of creating an attested last will consist of the testator's signing the will followed by the witnesses' signing the will.[47] In a variation, the testator signs the will and later acknowledges this to the witnesses. The witnesses then sign the will.[48] In yet a third and much more unusual option, the testator acknowledges her signature before a notary public.[49] These requisites are meant to guard against mistake, imposition, and fraud, and to serve as evidence of the will's authenticity and finality.[50] Most states require strict compliance with the formalities of will execution,[51] with some adhering to a more relaxed substantial compliance[52] or harmless error standard. Will execution requirements exist in tension with the paramount concern of wills law: determining and carrying out of the intent of the testator. While strict compliance can undermine testatorial intent,[53] the alternatives to it, although

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[46] Bridget J. Crawford, *Blockchain Wills*, 95 IND. L.J. 735, 739 (2020).

[47] UNIF. PROB. CODE § 2-502(a)(2)-(3)(A) (2019).

[48] *Id.*

[49] UNIF. PROB. CODE § 2-502(a)(2), (3)(B); UNIF. ELEC. WILLS ACT § 5(a)(3)(B) (2019).

[50] 95 C.J.S. *Wills* § 220; 79 Am. Jur. 2d *Wills* § 232; Succession of Carter, 298 So. 3d 370, 373 (La. Ct. App. 2020).

[51] *See, e.g.*, Zaidman v. Zaidman, 305 So. 3d 330 (Fla. Ct. App. 2020); *In re* Estate of Loftus, 920 N.W.2d 718, 723 (Neb. Ct. App. 2018); Stevens v. Casdorph, 508 S.E.2d 610, 613 (W. Va. 1998). Professor Melanie Leslie has theorized that judicial adherence to the strict compliance doctrine may be less than has been claimed. Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 259 (1996).

[52] *Carter*, 298 So. 3d at 374.

[53] *In the Estate of* Davies, 1 All E.R. 921, 922 (1951) (Eng.) ("I am compelled to decide the

intent-promoting, may make room for the evils strict compliance is meant to combat.

Presence is one of the requisites of will execution. The presence requirement assumes different forms in attested-will execution requirements throughout the country.[54] These can roughly be divided into the witnesses' presence and the testator's presence. The statute may require any or all of the following: (1) that the testator (a) sign the will in the presence of the witnesses or (b) acknowledge to them that he has signed the will,[55] (2) that the witnesses attest by signing in the testator's presence that they saw the testator sign the will or that he acknowledged his signature to them, and (3) that the witnesses attest the will in the presence of each other.[56]

As described in more detail below, the various presences required of wills law all refer to a party to the execution of a will's observation and perception of another party's signing the will in connection with making it fully executed. Proof of presence thus contemplates two actions. One action is doing the signing or acknowledging, while another action is observing the signing or the acknowledgment. Presence also contemplates two parties, the signer and the observer, both of whom must necessarily be present. Establishing an observer's presence at a signing is often a function of fixing the location of the signer vis-à-vis the observer. The degree of physical proximity that will satisfy the presence required of a will execution is whatever is necessary to establish or infer that from this location the

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case in accordance with the law, even though my decision has the effect of defeating the purpose and intention of the testatrix."); *In re* Colling, 1 W.L.R. 1440, 1442 (1972) (Eng. & Wales).

[54] Holographic wills do not require witnesses and are not the subject of this article. *See, e.g.*, Jay M. Zitter, *Requirement that Holographic Will, or Its Material Provisions, Be Entirely in Testator's Handwriting as Affected by Appearance of Some Printed or Written Matter Not in Testator's Handwriting*, 37 A.L.R. 4d 528 (1985).

[55] This requirement may require the simultaneous presence of the testator and both witnesses. *See, e.g.*, IND. CODE § 29-1-5-3(b)(1) (2021).

[56] *See, e.g.*, TEX. PROB. CODE § 251.051(3) (2017) (witnesses must attest the signature of the testator and must sign in the testator's presence); IND. CODE § 29-1-5-3(b)(2) ("The attesting witnesses must sign in the presence of the testator and each other."). The presence of the testator when the witnesses sign is optional under some statutory schemes, particularly those that allow the witnesses to sign the will after the testator has died. *See, e.g.*, *In re* Estate of Miller, 149 P.3d 840, 843 (Idaho 2006); COLO. REV. STAT. § 15-11-502 cmt. A (2017). Some statutes also have the requirements that the testator declare to the witnesses that the document is his will and request that they sign it, but these are far from universal requirements. *Compare* N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(3) (McKinney 2021) ("The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will."), *and In re* Estate of Fraccaro, 77 N.Y.S.3d 167, 171 (N.Y. App. Div. 2018) (requiring "publication" of the will), *with In re* Estate of Holden, 261 Minn. 527, 536, 113 N.W.2d 87, 93 (Minn. 1962) ("[I]t is generally held that, in the absence of a statute requiring publication, it is not necessary to show that the witnesses knew the nature of the instrument.").

observer perceived the signing.[57] Physical and temporal proximity has been a useful measure of the likelihood of awareness under the circumstances.[58]

The problem of physical remoteness undermining presence arose in case law long before the simultaneous audio-visual communication we know today. In the summer of 1964, Charles Groffman sought to inject some camaraderie into his estate planning by executing his will in the comfort of a gathering of dear friends hosted by the Blocks.[59] The Groffmans, the Leighs, and the Blocks were all in attendance.[60] Having received the appropriate instructions from his attorney and having already signed his will, Groffman at some point during the event gestured towards his coat, asking Mr. Leigh and Mr. Block to be his witnesses.[61] He did not at that time acknowledge that he had already signed his will.[62] Groffman then retrieved his will from the pocket of his coat and proceeded into an adjoining room.[63] One after the other, Block and Leigh entered and left, each one signing the will on a line below Groffman's signature.[64] The three parties to the execution of the will were never together in the adjoining room at the same time.[65] Whatever acknowledgment of his signature Groffman may have made to Block and Leigh individually, then, had at no time been done with them "present at the same time."[66] Because British courts require strict compliance with will execution formalities,[67] the court declared that Groffman's will was not properly executed and distributed his estate by intestate succession.[68]

The remoteness of the witnesses from each other at the relevant point in time was what doomed Groffman's estate plan. Amendments made to the Wills Act in 1982 relaxed certain will execution requirements[69] but did

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[57] See *infra* notes 69–71, 78–91, and accompanying text.

[58] *In re* Tracy's Estate, 182 P.2d 336 (Cal. Dist. Ct. App. 1947) (emphasizing, in part, the timing of the witnesses' signatures immediately after the testator's); *In re Demaris' Estate,* 110 P.2d 571, 582 (Or. 1941) ("They are in his presence whenever they are so near him that he is conscious of where they are and of what they are doing."); Kitchell v. Bridgman, 267 P. 26, 27 (Kan. 1928) (stating the issue as "whether, in this proximity, and under the circumstances mentioned, the will was signed by the witnesses in the presence of the testator").

[59] Groffman v. Groffman [1969], 2 All ER 108, 109 (Probate Div. 1969) (Eng).

[60] *Id.*

[61] *Id.* at 111.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* (quoting Wills Act, (1837) § 9 (UK)).

[66] Wills Act, (1837) § 9 (UK). The court concluded that no acknowledgment had been made to either witness. *Groffman*, 2 All ER at 113.

[67] J. Gareth Miller, *Substantial Compliance and the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 560, 564 (1987).

[68] *Groffman*, 2 All ER at 113.

[69] Administration of Justice Act 1982 § 17 (UK), https://www.legislation.gov.uk/ukpga/1982/53/section/17 [https://perma.cc/8PAE-5ZRR].

not in any way change the "present at the same time" requirement that was at issue in the case.[70] *Groffman* emphasizes that physical proximity is necessary to ensure that the witnesses perceive the same set of events constituting either the signing of the will or the acknowledgment. This understanding of what presence requires appears to establish a "single-room" standard evoking the typical will execution ceremony around a table in a law office. Otherwise, the court would have been interested to know what Leigh, having remained in the adjoining room, was capable of perceiving about the transaction occurring between Groffman and Brock.[71] The single-room standard can be stretched under current law in Britain only so far as witnessing the execution of the will through a window.[72] As a policy matter, this conception of the presence requirement seeks to ensure that the witnesses have the same information relevant to the will's authenticity and the testator's resolve to finalize it.[73] Under any microscope, *Groffman* offers a particularly rigid conception of presence at odds with the realities of living through a pandemic.

Although the "present at the same time" requirement applied in *Groffman* conjures up an image of the two witnesses standing or sitting next to each other in the same room, the typical statute does not require any specific degree of physical proximity.[74] Instead, most courts that have inquired into the purpose of the presence requirement construe it to be aimed at establishing a mental perception made more likely by physical proximity than by physical remoteness. Courts thus place the emphasis not so much on physical proximity as on mental perception, the ability to receive visual or aural stimuli and to understand these as signaling that the signing of a will is taking place.[75] Courts that reason in this direction understand that close physical proximity is obviously a useful proxy for presence, but at the same time they have broadened the presence requirement beyond the "one-room" rule of *Groffman* to admit that the

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[70] Miller, *supra* note 67, at 564.

[71] *See Groffman*, 2 All ER at 108.

