

## WILLS ABOVE GROUND

*Thomas E. Simmons*

*The widespread adoption of electronic court filing systems allow for easier and more efficient views of the rich data of probate proceedings. Wills Law on the Ground by Professor David Horton, published in the UCLA Law Review, highlights both the potential and some of the inherent limitations of empirical research in the law of wills.<sup>1</sup> Wills law has been the battleground of formalists and functionalists over the last half century, with both sides bearing the banner of testator intent, but neither backing up their proposals or counterproposals with much hard data about which better achieves their common aim. Professor Horton culls data from probate files to disprove predictions of litigiousness and runaway probate costs that were projected to accompany a departure from strict formalism.<sup>2</sup> At the same time, his study encounters the difficulty of assessing the measure of decedents' unstated goals. This Article outlines will doctrines and past empirical probate studies and probes a future when relaxed formalism will be finely tuned by empirical data to achieve majoritarian testator intent.*

---

Assistant Professor at the University of South Dakota School of Law. I thank Professor Horton for his insightful and intelligent comments. His assistance was collegial and does not imply endorsement.

1. David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094 (2015).
2. *Id.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	344
II.	DISCUSSION .....	346
	A. <i>Initial Observations</i> .....	346
	B. <i>Background and Theory</i> .....	349
	C. <i>Survey of Prior Empirical Studies of Probate Files</i> .....	354
	D. <i>Formalities and Rules of Construction in Context</i> .....	356
	1. <i>Will Execution</i> .....	356
	A. <i>The Attestation Formality with Non-Holographic Wills</i> .....	357
	B. <i>Holographic Wills</i> .....	359
	C. <i>Harmless Error: "Clear and Convincing Wills"</i> .....	362
	1. <i>Will Construction: Presumed Majoritarian Intent for</i> <i>Imperfectly Drafting</i> .....	364
	A. <i>Ademption by Extinction</i> .....	364
	B. <i>Antilapse</i> .....	366
III.	CONCLUSION.....	369

**I. Introduction**

Estate planning typically forms the backbone of an elder law practice. Despite the increasing popularity of trusts, especially revocable trusts, in a standard estate plan “package,” wills and will doctrines continue to inform drafting choices and the occasional omission overlooked by even the most careful drafting attorney. Will formality requirements and will construction doctrines make assumptions about the typical testator’s intent and preferences. Empirical probate research allows an assessment of whether those assumptions are, in fact, correct.

Professor David Horton’s *Wills Law on the Ground* presents a thoughtful and thought-provoking analysis of certain wills doctrines against data gleaned from 571 Alameda County, California probate files.<sup>3</sup> His empirical inquiry should be a model for the kind of research now made more attainable through the widespread adoption of electronic court filing systems. The ability to mine probate files for data from one’s tablet—as opposed to pawing through physical court files in a local courthouse as the clerks of court bustle about trying to keep the administration of justice moving—permits scholars to achieve the kind of empirical assays that earlier were cumbersome or

---

3. *Id.* at 1121.

even unattainable. Professor Horton, while recognizing the limitations of his database—“a pinprick of light in the vast darkness of probate”—makes a number of important and helpful findings.<sup>4</sup>

Professor Horton has generated a statistical analysis to measure the effects of the retreat from formalism and advance towards functionalism in the law of wills.<sup>5</sup> Professor Mark Ascher and others predicted uncertainty and litigiousness if the proposed wills law reforms of Professors Langbein and Waggoner were implemented.<sup>6</sup> Reformers such as Professor Langbein advocated, among other things, for the adoption of the harmless error rule to excuse trivial and not-so-trivial deviations from the strict formality requirements for the execution of a will.<sup>7</sup> Other liberalizations of wills law—replacing the “identity” theory of ademption with the “intent” theory,<sup>8</sup> relaxing the prohibition against will reformations,<sup>9</sup> and tweaking the lapse rules,<sup>10</sup> have also crept into the Uniform Probate Code and some state probate codes in the last thirty years as a part of the same reformist movement.

