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# Kentucky's Contradictory Treatment of the Testator's Intent when Considering Wills

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Kentucky's Contradictory Treatment of the Testator's Intent when Considering Wills

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Throughout our lives, we all work diligently to provide for ourselves and others. We work to buy our first car and house; to purchase jewelry, furniture, décor, etcetera; and to acquire many other assets. While we cherish these assets during our lives, we cannot hold onto them forever. We do, however, retain the right to control their disposition. For some, this process is made simple by hiring an attorney. For others, they will take matters into their own hands and write out their final wishes. Both processes, if done correctly, are valid,<sup>[1]</sup> but one mistake may have major consequences.

## Will Requirements

Kentucky law lays out the requirements of a valid will:

No will is valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction. If the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two (2) credible witnesses, who shall subscribe the will with their names in the present of the testator, and in the presence of each other.<sup>[2]</sup>

In summary, a formal will requires the attestation of two witnesses in the presence of each other and the testator.<sup>[3]</sup> Alternatively, a holographic will, must be handwritten and signed by the testator.<sup>[4]</sup> Furthermore, a holographic will must evidence the testamentary intent of the testator.<sup>[5]</sup> Regardless of whether the will is a formal will or a holographic will, the signature must be at the end on the document.<sup>[6]</sup>

## Various Views on Will Formalities

As with everything, mistakes are made when executing wills. Depending on the jurisdiction, such mistakes may invalidate the will. There are three views on this matter: strict compliance<sup>[7]</sup>, substantial compliance<sup>[8]</sup>, and harmless error<sup>[9]</sup>. Starting with the most restrictive view, strict compliance requires that all statutory requirements be complied with, barring any error in a valid will unless ad hoc relief is provided.<sup>[10]</sup> Loosening the reins, the substantial compliance view holds that a testator who fails to comply with all statutory requirements but still promotes the goals of the formalities may still execute a valid will.<sup>[11]</sup> Finally, the most lenient approach is the harmless error approach, which is adopted under the Uniform Probate Code (UPC).<sup>[12]</sup> In the few jurisdictions that have adopted this view, a will that was not properly executed may be found to be valid if there is proof that it accurately represents the decedent's testamentary intent.<sup>[13]</sup>

## Kentucky Law and Inconsistencies

In Kentucky, courts adhere to the substantial compliance view.<sup>[14]</sup> Additionally, as mentioned previously<sup>[15]</sup>, Kentucky permits the use of holographic wills.<sup>[16]</sup> To summarize the requirements for easier comparison, a formal will may violate the strict reading of the statute if it still upholds the intentions of the formalities, but a holographic will need only be handwritten and display testamentary intent.<sup>[17]</sup>

Between these two requirements is a great conflict: a testator who types his will is held to a higher standard than a testator who writes his will by hand. While handwriting may serve an evidentiary function, the current requirements create a greater propensity for the creation of invalid wills. In an age of technology, where most households possess a computer of some sort,<sup>[18]</sup> the days of handwritten letters and documents are quickly dissipating.<sup>[19]</sup> Consequently, it seems probable that the average person will take to their computer rather than their pen to document their final wishes. With this likelihood in mind, are we to penalize them for such a decision?

Under the current statute and the substantial compliance doctrine, the answer is clearly yes. The decision to type their will changes the test from inquiring about a signature at the end of the document and evidence of testamentary intent<sup>[20]</sup> to a test of whether the testator's will promoted the goal of the statutory formalities that he quite possibly did not know existed.<sup>[21]</sup> To resolve this inconsistency, the adoption of the harmless error approach would create a uniform assessment and allow the authors of holographic wills to escape penalization for the honest mistake of utilizing today's technology rather than pen and paper. Under this rule, the test for the validity of both holographic wills and formal wills that do not strictly adhere to the statutory requirements will be whether the purported will evidences the testator's testamentary intent.<sup>[22]</sup> Through this approach, the intent of the testator will be the primary focus of the court, ensuring that their interests are protected.

## Conclusion

Under the current law, the courts are more concerned about the purpose fostered through the formalities than the interest and intent of the testator when a typed will is contested. Given the wide-spread use of technology today, this view is likely to invalidate many wills typed by testators even though the same will would be valid if written by hand. The adoption of a harmless error test would mitigate this risk. Under this approach, the document need only show the testator's testamentary intent to be valid. Through the adoption of this doctrine, Kentucky law can finally put the testator's interest first.

[1] Ky. Rev. Stat. Ann. § 394.040 (West 2023).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Landrum v. McNeill*, 107 S.W.2d 314, 319 (KY 1937).

[6] Ky. Stat. Rev. Ann. § 446.060(1) (West 2023).

[7] See *Stevens v. Casdorph*, 508 S.E.2d 610, 613 (W. Va. 1998).

[8] *Rybolt v. Futrell*, 176 S.W.2d 269, 270 (Ky. 1943).

[9] Unif. Prob. Code § 2-503 (amended 2019).

[10] See *Stevens v. Casdorph*, 508 S.E.2d 610, 613 (W. Va. 1998).

[11] *Rybolt v. Futrell*, 176 S.W.2d 269, 270 (Ky. 1943).

[12] Unif. Prob. Code § 2-503 (amended 2019).

[13] *Id.*

[14] *Rybolt v. Futrell*, 176 S.W.2d 269, 270 (Ky. 1943).

[15] See *supra* text accompanying notes 4-5.

[16] Ky. Rev. Stat. Ann. § 394.040 (West 2023).

[17] *Id.*; *Rybolt*, 176 S.W.2d at 270.


[18] See *Computer and Internet Use in the United States: 2018*, U.S. Census Bureau (Apr. 21, 2021) <https://www.census.gov/newsroom/press-releases/2021/computer-internet-use.html> (showing that 92% of all households in 2018 had one or more computers).

[19] See John Coleman, *Handwritten Notes are a Rare Commodity. They're also More Important than Ever.*, *Harv. Bus. Rev.* (Apr. 5, 2013) <https://hbr.org/2013/04/handwritten-notes-are-a-rare-c> ("the average home only received a personal letter once every seven weeks in 2010").

[20] *Landrum v. McNeill*, 107 S.W.2d 314, 319 (KY 1937); Ky. Rev. Stat. Ann. § 394.040 (West 2023).

[21] *Rybolt v. Futrell*, 176 S.W.2d 269, 270 (Ky. 1943).

[22] *Unif. Prob. Code* § 2-503 (amended 2019).

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