[72] Casson v. Dade (1781) 1 Bro. C. C. 99 (Thurlow, L.C.) (Gr. Brit.). The requirement that each witness must sign the will in the presence of the testator has been relaxed to enable each witness to either sign the will or acknowledge his signature on the will in the presence of the testator.

Administration of Justice Act 1982 § 17 (UK), https://www.legislation.gov.uk/ukpga/1982/53/section/17 [https://perma.cc/8PAE-5ZRR].

[73] A properly worded self-proving affidavit, which often contains assertions that the witnesses believed the testator to be of sound mind and free of undue influence when he executed the will, is prima facie evidence of testamentary capacity. Hugenel v. Estate of Keller, 867 S.W.2d 298, 302 (Mo. Ct. App. 1993); Matter of Schmidt, 148 N.Y.S.3d 477, 480 (N.Y. App. Div. 2021); Matter of Hadden, 135 N.Y.S.3d 124, 126 (N.Y. App. Div. 2020); *In re* Rottkamp, 945 N.Y.S.2d 394, 396–97 (N.Y. App. Div. 2012).

[74] Physical proximity may be required where someone signs in the testator's stead. *See, e.g.*, COLO. REV. STAT. § 15-11-502(4) (2019) ("'[C]onscious presence' requires physical proximity to the testator but not necessarily within testator's line of sight.").

[75] *See infra* notes 84–91 and accompanying text (discussing the conscious presence test).

perception or awareness that another party is signing a will does not depend upon this degree of physical proximity.[76]

Given most courts' understanding of presence as a mental perception, the one-room test is happily not a feature of the American jurisprudence on presence in will execution. American courts invented terms, such as "line-of-sight" and "conscious," to describe these varieties of presence. These terms have also found their way into legislative enactments.[77] Judicial decision making around these varieties of presence reveals that line-of-sight presence aligns with a strict conception of presence and conscious presence to one that is more relaxed.

Line of sight presence requires the following:

> Courts adhering to the literal or strict construction rule generally hold that in order to constitute the attestation of a will in the presence of testator he must be able to see the instrument on the desk or table, to see the pen in the hand of witness, and to see and observe the movement of his hand and arm while in the act of signing his name.[78]

The line-of-sight test is a test of "contiguity, with an uninterrupted view between the testator and the subscribing witnesses."[79] The test permits the witness or testator not to see the actual signing of the document if she could see it from where she was sitting or standing by pivoting her body. The standard is permissive enough that the testator may even choose to look away.[80] But at some point, the testator's or witnesses' remoteness from the proceedings will raise the specter of fraud, the primary concern inhibiting any relaxation of the presence requirement. As such, under the line-of-sight test, the witness must be capable of seeing the testator sign the will from the witness's actual position, even if that position requires the witness to lean sideways or forward to do so.[81] Courts have ruled that there was an insufficient line of sight in cases where the testator and a witness attempted attestation over the telephone,[82] through a window not allowing a view of the

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[76] Whitacre v. Crowe, 972 N.E.2d 659, 664 (Ohio Ct. App. 2012) (referring to the testator's "understanding that the witnesses were signing the will"); *In re* Demaris' Estate, 110 P.2d 571, 582 (Or. 1941); Healey v. Bartlett, 59 A. 617, 618 (N.H. 1904) (exploring if the testator understood and was conscious of what the witnesses were doing when they signed the will); Calkins v. Calkins, 75 N.E. 182, 183 (Ill. 1905) (referring to "conscious personal knowledge").

[77] *See, e.g.*, OHIO REV. CODE § 2107.03 (2012); TEX. PROB. CODE § 4:69 (1997).

[78] Moore v. Glover, 163 P.2d 1003, 1006 (Okla. 1945).

[79] *Calkins*, 75 N.E. at 183.

[80] *Id.*

[81] Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App. 1967).

[82] *In re* Heaney's Will, 75 Misc. 2d 732, 735 (N.Y. Sur. Ct. 1973); *In re* Jefferson's Will, 349 So. 2d 1032, 1036 (Miss. 1977).

signing,[83] or were present in contiguous rooms where the only available line of sight would have been through an intervening, opaque wall.[84]

The conscious presence test can be met by a line of sight but extends beyond it under certain circumstances to permit a broader set of failures to actually see or be capable of seeing the signing:

> [I]f the attesting witnesses are in range of view of the testator and can or could have been plainly seen while in the act of signing their names and the body and person of witnesses could have been plainly seen while so doing, such facts are sufficient to sustain a finding that the will was attested in the presence of testator even though he might not at the time have been able to see the instrument on the desk or table at which the witness was seated nor to see the pen in his hand or to observe the motion of his hand and arm while in the act of subscribing his name thereto.[85]

The conscious presence test validates attestation as long as the witnesses are within the testator's "range of vision," or if he can "hear and understand that [they] are subscribing and attesting."[86] At a minimum, there must be a consciousness or perception on the part of the person required to be present that another is signing the document. Often that consciousness is a function of the proximity of the actors,[87] as where a testator could see the witnesses signing the will on the threshold of the doorway of the room where she was sitting,[88] and even when the testator could not see the witness signing her will but could perceive the signing by viewing the upper body of the witness through a pane of glass.

The conscious presence test is even broader under some iterations, namely the Restatement, which provides: "[i]f the testator and the witnesses are near enough to be able to *sense* each other's presence, typically by being within earshot of one another, so that the testator knows what is occurring, the presence requirement is satisfied."[89] Courts employing this broader conception understand conscious presence to comport with being "within range of any of a person's senses."[90] It is thus a "mental apprehension test"

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[83] *In re* Estate of Weber, 387 P.2d 165, 170 (Kan. 1963).

[84] Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. Ct. App. 1982); McCormick v. Jeffers, 637 S.E.2d 666 (Ga. 2006); Whitacre v. Crowe, 972 N.E.2d 659 (Ohio Ct. App. 2012); *In re* Estate of Fischer, 886 A.2d 996 (N.H. 2005).

[85] Moore v. Glover, 163 P.2d 1003, 1006 (Okla. 1945).

[86] *Whitacre*, 972 N.E.2d at 664.

[87] *In re* Estate of Fischer, 886 A.2d 996, 999 (N.H. 2005) (holding alternatively that the witnesses were so near the testatrix that she was conscious of their actions).

[88] *In re* Estate of Holden, 261 Minn. 527, 535, 113 N.W.2d 87, 93 (Minn. 1962).

[89] RESTATEMENT (THIRD) OF PROP: WILLS & DON. TRANS. § 3.1 cmt. p (Am. L. Inst. 1999).

[90] WIS. STAT. ANN. § 851.035 (1997); Calkins v. Calkins, 75 N.E. 182, 183 (Ill. 1905) (referring to "the medium of other senses").

that focuses on either the visual or the auditory consciousness of the person required to be present.[91] For example, in *In re Tracy's Estate*, the witnesses signed the will in a room twenty-five feet away from the testator so that he could not see them sign. The court ruled that he could hear them sign, and that was all the conscious presence test required.[92]

At times, the relevant statute will suggest different qualities of presence in connection with the execution and the attestation. For example, the word "presence" may appear in the statute with respect to the testator's watching the witnesses sign, while the words "see" or "hear" are used to describe the witnesses' awareness of the testator's signing his will or acknowledging that he has signed it.[93] Presence is thus multifaceted; above all, the witnesses and the testator must usually be in the presence of one another as they complete their respective tasks, but not always. The reality under American law is that relatively few jurisdictions require the witnesses to see the testator sign the will and to attest to what they saw while all in the presence of one another.[94] Nonetheless, the meaning of presence is far from intuitive and has been litigated frequently.

The Uniform Probate Code mentions "conscious presence" only with respect to one who signs in the testator's stead, describing the witnesses' responsibility as "witness[ing]" the testator sign the will or acknowledge his signature.[95] There is no explicit requirement that the testator or the other witness be present when each witness signs the will. Indeed, in some versions of this provision, the witnesses may sign the will after the testator's death.[96] In addition to these more flexible requirements, the Uniform Probate Code embodies the harmless error doctrine, permitting mistakes in execution to be excused if clear and convincing evidence establishes that the testator intended the document to be his will. Errors are thought to be harmless where "the defective execution did not result from irresolution or from circumstances suggesting duress or trickery."[97] Most states have not adopted this rule explicitly, but some nonetheless have a policy of construing the will execution requirements in whatever manner that favors "effectuating the testator's intent to make a valid will."[98]

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[91] OHIO REV. CODE § 2107.03 (2012).

[92] *In re* Tracy's Estate, 182 P.2d 336, 336–37 (Cal. Dist. Ct. App. 1947).

[93] *See, e.g.*, OHIO REV. CODE § 2107.03 (2012). In *Whitacre*, one of the issues was whether the witnesses were in the conscious presence of the testator when she signed her will. The Ohio statute, however, makes no reference to conscious presence with respect to this part of the transaction but requires the witnesses to have seen the testator sign.

[94] *See, e.g.*, FLA. STAT. § 732.502(1)(c); IND. CODE §§ 29-1-21-4(a)(4)-(5); W. VA. CODE § 41-1-3 (2022).

[95] UNIF. PROB. CODE § 2-502(a)(3)(A).

[96] COLO. REV. STAT. § 15-11-502(1)(c)(I) (2017).

[97] UNIF. PROB. CODE § 2-503 cmt.