This Article summarizes Professor Horton’s primary findings against the backdrop of liberalizations in the law of wills and the theory and assumptions which have driven those liberalizations. *Wills Law on the Ground* is not the first attempt to mine probate files for data,<sup>11</sup> but it may be one of the best. In this Article, I offer my own observations, compliments, and suggestions for areas of further empirical study.

An assessment of probate files such as the one undertaken by Professor Horton is invaluable in reckoning the effects of the liberalization of wills law, while falling short in providing substantive feed-

---

4. *Id.* at 1122.

5. *Id.* at 1126-28.

6. See John H. Langbein, *The Nonprobate Revolution and the Future of Succession*, 97 HARV. L. REV. 1108 (1984); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982). See also Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993).

7. UNIF. PROBATE CODE § 2-503 (amended 2010).

8. UNIF. PROBATE CODE § 2-606(a)(6) (amended 2010); see Raley L. Wiggins, Note, *Revoke a Specific Device*, 61 ALA. L. REV. 1163, 1166-68 (2010) (discussing the intent theory of ademption).

9. See UNIF. PROBATE CODE § 2-903 (amended 2010).

10. See, e.g., UNIF. PROBATE CODE § 2-201 (amended 2010).

11. See generally David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 655 (2015) [hereinafter *Partial Defense*] (analyzing a somewhat larger version of the same dataset of Alameda probate files).

back on the degree to which testator intent—the ultimate aim with the law of wills—is being either achieved or thwarted.<sup>12</sup> That feedback can be gathered only from the living, not from the dead. The limitations of empirical inquiry into probate files do not devalue Professor Horton’s important work, but do suggest future avenues of empirical investigations that can directly measure the effectiveness of functionalism in the law of wills. Indeed, the future of the law of wills and a true assessment of the degree to which formalism achieves or falls short of achieving majoritarian testator intent may lie in empirical inquiries—polls or surveys, perhaps—that seek to ascertain more direct and relevant answers to these important questions.

## II. Discussion

### A. Initial Observations

It is often said that the touchstone in the law of wills is giving effect to an individual’s intentional exercise of the power to determine the successors in ownership to his or her property.<sup>13</sup> The exceptions to this fountainhead are few and far between, but include restraints on the nonconsensual disinheritance of a spouse and a testamentary gift to the murderer of the testator (the “slayer rule”).<sup>14</sup> These limited exceptions prove the rule. Some states even permit their testators the option to override the “slayer rule.”<sup>15</sup> The required elements of a valid will and the rules of construction governing an ambiguous will are presumably designed to accurately deliver testator intent to a fact finder. Arguments about the merits of a particular rule are conducted

---

12. See generally Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALA. L. REV. 891, 912 (1992) (emphasizing that “succession law should reflect the desires of the ‘typical person,’” insofar as protecting expressed intentions and anticipating scenarios where expressions are inadequately preserved).

13. *Id.* See also UNIF. PROBATE CODE § 2-603 (amended 2010) (stating “[t]he intention of a testator as expressed in his will controls”).

14. See, e.g., UNIF. PROBATE CODE § 2-803 (amended 2010) (the “slayer rule”); UNIF. PROBATE CODE § 2-202 (amended 2010) (elective share rights in separate property states).

15. See, e.g., *In re Estate of Schunk*, 760 N.W.2d 446, 449 (Wis. Ct. App. 2008) (noting that WIS. STAT. § 854.14(6)(b) permits a testator to dispose of his or her property to whoever the testator wishes even if the devisee “has unlawfully and intentionally deprived the testator of his or her life[;]” a testator may, for example, wish to excuse euthanasia).

on the same field of battle: whether a rule is better suited to achieve a testator's intent.