[98] IND. CODE § 29-1-5-3(h) (2017). Some statutes declare the failure to follow certain statutory requirements to have no effect on the validity of the instrument, but these provisions do not

A. When the Testator Signs the Will

Due attestation of the testator's signature requires each witness to be present in some capacity, whether to see the testator sign the will[99] or to have him acknowledge to her that he signed.[100] Under some statutory regimes, the testator may also have to publish the will[101] and request that the witnesses sign it.[102]

In contrast to the testator's presence when the witnesses sign the will, the issue of the witnesses' presence when the testator signs or acknowledges is barely litigated.[103] It is of course mentioned in the recitation of the facts in challenges to the proper execution of the will,[104] but it is usually not the issue. This may be a function of the signature of the testator being considered the most important facet of will execution: under prevailing law "[i]f the testator did not sign, the will would fail."[105] And if the testator's signature is absent from the will, there will likely be other deficiencies in execution. There will, for example, be no witnesses to it. Whether under the harmless error rule the absence of the testator's signature (and by extension the absence of any attestation) can be excused remains an open question, with at least two courts deciding this question in the affirmative[106] and other jurisdictions drawing the line at excusing the absence of the testator's signature from the will.

B. When the Witnesses Sign the Will

Because the presence of the testator when the witnesses sign the will is not a feature of all Wills Acts,[107] it may seem counter-intuitive that there is more litigation about this requirement than about the witnesses' presence at

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extend to the presence requirement. N.Y. EST. POWERS & TRUSTS LAW § 7-1.17 (McKinney 2017) (failure to provide notice to trustee does not invalidate amendment to or revocation of trust instrument); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2017) (failure of witness to include her address on will does not invalidate will).

[99] *See, e.g.*, Bassford v. Bassford, 183 A.3d 680, 689 (Conn. App. Ct. 2018).

[100] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(4) (McKinney 2021); IND. CODE § 29-1-5-3(b)(1) (2017). Not every provision specifies that the acknowledgment must be done in the presence of the witness. *See, e.g.*, IDAHO CODE ANN. § 15-2-502 (2017); ARK. CODE § 28-25-103(b)(1)(B) (2019).

[101] IND. CODE § 29-1-5-3 (b)(1) (2017).

[102] A request that the witness sign is a rarity in the statutes but does appear in a few jurisdictions' law. *See, e.g.*, N.Y. EST. POWER & TRUSTS LAW § 3-2.1 (McKinney 2017).

[103] *See e.g.*, Stevens v. Casdorph, 508 S.E.2d 610, 612 (W.Va. 1998) ("Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will.").

[104] *See, e.g.*, Kitchell v. Bridgman, 267 P. 26, 27 (Kan. 1928).

[105] Rhodes, *supra* note 45, at 423.

[106] *In re Estate of Ehrlich, 47 A.3d 12, 19 (N.J. Super. Ct. App. Div. 2012); In re Will of Bradway, No. A-4535-16T3, 2018 WL 3097060, at *2 (N.J. Super. Ct. App. Div. June 25, 2018); In re Estate of Attia, 895 N.W.2d 564, 568 (Mich. Ct. App. 2016).*

[107] UNIF. PROB. CODE § 2-502(a)(3). The commentary explains that there is "no requirement that the witnesses sign before the testator's death." UNIF. PROB. CODE § 2-502 cmt.

the testator's signing. The impression that the presence of the testator is of less importance than the witnesses' presence for the testator's signing may contribute to the parties taking this requirement less seriously and more readily making mistakes. After all, there is some movement in the law to eliminate the witnessing requirement altogether. The sense that the witnessing requirement should be optional lies behind the notarization option for wills under the Uniform Probate Code.[108] Moreover, some statutes have even done away with the interested-witness penalty,[109] suggesting, again, that the witnessing function contributes little to the proceedings. Finally, in contrast to the absence of the testator's signature, the harmless error rule has allowed wills to stand even though they were not witnessed at all.[110]

The purpose of requiring the testator's presence when the witnesses sign is to ensure that no fraudulent substitution is taking place: the testator should be able to perceive that the witnesses are signing his will.[111] On this subject, one court has reasoned,

> [T]he object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will, and to effect that object it is necessary that the testator shall be able to see and know that the witnesses have affixed their names to the paper which he has signed and acknowledged as his will.[112]

Problems arise, of course, when, after the witnesses see the testator sign or receive the testator's acknowledgment, they depart and sign the will elsewhere. That "elsewhere" may fall outside of the ambit of the testator's presence and undermine the purpose of his presence when they sign.[113]

IV. WILL EXECUTION IN CYBERSPACE

When spreading coronavirus infections led to lockdowns around the globe, best practices in the execution of wills became untenable. It made no difference that a few jurisdictions had enacted electronic will legislation or that numerous web sites were already offering online assistance with wills. None of these avenues gave consumers any way of finalizing their wills in a

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[108] Rhodes, *supra* note 45, at 427. Rhodes opines that the elimination of witnesses would not serve the same ritual and protective functions of the attestation requirement. *Id.* at 429, 431.
[109] *See* COLO. REV. STAT. § 15-11-505.
[110] *See, e.g.*, *In re* Estate of Hall, 51 P.3d 1134, 1136 (Mont. 2002) ("The court could reasonably interpret this testimony to mean that Jim and Betty expected the Joint Will to stand as a will until Cannon provided one in a cleaner, more final form.").
[111] *In re* Will and Estate of Jefferson, 349 So. 2d 1032, 1036 (Miss. 1977); *In re* Demaris' Estate, 110 P.2d 571, 581 (Or. 1941).
[112] Calkins v. Calkins, 75 N.E. 182, 183 (Ill. 1905).
[113] *See, e.g.*, Morris v. Estate of West, 643 S.W.2d 204 (Tex. Ct. App. 1982).

manner consistent with lockdown protocols.[114]

Recognizing how quarantines and lockdowns spawned by the pandemic have undermined effective estate planning, governors and legislatures have taken the unprecedented step of making remote attestation available while continuing to prohibit electronic wills. These jurisdictions have recognized that, at a minimum, the necessary mechanism for pursuing estate planning during the pandemic is remote witnessing. This mechanism has been made available predominantly through executive orders, with some jurisdictions opting for legislation or changes to court rules. By and large, they are temporary measures, defined as either lasting for the duration of the public health emergency in that state[115] or subject to periodic extensions as the health emergency continues.[116]

There are about twenty jurisdictions that have decided to move in this direction,[117] some with very detailed provisions and some with terribly vague ones. The broad outlines of the provisions have many similarities, but in this rapidly evolving context there is no way, shape, or form, to characterize these provisions as uniform, nor is it clear from what source states are borrowing the language used in their provisions.

Some of the similarities and differences between these provisions are as follows. "Remote" in this context means "using technology that enables the testator, notary, or the person making the acknowledgment and the person executing the document and witnesses to, while in different locations, simultaneously communicate orally and maintain visual contact."[118] In states that require physical presence for will execution, the measures act as temporary suspensions of any prohibition on remote attestation that the will execution statute might be assumed to contain.[119] In

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[114] Like many hair and nail estheticians who took their trade outdoors, some estate planning lawyers conducted will execution ceremonies alfresco during the coronavirus pandemic. *See, e.g., In re* Ryan, 140 N.Y.S.3d 682, 682–83 (N.Y. Sur. Ct. 2021) (describing law office's conducting will execution ceremonies in its parking lot).

[115] *See, e.g.*, S.B. 241, 31st Leg. (Alaska 2020) (enacted); Conn. Exec. Order No. 7Q (Mar. 30, 2020).

[116] Bob Friedman, *Remote Signing of NY Estate Planning Documents Extended Until October 4th*, FRIEDMAN & RANZENHOFER (Sept. 8, 2020), https://www.wny-lawyers.com/2020/09/remote-signing-of-ny-estate-planning-documents-extended-until-october-4th/ [https://perma.cc/59NV-5SA3].

[117] Twenty states of this type have been identified, although it bears noting that the eight in italics are holographic will jurisdictions: Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, Illinois, Kansas, Kentucky, Missouri, Maine, Maryland, Massachusetts, Michigan, New York, North Carolina, Tennessee, Wyoming. *See Emergency Remote Notarization and Remote Witnessing Orders*, AM. COLL. OF TR. & EST. COUNS., *supra* note 14.

[118] S.B. 241, § 25(c), 31st Leg. (Alaska 2020) (enacted). Some definitions specify Skype, Zoom and FaceTime as examples of videoconferencing applications. *See, e.g.*, Ark. Exec. Order No. 20-12(7) (Mar. 30, 2020).

[119] Proclamation of the Governor of Alabama, Fifth Supplemental State of Emergency:

states that require mere presence, the real-time audio-visual connection is defined as being "in person" or "in the presence of."[120]

In all models, the witnesses must see the testator sign, but there is variation in how and when the witnesses sign. Witnesses are provided a copy of the document or the signature page, which they may sign on the spot, or within a specified timeframe (perhaps forty-eight hours). The result is an awkward system of electronic transmission of the testimonium and attestation page of the will to be printed by each witness at their location, signed, and then transmitted back to the testator executing his will without an attorney or to the attorney who is overseeing the ceremony. The counterparts are considered the will, or, on the strength of the counterparts, an original document will be circulated to the witnesses via U.S. mail for them to sign within thirty days of the execution ceremony, resulting in a single will indistinguishable from one executed pre-pandemic, not an electronic will.[121] If the latter applies, the date of the will's validity relates back to the date of execution and attestation.[122]

Some models require the parties to confirm one another's identities before the execution commences[123] and that they are all present in the state. Some of the more detailed versions describe the line of sight that witnesses must have of the testator signing the will[124] and require the testator to show the witnesses each page of the document one at a time and initial each page during this exercise. The witnesses' attestations may be more in the form of a certification that all of this has taken place and, in that regard, more like a self-proving affidavit than like a traditional attestation.

These measures vary in character and contain a variety of limitations and requirements. A common requirement is that the remote attestation be documented, verified or justified with additional safeguards. This might include that the attestation be supervised[125] or recorded for possible later playback, that a statement be appended to the will, that copies be sent to the

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Coronavirus (COVID-19) (III)(B) (Apr. 2, 2020) (declaring witnessing remotely to count as witnessing "in person"); Iowa Proclamation of Disaster Emergency (Mar. 22, 2020) (suspension to the extent physical presence is required).

[120] *See, e.g.*, Ark. Exec. Order No. 20-12(6).

[121] *See* Ark. Exec. Order No. 20-12(8) (recognizing that if the witnesses are in different locations "they must necessarily sign separate signature pages"); 755 ILL. COMP. STAT. 6/15-20(e) ("The prohibition on electronic signatures . . . remains in full effect."); 755 ILL. COMP. STAT. 6/15-20(f) (referring to the parties' signing "in counterparts"); Kan. Exec. Order No. 20-20(2) (Apr. 9, 2020).

[122] N.Y. Exec. Order No. 202.14 (Apr. 7, 2020) ("The witness(es) may repeat the witnessing of the original signature page(s) as of the date of the execution . . . .").

[123] 755 ILL. COMP. STAT. 6/15-15.

[124] 755 ILL. COMP. STAT. 6/15-20(d)(6) ("[T]he act of signing shall be captured sufficiently up close on the 2-way audio-video communication for the witness to observe."); MICH. COMP. LAWS § 700.1202(f) (2020) (same).

[125] Conn. Exec. Order No. 7Q(g) ("Any witnessing requirement for a Last Will and Testament may be satisfied remotely through the use of Communication Technology if it is completed under the supervision of a Commissioner.").

witnesses, or that the testator or supervisor of the proceedings be shown identification documents by each of the witnesses.[126] In Alaska, for example, a statement must be attached to the will certifying that those who executed or attested the will remotely are "at higher risk for severe illness from novel coronavirus disease" or have been advised by a health care provider or governmental agency "that being in the physical presence of others may expose me or others to a health risk related to novel coronavirus disease."[127] Other jurisdictions require a notary to be present to verify the identities of the witnesses,[128] while others require that the proceedings be recorded and kept for a specified number of years.[129] Some of the more detailed versions go further to require the session to be supervised by an attorney, a notary[130] or, as in Connecticut,[131] a "Commissioner." This supervising entity is someone who will certify that all has been done correctly and who will retain custody of the recording. Some provisions, but by no means all, prohibit interjurisdictional witnessing or attestation of the will, a matter explored below in Part IV.C.[132]

Whether these efforts will be merely temporary or something more long-lasting remains to be seen. In a course in wills, trusts and estates at the City University School of Law ("CUNY"), I conducted experiments in remote attestation and notarization (for self-proving the will) that required students to fill in the procedural gaps in New York's hastily drafted executive order permitting the remote attestation of wills. These experiments revealed not only the executive order's shortcomings, but also the direction future legislation would have to take for a permanent directive to be viable.

On June 10 and September 13, 2021, each student enrolled in my Wills, Trusts & Estates at CUNY Law School participated in a mock online execution of a will.[133] The need to conduct the simulated will execution ceremony in this manner was necessitated by CUNY's resorting to online instruction beginning in mid-March of 2020, the lockdown of New York State on March 22, 2020, and in part by the Governor of New York's order of April 7, 2020, permitting remote attestation. Prior to April 7, the typical will execution ceremony in a law office was rendered unavailable by the

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[126] Proclamation of the Governor of Alabama, Fifth Supplemental State of Emergency: Coronavirus (COVID-19) (III)(B) (Apr. 2, 2020); Eleventh Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (B)(2)(b) (Apr. 15, 2020).

[127] *Enrolled SB 241*, ALASKA STATE LEGISLATURE https://www.akleg.gov/basis/Bill/Text/31?Hsid=SB0241Z [https://perma.cc/BE7R-SBFT].

[128] *See, e.g.*, Ark. Exec. Order No. 20-12(6).

[129] Me. Exec. Order 37 FY 19/20(II)(B)(15) (Apr. 8, 2020).

[130] *See, e.g.*, Ark. Exec. Order No. 20-12(6).

[131] Conn. Exec. Order No. 7Q(3)(g).

[132] Tenn. Exec. Order No. 72(3)(b) (Dec. 22, 2020) (declaring that the signer and the witnesses "must each be physically located in Tennessee").

[133] The enrollment in these courses was 36 and 43, respectively.

lockdown, leaving testators to conduct their own backyard ceremonies,[134] sometimes under the direction of an attorney and sometimes without. The executive order remained in effect through June 24, 2021, when it was declared "no longer necessary."[135]

Executive Order 202.14 was not meant to help wills law "catch up with technology" but to use technology as a stopgap to address a set of conditions that makes the traditional manner of executing wills untenable. The directive results in a physical document, the traditional will. Witnessing is by simultaneous teleconference, but neither the document nor any of the signatures are digital. Remote witnessing under this executive order requires a paper copy of the will, scanners, e-mail, printers, and a courier service to effect a properly executed and witnessed will. Even the self-proving affidavit, which can be notarized remotely, winds up in paper format. By any measure, the procedure is cumbersome and confusing. It requires a fair amount of guesswork about what is required.

The class met in groups of three to four in Zoom breakout rooms. As I moved through the rooms in which the will execution ceremonies were taking place, trying to be a fly on the wall but clearly disrupting their flow, it became obvious to me that my students were finding and trying to address the gaps in the governor's executive order as they went along. On more than one occasion, I was asked for a step-by-step explanation of the procedure, something I obviously could not provide. My lawyers-in-training were in the unenviable position of simultaneously assisting a client with an important transaction and conducting statutory interpretation.

As the students were puzzling over how to implement the vague set of instructions in a manner that would result in a valid will, I had to caution them against proceeding in a way that felt second-nature to them. Their immediate instinct was to imagine that the remote execution and attestation of a will would involve the signatories sharing a document, say, on a Google Docs-type platform and each typing their names on the appropriate line in the manner of DocuSign. Several groups gravitated automatically to "signing" the will online in this fashion. Their instinct revealed the close association my students, who spend much of their time online, draw in both directions between electronic wills and remote witnessing.

Others were concerned about what might be going on outside of the range of the camera. Was someone orchestrating the testator's actions from the wings? Was the testator's appearance enhanced with lights and filters or even computer-generated imagery? These are certainly not fanciful concerns in a world where digital images can so often look like the "real thing," even when they are altered by tools to which consumers have easy

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[134] *See* Brian M. Sweet, *Executing Wills and Trusts While Observing Distancing Guidelines*, N.Y. CMTY. TR. (May 18, 2020), https://www.nycommunitytrust.org/newsroom/professional-notes/executing-wills-and-trusts-while-observing-distancing-guidelines/ [https://perma.cc/7LU6-ZGNE].

[135] N.Y. Exec. Order 210 (June 24, 2021).

access. Nonetheless, just as the possibility of fraud appears to be barely there in so many due execution challenges,[136] it was likely they were concocting scenarios that would be highly improbable in the vast majority of cases.

Finally, students noted jurisdictional questions unfamiliar to them from pre-pandemic legislation. The procedure is not meant to allow for the execution of a will in Connecticut to be considered valid in New York or, for parties present in different jurisdictions, to be able to execute a will at all. A testator in Rouses Point, New York, on Lake Champlain, for example, could execute a will with witnesses on the other side of the state in Clymer, New York, 375 miles away as the crow flies, but could not include a witness across the bridge in Alburgh, Vermont, only 1.1 miles away. Since my students were spread out across the country, we were engaged in an exercise that more than likely could not have resulted in a validly executed will under such an "interjurisdictional" prohibition. True, probate courts routinely admit to probate wills that have been validly executed in other jurisdictions either in conformity with the law of that jurisdiction or the law of the testator's domicile, but it was not clear that in any of the breakout rooms, the execution requirements of any state were being complied with.

A. Interjurisdictional Witnessing

Geographical specificity is one of the features of many remote attestation provisions that raises questions. Whereas the presence question discussed above is ubiquitous in wills law and has evolved in different directions in different jurisdictions over the years, the validity of a will that has been executed by parties simultaneously in multiple jurisdictions is one of first impression. The imperfect analogy that comes to mind is the foreign will—a will executed in accordance with the requisites of another jurisdiction. If the testator was in that jurisdiction at the time he executed his will, it can usually be probated in the testator's state of domicile after he dies.[137] Probate courts have the discretion to admit even the will of a nonresident.[138] And some statutes allow the execution rules of the testator's country of nationality or jurisdiction where he has a residence to control the question of admissibility to probate.[139] The policy behind broadening the range of possible grounds for admissibility to probate is "to provide a wide opportunity for validation of expectations of testators."[140] These provisions and decisions answer neither the question whether an electronic will may be admitted to probate nor the question whether an interjurisdictionally

[136] *See, e.g.,* Snide v. Johnson, 52 N.Y.2d 193, 197 (1981).
[137] *See* UNIF. PROB. CODE §§ 1-301, 2-506 ("A written will is valid if executed in compliance with the law . . . of the place where the will is executed . . . .").
[138] UNIF. PROB. CODE § 1-301(2) (granting the court jurisdiction over "the property of nonresidents located in this state").
[139] *See, e.g.,* UNIF. PROB. CODE § 2-506.
[140] *See, e.g.,* UNIF. PROB. CODE § 2-506 cmt.

executed will may be admitted to probate.