The trend of relaxation and liberalization in the law of wills has replaced rules and certainty with fact-sensitive judicial inquiries. Formalism has been exchanged for less predictability, but, the reformers hope, greater accuracy. The trend has been pursued on the basis of being better attuned to what everyone agrees to be the ultimate aim in wills law; testator intent.<sup>16</sup> Professor Horton's Article deploys an empirical analysis to determine whether this relaxation of formalism has achieved its goal, and at what cost.<sup>17</sup> One of his preliminary and more surprising findings is that although contested probate proceedings in his sampling tended to take somewhat longer to reach finality than uncontested ones, the estate's attorney and personal representative fees were not markedly higher.<sup>18</sup> The cost of functionalism, in other words, appears to be minimal.<sup>19</sup>

This is explained in part, as Professor Horton notes, because both estate attorney and personal representative fees are set by statute in California.<sup>20</sup> Fees can be increased with court approval if justified by "extraordinary services," but the courts are reluctant to do so.<sup>21</sup> It also bears emphasis that it does not appear that the data in the Alameda County files reveal the attorney fees incurred by the heirs and devisees in contested matters.<sup>22</sup> Doubtless, if these fees were included,

---

16. See also UNIF. PROBATE CODE § 1-102(b), (b)(2) (amended 2010) (stating that "[t]he underlying purposes and policies of" the Uniform Probate Code "are: to discover and make effective the intent of a decedent in distribution of his property").

17. See generally Horton, *supra* note 1, at 1120-55.

18. See *id.* at 1128 (noting "lawsuits seem to cost much less than expected").

19. Cf. Glenn R. Drury, *The Uniform Probate Code and Illinois Probate Practice*, 6 LOY. U. CHI. L.J. 303, 337 (1975) (predicting, based upon a review of Cook County, Illinois probate files, that "the adoption of the Uniform Probate Code would not significantly reduce the time and expense involved in the administration of a decedent's estate in Illinois"); Robert W. Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D. L. REV. 523, 527 (1974) (concluding, based on a review of several thousand estate tax returns, that "the Uniform Probate Code in Idaho has been effective in reducing the outlay of money in the 'probate' process").

20. CAL. PROB. CODE § 10811 (West 1991 & Supp. 2014); see *Partial Defense*, *supra* note 11 (analyzing a somewhat larger version of the same dataset of Alameda probate files and concluding that even "when litigation is unavoidable, probate's fixed fee schedule puts a damper on costs").

21. Horton, *supra* note 1, at 1128; see also CAL. PROB. CODE § 10811.

22. See *Partial Defense*, *supra* note 11.

there would be a more dramatic difference in the costs of contested compared with uncontested probates.

Fulfilling testator intent is mixed with other related, less vocalized, yet powerful policies, including cost sensitivity. Were testator intent the only concern, judges regularly would admit witnesses to testify on what the testator thought of his or her heirs, whether they treated him or her with respect, or whether affections were reciprocated. Were testator intent the sole aim of probate proceedings, nuncupative wills would be freely allowed, and verbal modifications or revocations of wills would be widely recognized. Formalism can be painted as the antithesis to a factually sensitive inquiry into testator intent.

In some instances, formalism seems to have worked against the aim of achieving testator intent because the courts tell us that this is the case. In *In re Colling*, George Colling started to sign his will before two witnesses from his hospital bed.<sup>23</sup> Before he had finished, one witness, a female nurse, was called away.<sup>24</sup> When she returned, he acknowledged his signature to her—as did the other witness—and she signed the instrument.<sup>25</sup> The court held that because Mr. Colling did not sign or acknowledge before either witness had attested, the will was invalid, noting that the Wills Act “has manifestly on occasion defeated the intention of the testator,” and in this case, “glaringly so.”<sup>26</sup>

Of course, our courts do not actually know what a decedent wanted; they are merely pointing out that the quantum of proof that has been submitted on the issue—if considered independent of the technical formality requirements—is overwhelming. The courts in this type of case are telling us that were the issue simply presented in the form of a question to be decided on the evidence, the outcome would much more likely match with testator intent than the outcome demanded by formalistic statutory rubrics. Only the decedent at the center of a probate proceeding could reveal whether the formality in question succeeded in its aim of ascertaining intent.

A natural question then, is: why do we adopt formalistic demands at all? Why, for example, require a signature at the foot of an

---

23. *Re Colling* [1972] 3 All ER 729 (Ch) at 730.