Some remote attestation provisions present this problem of geographical specificity by requiring the witnesses and the testator to all be present in the same state when conducting a will-execution ceremony by remote means,[141] a requirement not present in pre-pandemic legislation. To envision this problem in a pre-pandemic context requires concocting an extravagant hypothetical.

Imagine that a car is moving rapidly along an interstate highway in the mid-Atlantic region of the United States. Depending upon the location (and the level of traffic congestion), the car might move swiftly between states. On Interstate 95, the car could travel quickly from New Jersey to Delaware and on into Maryland. Further south, the same interstate will speed cars from Maryland, through Washington, D.C., and on into Virginia. Further west, cars on Interstate 81 will enter Maryland from Pennsylvania and after twelve miles enter West Virginia. From there, it is a mere twenty-six miles to the Virginia border.

Imagine further that a will execution ceremony is taking place inside the car. The testator, seated in the backseat between the witnesses, is listening to the attorney-notary, who is seated up front and is turning around to face the occupants of the backseat and to explain to the how he will conduct the proceedings. Given the rapid progress of the car along the interstate highway, it is possible that the testator will sign the will in one state and that each witness will attest his will in a second and a third, respectively. If this journey is unfolding along Interstate 81, the attorney might even complete the notarization of the self-proving affidavit in yet a fourth state.

A moving will execution ceremony is a fanciful way to conjure a particular execution-related and jurisdictional question: can a will executed interjurisdictionally be admitted to probate? The question presented relates to the portability of wills. It is a question that may have occurred to practitioners before the pandemic, but it is largely missing from will-execution jurisprudence. It arises now and will likely arise more often given the probability that the temporary changes to the legal landscape brought about by the pandemic will made permanent, at least in part, in a post-pandemic world.

The question whether a court will admit a will to probate is both a question of jurisdiction and execution. The jurisdictional question is rarely controversial. The courts of a state have jurisdiction over a domiciliary's estate[142] and nonresidents' property located in that state.[143]

The execution question is somewhat more complicated. A court's jurisdiction over an estate does not mean that it will recognize a will intended to control the disposition of that estate. That determination requires that the

[141] *See, e.g.,* Ark. Exec. Order No. 20-12(6).
[142] UNIF. PROB. CODE § 1-301(1).
[143] *Id.* at § 1-301(2).

manner of the will's execution be embraced within the state's choice of law provision. Some states only admit wills to probate that have been executed in conformity with that state's will execution formalities.[144] Most states are more flexible and will "recognize a will if it complies with one of the following: the local statute, the law of the place[145] of execution of the will at the time of execution, or the law of the decedent's domicile."[146] A hybrid choice of law provision allows wills that do not comply with the local will execution rules, but only if they were "executed outside this state."[147] This approach sounds more restrictive than it actually is, since the law of the place of execution may itself have a permissive choice of law provision. Finally, other jurisdictions' statutes make clear that the place of a will's execution is of no legal significance as long as the manner of the will's execution conforms to at least one of several permissible statutory regimes.[148] Choice of law provisions sometimes broaden the typical bases for admission to probate in other ways. These may include conformity either with the law at the time the will was executed or at the time the testator died.[149] Still others grant recognition to wills that have been admitted to probate in any other jurisdiction.[150]

The policy behind permissive choice of law provisions is "to provide a wide opportunity for validation of expectations of testators."[151] This policy, coupled with the similarity in will execution requirements across jurisdictions, means that, assuming a court has jurisdiction over some or all of the estate, an individual will may be admissible to probate in several jurisdictions and on several grounds. The Uniform Probate Code reflects

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[144] *See, e.g.*, GA. CODE ANN. § 53-5-1. Note, however, that Georgia recognizes both attested and holographic wills.

[145] The UPC specifies that "place" means "when [the will] is executed in another state or country." UNIF. PROB. CODE § 2-506 cmt..

[146] Roger Andersen, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57, 58 (1994); *see, e.g.*, 755 ILL. COMP. STAT. 5/7-1 ("A will signed by the testator when proved as provided in this Article may be admitted to probate in this State when (a) the will has been admitted to probate outside of this State or (b) the will was executed outside of this State in accordance with the law of this State, of the place where executed or of the testator's domicile at the time of its execution.").

[147] *See, e.g.*, TENN. CODE § 32-1-107 (stating, "a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with those sections").

[148] *See, e.g.*, WASH. REV. CODE § 11.12.020 (1990) ("[E]xecuted in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death.").

[149] *Id.*

[150] 15 GUAM CODE ANN. § 1509 (2019) ("A will admitted to probate in any State or United States territory, or established or proved in accordance with the laws thereof, may be offered for probate in the Superior Court of Guam if the Superior Court of Guam has jurisdiction under the provisions of Chapter 14 of this Title.").

[151] UNIF. PROB. CODE § 2-506 cmt.

the policy by broadening admissibility to probate to include the law of the state where the testator is domiciled, has a residence, or the country where he is a national.[152] Under such broad and permissive choice of law provisions, a court with jurisdiction over an estate is endowed with the power to admit to probate wills executed under varying will execution models.

Although not a will-execution-in-a-moving-car case, the Washington case of *In re Hook*[153] involved the cross-border completion of a will, even if the court did not see it that way. The testator, Bert Hook, remained unmarried and childless throughout his life. At the time of his death, he was domiciled in Washington and had a residence in Arizona. His 1988 will, executed in Washington, bequeathed his entire estate to his brother. In 2012, while in Arizona, Hook prepared a new will that included two of his friends in the bequest to brother. A notary witnessed Hook's signature,[154] but the second witness, Anna Levitte, signed the will in Washington after Hook had passed away.[155] Washington had jurisdiction over the bulk of Hook's estate.

Washington's law of will execution requires the witnesses to sign in the presence of the testator. Washington will admit "foreign" wills to probate if they comply with the law either of the place of their execution or of the testator's domicile.[156] Hook's will did not comply with Washington's

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[152] *Id.*; *see, e.g.*, ALA. CODE § 43-8-135 ("A written will is valid if executed in compliance with section 43-8-131 or if its execution complies with the law at the time of execution of the place where the will is executed, or with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.").

[153] Atkinson v. Estate of Hook, 374 P.3d 215 (Wash. Ct. App. 2016).

[154] The attorney notarized the will, raising the issue of whether she had signed in the capacity of a witness or in her capacity as a notary. *Id.* at 218; *see In re* Hammer's Estate, 72 N.Y.S.2d 636, 637 (N.Y. Gen. Term 1946) (ruling that a notarization conducted to authenticate the testator's signature did not satisfy the witnessing requirement). Under the Uniform Probate Code, the notarization of a will is sufficient by itself; witnesses are not required. UNIF. PROB. CODE § 2-502(a)(3)(B).

[155] The parties may have been under the mistaken impression that only notarization was required to validate the will, but the decision is unclear on this point. *See* UNIF. PROB. CODE § 2-502 cmt.

[156] The words "executed without this state" used to describe these other wills appeared in the 1917 version of the statute, PROB. CODE § 25, 1917 Wash. Sess. Laws, ch. 156, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1917c156.pdf?cite=1917%20c%20156%20§%2025 [https://perma.cc/7SK8-ULLX], survived revisions in 1929 and 1965, PROB. CODE § 25, 1929 Wash. Sess. Laws, ch. 21, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1929c21.pdf?cite=1929%20c%2021%20§%201 [https://perma.cc/Q5J5-3ZRK]; PROB. CODE § 11.12.020, 1965 Wash. Sess. Laws, ch. 145, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1965c145.pdf?cite=1965%20c%20145%20§%2011.12.020 [https://perma.cc/3X33-SF9N], but then were expressly stricken from the statute in 1990, PROB. CODE § 11.12.020, 1990 Wash. Sess. Laws, ch. 78, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1990c79.pdf?cite=1990%20c%2079%20§%201 [https://perma.cc/9F9N-2CHT]. It bears noting that "foreign wills" appears as a

witnessing requirement, but it did comply with Arizona's, which allows witnesses to sign the will "within a reasonable time,"[157] even after the testator has died.[158] Washington, though, could admit the will to probate under these circumstances only if Arizona was the place of the will's execution. The court reasoned that Arizona was not the place of the will's execution, Washington was. This rather surprising conclusion about a will that was not signed by the testator in Washington found support in both the trial and appellate courts' reasoning that a will is not executed until "the last formal act necessary to make the will valid" takes place. In this sense, execution "comprises the acts of the witnesses as well as the act of the testator."[159] This logic meant that Hook's will was not actually executed until Levitte signed it.[160] Since she was the last of witnesses to sign and signed the will in Washington, the will was *ipso facto* executed in Washington. Hook's will was not a foreign will at all in the courts' estimation. Thus, there could be no exception: the will had to comply with Washington law, or it could not be admitted to probate.

The *Hook* decision does not rest on firm footing. The law clearly identifies the courts with jurisdiction over some or all of a decedent's estate, but it contains very little geographic specificity regarding *where* a will must be executed to be admissible to probate. Indeed, no will execution statute requires every will presented for probate to have been executed in that state. Neither compliance with the local law nor compliance with the law of the testator's jurisdiction requires the will's execution to happen in a particular place. Tellingly, only one of the choice-of-law bases described by Professor Anderson[161] for probating a will suggests a will might have a legally significant "place of execution" at all. Linking all three of the grounds he describes is the notion that a will needs to be in compliance with some statute somewhere. Washington is now poised to embrace this position and to eliminate any distinction between wills executed within and without the state.[162] Its prior law forced the courts to make a distinction between

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heading as early as 1917 but does not appear in the statutory text. The heading inexplicably remained in place after the 1990 revision, which appears to render the "foreignness" of a will irrelevant. In any event, section headings in section 11 of the Washington Revised Code are not part of the law. WASH. REV. CODE § 11.02.001 (2021).

[157] ARIZ. REV. STAT. ANN. § 14-2502(A)(3) (2019).

[158] *In re* Estate of Jung, 109 P.3d 97, 99 (Ariz. Ct. App. 2005).

[159] Atkinson v. Estate of Hook, 374 P.3d 215, 219 (Wash. Ct. App. 2016).

[160] *Id.* at 216–17, 219, 220.

[161] *See* Andersen, *supra* note 146, at 58.

[162] *See* PROB. CODE § 11.12.020, 1990 Wash. Sess. Laws, ch. 78, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1990c79.pdf?cite=1990%20c%2079%20§%201 [https://perma.cc/9F9N-2CHT] (noting that Washington expunged the descriptor "executed without this state" from the Revised Code of Washington 11.20.020 in 1990); WASH. REV. CODE § 11.20.100 (2021) (stating there shall be no distinction between domestic and foreign wills, once probated); WASH. REV. CODE § 11.20.090 (2021)

domestic and foreign wills that was then, and is now, out of step with wills executed interjurisdictionally and is to blame for the perplexing discussion of where Hook's will was executed.

The *Hook* court's conviction that "execution" has such a specific meaning that the moment it occurs can be pinpointed with precision is the weakest link in its reasoning. It will be helpful to distinguish certain terms that in imprecise usage are often conflated. "Execution" refers to the testator's signature of his will. "Attestation" refers to the declaration the witnesses make that they are present and witness the testator sign his will. The attestation is confirmed by the witnesses' signature, which in essence embodies it.[163] These necessary components of finalizing a will are sometimes performed separately.[164] The distinctions between them are necessary because execution is sometimes thought to mean the entire process of finalizing a will, as in a "will execution ceremony" or a will contest brought on the basis of due execution or a "fully executed" will. Attestation is folded into that use of the term execution and loses its independent significance.

"Attestation" deserves further definition. It is sometimes thought to mean the act of seeing the testator sign.[165] To attest a will, though, is to affirm that one has witnessed the testator sign the will. Although attestation clauses are sometimes written with present-tense verbs, they actually describe an act that has already taken place, that the witnesses have already witnessed. The self-proving affidavit, by contrast, employs past tense verbs. It is a document in which the witnesses, and sometimes the testator, explain the role they played in fulfilling the formalities of finalizing the will.

The *Hook* decision fails to acknowledge the nuances inherent in the terms "executed" and "execution." The terms do not have fixed meanings in either legislation or jurisprudence. They are especially indefinite when they appear unmodified by "complete," "valid," "effective" or words of similar effect that the *Hook* court tellingly employs throughout the decision without acknowledging either their significance or that they do not appear in the statute. Even the lost wills statute the court relies on for support requires proof of both the execution *and* the validity of the lost will.[166]

Practitioners understand that a will execution connotes a process. The process comprises compliance with all steps necessary for a will to be legally enforceable upon the death of the testator.[167] "Execution" can also mean the

(appearing to define a foreign will as one that has been probated elsewhere, not necessarily executed elsewhere).

[163] *In re* Sloan's Estate, 56 N.E. 952, 953 (Ill. 1900).

[164] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(3), (b) (McKinney 2019).

[165] Whitacre v. Crowe, 972 N.E.2d 659, 662 (Ohio Ct. App. 2012).

[166] WASH. REV. CODE § 11.20.070(1) (2021).

[167] Turlington v. Neighbors, 24 S.E.2d 648, 650 (N.C. 1943) ("The 'execution' of a deed means . . . all acts which are necessary to give effect thereto.") (citation omitted).

specific moment of the will's taking effect at the testator's death[168] or refer to the executor's carrying out the directions in the will.[169] Even "due execution" sometimes refers not merely to a proper will execution but to a probate court's sense of the will's genuineness more broadly.[170]

"Executed," by contrast, connotes completion, but can refer variously to completed tasks in the process or to the completion of the entire ceremony. The most common use of the term is to describe the completion by the testator of his signature, as where we speak of a testator's executing his will,[171] after which we might say that the witnesses have witnessed or attested the execution of the will.[172] There are also examples, albeit less common, of courts describing the witnesses' attestations as their having executed the will.[173] "Executed" can also refer to the completion of the ceremony, after which courts typically include the modifier "fully" rather than "partially" executed.[174]

The *Hook* court seemed unaware of these varying usages, but more to the point is its lack of acknowledgment of the common understanding that the execution of a will is a process where the point of focus is the moment the testator signs the document. When a testator signs his will, he exhibits his resolve to render the appointive and dispositive provisions he has included in the document legally enforceable should he then die. The witnesses have two roles to fulfill. They are there to perceive to the testator's resolve and to attest to it by adding their own signatures to the will. In essence, then, when they sign the document, the witnesses are attesting to something they *already* have done. It is not accurate to say that the attestation is the act of witnessing, as the court did in *Whitacre v. Crowe.*[175]

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[168] Cent. Nat'l Bank v. Stevenson, 16 A.2d 114, 115 (Del. Ch. 1940).

[169] *In re* Richardson's Will, 229 N.Y.S. 299, 300 (N.Y. Gen. Term 1928).

[170] *In re* Huston's Estate, 27 N.W.2d 26, 28 (Iowa 1947).

[171] *See, e.g.*, *In re* Estate of Phillips, 112 N.W.2d 591, 596 (Wis. 1961); *In re* Estate of Picillo, 99 A.3d 975, 978 (R.I. 2014) ("The testatrix executed the will that night."); *In re* Will of Carter, 565 A.2d 933, 935 (Del. 1989); Succession of Hackney, 707 So. 2d 1302, 1306 (La. Ct. App. 1998). In one particularly odd use of "executed," the testator is said to have executed a will "which she did not sign." Durell v. Martin, 110 S.W.2d 316, 318 (Tenn. 1937).

[172] *See, e.g.*, Amerson v. Pahl, 734 S.E.2d 399, 400 (Ga. 2012); *Phillips*, 112 N.W.2d at 596; *In re* Kelly's Will, 174 S.E. 453, 454 (N.C. 1934); *In re* Holloway's Estate, 235 P. 1012, 1016 (Cal. 1925); *In re* Tayrien's Estate, 246 P. 400, 401 (Okla. 1926); *In re* Estate of Horowitz, No. 92-T-4710, 1993 WL 150487, at *3 (Ohio Ct. App. Mar. 26, 1993).

[173] *In re* Estate of Yelvington, 280 So. 2d 497, 498 (Fla. Dist. Ct. App. 1973); Hendry v. Wilson, 151 S.W.2d 683, 683 (Ark. 1941).

[174] *Compare In re* Estate of Goodwin, 18 P.3d 373, 375 (Okla. Civ. App. 2000) (contending that every will, except a holographic or nuncupative will, must be subscribed at the end by the testator, or another person, within his presence and by direction, must subscribe his name), *with* Swain v. Lee, 700 S.E.2d 541, 543 (Ga. 2010) (stating that a will is partially executed, and thus invalid, if it is not attested and subscribed in the presence of two witnesses).

[175] 972 N.E.2d 659, 662 (Ohio Ct. App. 2012).

Instead, it is a statement about what one *has* witnessed.

Statutes that allow the witnesses to sign the will within a reasonable time of the testator's having signed it recognize that where or when the witnesses sign the document is really beside the point. Bolstering this understanding are statutes that define the "place of execution" of a will as "the place where the testator is physically present when the testator executes the will."[176] These principles render the *Hook* court's declaration that Levitte's signature in Washington made the will *ipso facto* executed in Washington indefensible, especially since nothing else of importance occurred there. The conclusion is analytically lazy, making no sense doctrinally or as a matter of policy. The court's rigid adherence to the domestic-versus-foreign dichotomy allowed it to sidestep a serious consideration either that the will was executed in Arizona or, more importantly, that it was an interjurisdictional will, executed, as it were, across borders and neither solely in Arizona nor solely in Washington. To take issue with the court missing the opportunity to consider the ramifications of interjurisdictionally executed wills, however, is not to argue that *Hook* was wrongly decided. Washington admits to probate wills executed under a number of different models. It is correct that Hook's 2010 will did not satisfy any of these models, but that fact has nothing to do with where the will was executed.