24. *Id.*

25. *Id.*

26. *Id.*

instrument before allowing it to qualify as a will?<sup>27</sup> The familiar truth-seeking methods of courts—“cross examination, the oath, the proficiency of handwriting experts, and the discriminating judgment of courts and juries”<sup>28</sup>—why not simply employ these methods to the question of whether the testator intended the writing to constitute her will? These methods seem to work well enough with other factual issues in our courts. Why not with assessing testator intent? Seventy-five years ago, Dean Gulliver and Catherine Tilson took up this question and explained how formalistic rules can be justified on the basis of achieving testator intent.<sup>29</sup> Their explanations still shape the way wills law is thought about today.

## B. Background and Theory

Gulliver and Tilson identified overlapping values at work in the law of wills.<sup>30</sup> They sketched out two primary functions to the will formality rules (such as those for attested instruments which require that wills be in writing, signed and witnessed): an evidentiary function and a ritual function.<sup>31</sup> The evidentiary and ritual functions both relate to the principal issue of testator intent, but each focuses on different aspects of that aim and fulfills different purposes.

When an attested instrument is offered for probate, Gulliver and Tilson explained, evidentiary functions are fulfilled by virtue of the document; at a minimum, the “evidentiary value in identifying, in most cases, the maker of the document.”<sup>32</sup> The reliability of proof from a written document is greater than the recollections of long ago verbalizations. With wills, the most important witness—the testator—is always unavailable.<sup>33</sup> Many witnesses will have a dog in the

---

27. “An obvious reason for requiring the name of the testator to be subscribed at the end of the will is not only to make it appear from the face of the instrument that the testamentary act is completed, but to preclude opportunities for interpolations, fraudulent or otherwise.” PETER V. ROSS, *PROBATE LAW AND PRACTICE: A TREATISE ON WILLS, SUCCESSION, ADMINISTRATION AND GUARDIANSHIP* 35 (1908).

28. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 *YALE L.J.* 1, 4 (1941).

29. *Id.*

30. *Id.* at 2-10.

31. *Id.* at 3-10.

32. *Id.* at 7.

33. The trend of “living” or antemortem probates contradicts this assertion. See, e.g., Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 *NEV. L.J.* 1, 9 (2013) (noting that “Alaska, Arkansas, Nevada, North Dakota, and Ohio have such antemortem probate stat-

fight; a legatee or a disinherited heir stepping forward with their own version of events and family history. The recollections of contemporaries of the deceased may have faded over time, although if necessary, the witnesses to an attested instrument itself might be called to testify as to those recollections. On balance, will formality requirements function to encourage a better assortment of evidence than a nuncupative testament.

Second, signed and attested wills satisfy a ritual function; the ceremony, which accompanies the execution of the instrument, “precludes the possibility that the testator was acting in a casual or haphazard fashion.”<sup>34</sup> Were we to simply allow an evidentiary free-for-all and conduct fact-finding into decedents’ intentions regarding the disposition of their property at death, one can envision a long line of witnesses, all of whom may assert various plans that the decedent articulated at one time or another.<sup>35</sup> The trusted employee might testify that the decedent promised to reward his loyal service with a legacy; the ne’er-do-well sibling swear that the decedent told her she would receive his homestead; the sometimes lover explain that how boyfriend, after coitus, suggested that his estate was hers. One problem presented for the factfinder with this evidence is the reliability of the witnesses. Assuming the factfinder finds all the witnesses credible, some of the decedents’ statements may have represented only a passing fancy. The factfinder needs to sort out those statements which were intended to have dispositive effect from those not intended to have that effect.<sup>36</sup> Some donor remarks may have been deliberately intended to effectuate a testamentary transfer, others, idle chatter. Formalistic requirements, thus, advance a gatekeeping function, separating the wheat from the chaff, the proclamation from the haphazard aside.

Gulliver and Tilson also identified but dismissed a third function of will formality requirements: a prophylactic purpose.<sup>37</sup> Formality requirements protect the testator—especially the testator on his

---

utes, which authorize a person to initiate, during life, ‘an adversary proceeding during the testator’s life to declare the validity of a will’”).

34. Gulliver & Tilson, *supra* note 28, at 5.

35. Thus, one could also articulate a cost-savings function in replacing wide-ranging post-mortem evidentiary inquiries with pre-mortem formality requirements. See UNIF. PROBATE CODE § 1-102(b)(3) (amended 2010) (noting that the purpose and policies of the UPC include “promot[ing] a speedy and efficient system”).

36. Gulliver & Tilson, *supra* note 28, at 4.

37. *Id.*



deathbed with diminished capacity—from the improper influence of those who wish to inherit.<sup>38</sup> Gulliver and Tilson disregarded the “protective” function, reasoning that both the value of any safeguarding function and the extent of its accomplishment were doubtful.<sup>39</sup> Protection of the testator from deathbed pressures was ensured through the revocability of wills rather than formalities.<sup>40</sup> If a testator had been cajoled, she could just revoke the will after the wrongdoers had departed. Of course, the closer the testator was to death, the less available the revocability means of correcting a villain’s pressures.<sup>41</sup> Thus, part of Gulliver and Tilson’s thesis rested on an untested thesis that in the twentieth century, deathbed wills were much less common than in the days of Mozart.<sup>42</sup>

One can perceive in all three of these functions—evidentiary, ritual, and protective—a common aim: ascertaining the different angles of testator intent. Some formality requirements achieve these subsidiary functions to different degrees. Take a signed handwritten note found among other scraps on the kitchen table of a recently departed widower reading: “To my son, Billy, all my estate.” The statement itself is better preserved in this written format than if the widower had declared it verbally at a dinner party; witnesses to a verbal declaration would no doubt diverge and some guests may not remember the statement at all. With a written statement, we eliminate differing versions of the statement and focus only on the printed words left behind. Thus, the “evidentiary function” can be seen in a holographic instrument. The authenticity of the document (i.e., who made it) and its contents (i.e., what it says) require little in the way of any additional testimony to establish.

Yet, an inquiry into testamentary intent goes beyond simple authenticity and the ordering of words and punctuation. It also encompasses finality and whether the written statement was backed up by genuine testamentary intent.<sup>43</sup> From my years in private practice, my

---

38. *Id.* at 9-10.

39. *Id.* at 10-11.

40. *Id.* at 9.

41. *Id.* at 10.

42. *See id.* at 10.

43. *See, e.g.,* In re Estate of Allen, 301 S.W.3d 923, 929 (Ct. App. Tex. 2009) (holding that a handwritten and witnessed writing titled “Statement” and providing “For: Leonard Allen” followed by a list of equipment, cattle, and personality fails as a codicil for lack testamentary intent). “Testamentary intent depends on the maker’s intention to create an irrevocable disposition of her property to take effect after her death.” *Id.* at 927 (citation omitted).

clients would often try sketching out their testamentary thoughts in writing in order to step back and try them on for size, as it were, before reaching a final decision. Clients will bring in handwritten notes that on the surface would appear to satisfy the requirements of a holographic will or codicil if it is signed, but they have not reached the finality of their thought process. They bring in those notes to discuss with their attorney, look at the issue from a different point of view, and then finalize their wishes. Our widower may have been engaging in the same process with his kitchen table note. We cannot tell. An attested will, much more so than a holographic will, fulfills the “ritual function,” which considers the finality of the decedent’s intentions.<sup>44</sup> It can safely be assumed that decedents who go through the ritual of witnesses and—typically—a fancily worded document on expensive paper—had finished thinking things through and reached a decision they were willing to formalize.