One important distinction between the fanciful will-execution-in-a-moving-car hypothetical described above and the facts of *Hook* is that the hypothetical describes a will execution *ceremony*, an event at which the execution of the will is completed in one sitting. Under pre-pandemic conditions, it was difficult to conceive of such a ceremony occurring across borders. In *Hook,* the will execution was not a ceremony at all but was performed piecemeal in a manner allowed by statutes that do not require the testator to sign the will in the presence of the witnesses but instead to "acknowledge" his signature to them later.[177] It is easy to imagine the components of a will executed in this fashion to be completed in different jurisdictions. Indeed, in *Hook* this is precisely what happened, with the testator executing the will in one jurisdiction and one of the witnesses attesting his signature in another.

Now that simultaneous audio-visual communication is a widely accepted emergency measure for conducting will execution ceremonies, it is just as easy to imagine a will execution ceremony occurring across jurisdictional borders. When a will execution ceremony takes place in a digital "room," the testator and the witnesses may not all be in the same jurisdiction when the will is executed. Some executive orders have expressed concern about this possibility. Arkansas's, for example, specifies that the witnesses must verify that they are in the state.[178] Georgia's proposed

[176] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2506(B) (2019).
[177] *See, e.g., id.* at § 14-2502(A)(3).
[178] Ark. Exec. Order No. 20-12(6).

legislation is similar.[179] Illinois's statute has no such requirement.[180] Michigan's hybrid approach requires in-state presence of the witness unless the document relates to a matter over which Michigan has jurisdiction.[181]

The implications of requiring "unijurisdictionality" could mean that a will executed with remote attestation in one jurisdiction with a witness across the border in another state would not be admissible even in a state that had jurisdiction over the decedent's estate. Under its optional remote attestation provision, the UEWA requires each witness to be a resident of *a* state and present in *a* state when the witnessing takes place.[182] This is a curious locution that has found its way into Colorado's enactment[183] and the District of Columbia's proposed legislation.[184] By reference to the UEWA's definitions, this may simply mean that the witnesses need to be present in and residents of the United States, its territories or possessions.[185] This unusual language does not appear in Utah's enactment of the UEWA.[186] Like most statutory schemes permitting remote attestation, Utah's simply contains no mention of where the witnesses need to be at the time of the execution of the will in order for the will to be probatable at a later date.

It is clear that remote attestation has brought forth unanticipated concerns about the location of the witnesses when they attest the will. Given that the location of the attesting witness made little difference before the pandemic, we are right to wonder what it is about remote attestation that calls into question traditionally liberal choice of law principles. Had the court in *Hook* been capable of conceptualizing an interjurisdictionally-executed will, it could have explained why such a will was inadmissible to probate in Washington despite the interjurisdictionality. Under executive orders prohibiting interjurisdictionally executed wills, it is the interjurisdictionality itself that is the fatal flaw and not the limitations of the choice of law statute. Under such an order, if Levitte had attended a will execution ceremony overseen by an attorney and had attested Hook's signature from Washington, the will would fail due to the remote attestation requirement that she be physically located in the state whose remote attestation law is being employed. This new focus on unijurisdictional execution introduces an unnecessary obstacle to validating wills for probate within a legal landscape where the location of the witnesses has traditionally assumed no significance. It more importantly seems out of step with the

[179] Ga. H.B. 940 § 1 (requiring the witnesses to be residents of and "physically located in this state").
[180] 755 ILL. COMP. STAT. 6/15-10(a) (requiring the witnesses to be "located in the United States at the time of the attestation").
[181] Mich. Exec. Order No. 2020-74 (June 30, 2020).
[182] UNIF. ELEC. WILLS ACT § (5)(a)(3)(A).
[183] COLO. REV. STAT. § 15-11-1305.
[184] B24-0450, 2021 Leg., 24 Council (Wash. D.C. 2021).
[185] UNIF. ELEC. WILLS ACT § 2(6).
[186] UTAH CODE § 75-2-1405 (2020).

need to address urgent estate planning imperatives with *more* remoteness rather than less. Remote attestation laws should recognize that the place of a will's execution has no legal significance and that, as was largely true pre-pandemic, a probate court with jurisdiction over a testator's estate should look with favor upon the execution rules of whatever jurisdictions the testator had significant contacts with.

B. Remote Presence

Several questions related to law reform arise when we consider the extant law of presence and the ongoing remote attestation experiment occurring in many states. The first is the most basic: is remote attestation meant to satisfy the presence requirement? If not, can it be said to substantially comply with it? To be a harmless error? The answer appears to be no. After all, just as law reform efforts promoting electronic wills are not meant to supplant extant law,[187] remote attestation is currently understood to be a temporary fix to a (hopefully) temporary problem, the resolution of which will enable us to return to the time when we could "hold a contemporaneous execution ceremony at which the testator and all subscribing witnesses are [physically] present and perform the requisite acts."[188] Under this understanding of the policy underlying pandemic-related will-execution measures, nothing digital should be imported into wills law that would upend established understandings of what can satisfy the presence requirement. In short, we exist in a holding pattern waiting to return to a status quo ante where electronic wills were receiving at best a tepid degree of interest.

Before the pandemic, the idea of remote attestation probably sounded futuristic and at odds with both the line-of-sight and conscious presence versions of the presence requirement. But thanks to the measures adopted in response to the pandemic, there is now a body of evidence that makes a return to the status quo ante unlikely. As described in more detail below, both completed and pending legislative activity portends that remote attestation *and* electronic wills eventually will become permanent features of our legal landscape. The budding legislative trend alone may mean that the digital revolution in wills law is a train that has already left the station. More likely, the experiment with remote attestation has revealed to practitioners who have the ear of legislators that remote attestation, when set alongside the meaning, purpose and application of the presence requirement in wills law, is not only consistent with the line-of-sight and conscious presence tests but likely superior to them.

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[187] UNIF. ELEC. WILLS ACT § 5 cmt. ("[A] state's existing requirements for valid wills will apply to electronic wills.").

[188] Katheleen R. Guzman, *Where Strict Meets Substantial: Oklahoma Standards for the Execution of a Will*, 66 OKLA. L. REV. 543, 564 n.119 (2014).

The predominating version of remote attestation, requiring the signing to be "captured sufficiently up close on the two-way audio-video communication for the witness to observe,"[189] provides better evidence than does a will execution ceremony conducted in contiguous rooms that the witnesses are "so near [the testator] that he is conscious of where they are and of what they are doing."[190] As was made clear from the experiment described above, the witnesses could see the testator signing the will and vice versa if appropriate adjustments to the camera were made, alleviating the perceptual problems inherent in bank-teller and through-the-window attestations that had to be handed over to courts for resolution. Remote attestation removes any "material obstacle prevent[ing the testator] from knowing of his own knowledge, or perceiving by his senses, the act of attestation."[191] Moreover, just as the testator could be required to show identification via the camera, the testator, under the appropriate statutory regime, could acknowledge her signature to the witnesses. Under statutes that provide the option for the witnesses to sign at a later time, the testator would not need to see the witnesses sign the will.

There is thus a strong case that simultaneous two-way video and audio transmission, a method of communication unanticipated by courts that created the line-of-sight and conscious-presence tests, satisfies any extant presence requirement. The two-way channel of communication permits the one-room test to be satisfied via a bridge of technology that ushers in the visual component that was lacking in the cases where attestation was attempted by telephone. Furthermore, the camera, if angled correctly, permits the witnesses to see the testator sign and for the testator to see the witnesses sign in a fashion that would not lead to the disputes over the adequacy of the view in "through the window"[192] Thus, a close look at what can be achieved with simultaneous two-way transmission of video and audio has revealed that the ability of the testator and the witnesses to converse in real time, while not physical presence, is communication every bit as consonant with the purposes of the presence requirement as are standards that extol and reward physical proximity.

C. Electronic Wills

The most interesting facet of remote-attestation orders as a response to the pandemic is their interplay with electronic wills. Although it would seem as if remote attestation might simply go hand in hand with electronic wills as part of a concerted effort to digitize will execution, there has been and remains ambivalence about pairing the two. The direction in which we can expect the law to evolve is the subject of this section.

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[189] Ill. Exec. Order 2020-14 (Mar. 26, 2020).
[190] *In re* Demaris' Estate, 110 P.2d 571, 582 (Or. 1941).
[191] Calkins v. Calkins, 75 N.E. 182, 183 (Ill. 1905).
[192] Moore v. Glover, 163 P.2d 1003, 1006 (Okla. 1945).

Executing pen-and-paper wills using remote execution and attestation has been anything but comfortable and is the biggest challenge facing estate planners and their clients. In the experiments with remote attestation described above, remote attestation in the absence of electronic wills proved cumbersome and nonintuitive. Moreover, it was observed that this method of executing wills requires an internet connection, a computer or smartphone, and a printer. These are tools that a significant number of Americans lack, among them roughly a quarter of those aged sixty-five and over.[193] No emergency remote-attestation measure acknowledged these difficulties, however. Nonetheless, remote attestation has breathed new life into electronic wills precisely because many associate online execution with electronic wills and also because pairing remote attestation with electronic wills would be a boon to estate planning. But until recently, at least in the vast majority of jurisdictions, an electronic will could not be remotely attested, and remote attestation could not be used to complete an electronic will.