There is a secondary shade to the “ritual function.” Consider matters from the perspective of the widower who scrawled out a note about his son at the kitchen table. Assuming that the widower did have finality of intention, he would have received lower grade feedback as to whether he accomplished his aims rather than if he had instead signed an instrument in the presence of two witnesses. Some holographic wills in Horton’s sample do not necessarily suffer from this same defect because their authors seem quite convinced of both the finality of their intentions and of their success in effectively declaring those intentions. Holographic flourishes such as Brian Manderson’s (“This is written to acknowledge and state my final wishes. . .”)<sup>45</sup> and Evelyn Vierra’s (“Anyone tries to break this will, give them \$1”)<sup>46</sup> contain more evidence of finality than others.<sup>47</sup>

Similarly, I can perceive two shades to the “protective function” of wills, one which is intended to benefit the author of the instrument and the other to benefit his estate’s efficient administration. Requiring certain degrees of formality to testamentary instruments encourages their execution in the atmosphere of a lawyer’s office who is trained to

---

44. *But see, e.g.,* *Vickrey v. Vickrey*, 170 So. 745, 746 (Fla. 1936) (invalidating an attested will executed in order to join a fraternal lodge for lack of testamentary intent (i.e., lack of finality of intent)).

45. Horton, *supra* note 1, at 1136 (citing Will Dated July 15, 2007, at 1-2, Estate of Manderson, No. RP07351072 (Cal. Super. Ct. Oct. 15, 2007)).

46. *Id.* at 1137 (citing Will Dated Dec. 10, 2000 at 1, Estate of Vierra, No. HP08387031 (Cal. Super Ct. June 16, 2008)).

47. *Id.* at 1136-37.

ensure the formalities are achieved as well as provide zealous, undivided loyalty to the interests of her client. Even if executed outside a lawyer's supervision, the two (ideally) disinterested witnesses provide some safeguards against greedy heirs substituting their wishes of wealth for that of the testator.<sup>48</sup> Thus, formalities are designed both to help reduce the frequency of scoundrels pressuring weakened and isolated elders into making testamentary plans against their true wishes and to provide a better record after death that such shenanigans did not occur. Formalities in some measure deter financial exploitation (saving some would-be victims) while reducing suspicions of undue influence post-mortem (benefitting their estates).<sup>49</sup>

Beneath the surface of Gulliver and Tilson's widely cited functions lies yet another unspoken value behind will formalities and the rules of construction which will be discussed below: the desire to avoid contested probates.<sup>50</sup> There is an economic justification for this: greater lawyer involvement erodes and delays the wealth passing through the succession system.<sup>51</sup> There is also a distaste of adversarial proceedings in the context of probate, which is greater than the negativity associated with litigation in other arenas. The fact that family members have counseled up to attack one another following the death of a matriarch or patriarch troubles our society on a different emotional level than the drama of a slip-fall case between a shopkeeper and a customer or an antitrust case between two competitors. We trust the adversarial process in these cases; we loathe it between family members after someone's death.<sup>52</sup> Societal pressures to avoid fighting over a decedent's funds translate to legislative resistance to

---

48. The UPC no longer requires disinterested witnesses. UNIF. PROBATE CODE § 2-505(b) (amended 2010).

49. See *Wilson v. Polite*, 218 So. 2d 843, 849 (Miss. 1969). The court states: The purpose of statutes prescribing [sic] formalities for the execution of wills is not for the purpose of restricting the power of testator to dispose of his property, but it is to guard against mistakes, impositions, undue influences, fraud, deception, etc., which would divert the property of the testator from those intended by him or her to inherit same.

50. See *infra* Part II Section (D)(2) for a discussion of two important will construction doctrines.

51. See *Partial Defense*, *supra* note 11, at 608.

52. See, e.g., *Espinosa v. Sparber*, 612 So. 2d 1378, 1379 (Fla. 1993) (expressing the "hope" that a guardian ad litem representing the interests of minor children in a probate "would not focus strictly on the financial consequences for the child, but would also consider family harmony" instead of resisting the assertion of an after-born child's assertion of pretermitted child status).

fact-sensitive inquiries in favor of the predictable, if occasionally imprecise, dictates of formalism.