Before the pandemic, electronic-wills jurisdictions were of two minds about pairing remote attestation with electronic wills. Arizona and Indiana, for example, disfavored remote attestation altogether.[194] Nevada and Florida, allowed remote attestation for electronic wills but not for pen-and-paper wills.[195] The Uniform Laws Commission did not believe remote attestation to be indispensable to a robust electronic-wills statutory scheme under the UEWA and never included remote attestation in the Uniform Probate Code. Early responses to the pandemic were consistent with this trend in permitting remote attestation on an emergency basis but not providing for electronic wills and in some cases expressly forbidding them to be the product of a remotely attested will,[196] as if the amount of digitization might

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[193] Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption,* PEW RSCH. CTR. (June 21, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/ [https://perma.cc/DYX2-W7D7]; Andrew Perrin & Sandra Atske, *7% of Americans Don't Use the Internet. Who Are They?,* PEW RSCH. CTR. (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/5K47-MQXY].

[194] Dave Stafford, *Probate Bar Proposes Legislation to Permit Electronic Signatures on Wills*, IND. LAWYER (Oct. 17, 2017), https://www.theindianalawyer.com/articles/45116-probate-bar-proposes-legislation-to-permit-electronic-signatures-on-wills [https://perma.cc/7KHT-P5AB] (noting that the task force assigned to study electronic wills was not supportive of remote attestation); ARIZ. REV. STAT. § 14-2518(A)(3)(a); Pub. L. 40-2018 (Ind.) (requiring "actual presence" for electronic wills and excluding "audiovisual telecommunication" from its definition).

[195] *Compare* FLA. STAT. § 732.502(1)(b)-(c) (requiring "presence" for attested non-electronic wills) *with* FLA. STAT. § 732.522 (permitting remote attestation of electronic wills); *compare* NEV. REV. STAT. § 133.040 (requiring "presence" for attested non-electronic wills) *with* NEV. REV. STAT. § 133.088(1)(a)(2) (permitting remote attestation of electronic wills).

[196] *See* Ill. Exec. Order 2020-14 (maintaining the prohibition of electronic signatures on wills,

eventually reach an unacceptable degree.

States may now be poised to embrace, on a permanent basis, one or both of these reforms. The tide is discernibly turning by degrees, as more jurisdictions embark on the electronic-wills experiment and consider whether to include remote attestation for electronic wills alone or for all wills. Some states that already recognized electronic wills are extending remote attestation to paper wills. For example, Indiana has added remote attestation provisions to both its electronic wills and its paper wills statutes. The electronic wills statute now requires only "presence" and recognizes that "audiovisual technology" may be used "to satisfy the presence requirement."[197] Effective July 1, 2022, Indiana's statute governing paper wills defines presence as encompassing remote attestation and specifies that a will executed "in two (2) or more original counterparts" must be supervised by an attorney or a notary public.[198] Nevada, which previously permitted remote attestation only of electronic wills, has extended remote attestation to paper wills by adding a definition of presence that encompasses "audio-video communication."[199] Other states, considering electronic wills for the first time, may or may not include provisions for remote attestation. Illinois and Maryland have both enacted comprehensive legislation permitting electronic wills and remote attestation for all wills.[200] Neither state used the UEWA as a legislative model.

Among the states that have enacted the UEWA, there appears to be no agreement about whether remote attestation should be available for electronic wills and, for those states that believe it should, no agreement about whether remote attestation should also be extended to paper wills. Utah and Colorado, for example, employed the UEWA as their model and permit remote attestation of electronic wills but have separate statutes for paper wills that make no mention of remote attestation.[201] North Dakota's version rejects remote attestation altogether,[202] while Washington's version, effective January 1, 2022, permits remote attestation for all wills.[203] States considering enacting the UEWA are likewise not in agreement. Bills introduced in Massachusetts and the District of Columbia reject remote

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trusts, living wills and healthcare powers of attorney under section 5-105(c) of the Electronic Commerce Security Act, since repealed).

[197] IND. CODE § 29-1-21-4.

[198] H.B. 1255, 2021 Leg., Reg. Sess. (Ind. 2022).

[199] NEV. REV. STAT. § 133.050(4) (2021).

[200] 755 ILL. COMP. STAT. 6/15-10(b) (permitting remote attestation for electronic or paper wills); MD. CODE, ESTATES AND TRUSTS LAW § 4-102(b)(3)(ii), (c)(1).

[201] *Compare* UTAH CODE § 75-2-1405(1)(c) (permitting remote attestation of electronic wills) *with* UTAH CODE § 75-2-502(1)(c) (requiring witnessing of the testator's signing or acknowledgment of having signed); *compare* COLO. REV. STAT. § 15-11-1305(1)(c)(I) (permitting remote attestation of electronic wills) *with* COLO. REV. STAT. § 15-11-502(1)(c)(I) (requiring witnessing of the testator's signing or acknowledgment of having signed).

[202] N.D. CENT. CODE. § 30.1-37-04.

[203] WASH. REV. CODE § 11.12.020.

attestation altogether,[204] but the bill introduced in Georgia would allow it for electronic wills.[205] Some legislative activity reflects none of these patterns, as in Oregon's new remote attestation provision that expressly excludes "[t]he witnessing of the execution of a will."[206] Similarly, bills introduced in New York, harkening back to the emergency orders made at the outset of pandemic, would not permit electronic wills but would allow remote attestation for pen-and-paper wills.[207]

In this flurry of legislative activity, the trend is toward permitting some element of electronic technology into will executions, but the variety of approaches portends that uniformity will be elusive for some time to come. Perhaps the drafters of the UEWA were correct that under pre-pandemic conditions legislators would not want to embrace both. Electronic wills had been on the legal landscape—admittedly to a limited extent—for some time, but remote attestation had not. Perhaps it made sense to market electronic wills first to legislatures and then to build on whatever legislative territory was thereby gained by introducing remote attestation at a later date. Such planning is in keeping with an incremental strategy to aim for uniformity that is unachievable all at once. The tireless work of the Uniform Laws Commission and, to a lesser extent, of the American Law Institute in this vein have yet to be influential in large measure because they are so recent. There has not been adequate time for them to be reflected broadly in legislative enactments.

Remote attestation and electronic wills may well exist comfortably alongside each other at a future time yet to be determined. The pandemic-inspired experiment with remote attestation has made it so that instead of electronic wills setting the stage for the eventual acceptance of remote witnessing, remote witnessing has set the stage for the eventual acceptance of electronic wills. This has been an unexpected shift in course and one from which there is no way back. The pandemic has shed new light on the value of electronic wills, and we can all now easily envision a legal regime where electronic wills and remote attestation exist side by side. There is reason to believe that legislative activity going forward will eventually confirm that remote attestation and electronic wills are two sides of the same digitization coin and that the introduction of one into the statutes should mean the introduction of the other.

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[204] SD.2927, 2021 Leg., 192 Gen. Court (Mass. 2022); B24-0450, 2021 Leg., 24 Council (Wash. D.C. 2021).

[205] H.B. 940, 2021 Leg., 442nd Sess. (Md. 2021).

[206] OR. REV. STAT. § 42.141(7)(a).

[207] S.B. 8071, 2021 Leg., 238th Sess. (N.Y. 2021); A.B. 6063, 2021 Leg., 238th Sess. (N.Y. 2021).

V. CONCLUSION

The social distancing norms of the coronavirus crisis made the execution of wills more difficult by placing beyond reach the traditional will-execution ceremony conducted indoors with the testator, the witnesses, and the estate planning attorney seated around a table in a conference room. With a *Groffman*-style dinner party also out of the question and with only a handful of estate planning lawyers offering to make house calls or to meet in a nearby park, testators eager to put their affairs in order have been reduced to following an attorney's or a do-it-yourself kit's instructions as faithfully as they can. Much can go wrong during such proceedings, however, as the proponents of Groffman's will learned. Online will execution services are not the answer, as these services still require the testator to print and scan paper documents and are in this sense not truly "online." Travel to jurisdictions that permit holographic wills is not always possible and cross-border recognition of such wills not assured. An individual faced with this poor set of options may conclude that postponing estate planning is the most sensible choice.

The emergency orders permitting will-execution witnesses to attest the testator's signature by means of simultaneous audio-visual communication have proven difficult to maneuver. They do nothing to relax the requirement that wills be completed with pen and paper, and they raise complicated questions of geographic specificity unfamiliar from pre-pandemic probate law. Practitioners and scholars interested in seeing a wider and more flexible embrace of electronic wills than currently exists will likely applaud the current widespread use of remote attestation. Experiments reveal that those interacting in such a setting understand that remote attestation cannot be viable long-term without also embracing electronic wills. The use of remote attestation for the sole purpose of executing pen-and-paper wills results in a cumbersome process that will at least dissuade many from pursuing estate planning and at worst will lead to irreparable mistakes in a legal system not wholly accepting of the substantial compliance and harmless error doctrines.

This Article has described the current experiment with remote attestation as one marked by hastily drawn executive orders that have raised more questions than they have answered. At the same time, these orders, although prompted by a crisis we hope will go away, present an opportunity for ushering probate law into the digital age. As the British Law Commission put it before it abandoned its 2017 project to modernize the Wills Act, any move made toward the digital creation and execution of wills would "better reflect the modern world."[208] Making remote attestation and electronic wills

[208] *Wills*, L. COMM'N (UK), https://www.lawcom.gov.uk/project/wills/ [https://perma.cc/YZ99-MP5Z].

permanent features of our will-execution norms will not only serve this important purpose but will help make estate planning more accessible and egalitarian.