### C. Survey of Prior Empirical Studies of Probate Files

Probate files offer rich data for a number of different disciplines and approaches. A number of legal scholars have previously attempted empirical studies of probate files.<sup>53</sup> History scholars have also conducted fruitful research by utilizing data from state court probate filings.<sup>54</sup> Feminist-oriented historical inquiries, which utilize probate files, are particularly revealing in tracking the evolution of women's

---

53. See, e.g., JOULA E. DEKKER & MARK V. A. HOWARD, N.S.W. LAW REFORM COMM'N, RESEARCH REPORT 13: I GIVE, DEVISE AND BEQUEATH: AN EMPIRICAL STUDY OF TESTATORS CHOICE (2006) (considering 222 testators in a study); MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE (1970) (studying 659 1960s probate records from Cuyahoga County, Ohio alongside interviews with survivors); JOSIAH WEDGEWOOD, THE ECONOMICS OF INHERITANCE (1929) (presenting data from 239 early twentieth century British estates); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1052 (1978) (analyzing 300 estates from six Iowa counties in the early 1970s); Stephen Duane Davis II & Alfred L. Brophy, "The Most Solemn Act of My Life": Family, Property, Will, and Trust in the Antebellum South, 62 ALA. L. REV. 757, 803 (2011) (evaluating nineteenth century wills from Greene County, Alabama); Drury, *supra* note 19, at 313-37 (surveying 500 Cook County, Illinois estates from 1969); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (surveying 170 estates from 1953-1957 from Cook County, Illinois); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445 (2007) (analyzing estates from San Bernardino County, California in the 1960s); *Partial Defense*, *supra* note 11, at 624-28 (assessing 668 of the Alameda court files described hereinbefore); Richard R. Powell & Charles Looker, *Decedents' Estates: Illumination from Probate and Tax Records*, 30 COLUM. L. REV. 919, 921-52 (1930) (examining data from two New York State counties); Robert A. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TRS. J. 596, 596 (1974) (collecting data from four Minnesota counties in 1969 along with inheritance tax records and attorney interviews); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 393-94 (1950) (looking at 415 estates from the first half of the twentieth century in Dane County, Wisconsin); Jason C. Kirklin, Note, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479, 535 (2011) (examining nineteenth century wills from Hamilton County, Indiana).

54. See e.g., WHEN DEATH DO US PART: UNDERSTANDING AND INTERPRETING THE PROBATE RECORDS OF EARLY-MODERN ENGLAND (Tom Arkell, Nigel Goose & Nesta Evans eds., 2000) (collecting seventeen essays discussing an historian's study of probate materials); HENRIETTA MARTINEZ CHRISTMAS & PATRICIA SANCHEZ RAU, PROBS. & WILLS: SANTA FE, NEW MEXICO 1774-1896 (2012) (containing the abstracts of New Mexico wills from probate files); L.A. Clarkson, *The Leather Crafts in Tudor and Stuart England*, 14 AGRIC. HIST. REV. 245 (1966) (studying the leather industry by use of the probate inventories of fifty-five English leather workers).

wealth and property rights in connection with the departure of coverage in the nineteenth century.<sup>55</sup>

An illustrative study is Dean/Professor Robert Stein's *Probate Administration Study: Some Emerging Conclusions*, which considered data from four Minnesota counties—one urban and three rural—in the year 1969.<sup>56</sup> Professor Stein's study was impressive in its scope, especially in the pre-digital age. He recorded four million bits of data.<sup>57</sup> Some of his findings are unsurprising. He notes, for example, the predominance of small estates and the limited use of corporate fiduciaries.<sup>58</sup>

Professor Stein's more surprising findings related to costs and temporal lengths of probate proceedings. Across all of his data, administration expenses (of which attorneys' fees comprised about half) averaged six percent of the probate estate.<sup>59</sup> When nonprobate assets are included in the calculation, attorneys' fees, as a percentage of the probate estate, fell from three percent to two percent.<sup>60</sup> Stein further noted that when he communicated his preliminary findings to the Minnesota legislature in 1973, one vocal critic of the probate process commented on the reasonableness of attorney fees: "He was amazed that the many horror stories he had heard—for example, 25 percent of estates being consumed by attorneys' fees—did not seem the case."<sup>61</sup>

---

55. See e.g., Richard H. Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 BERKELEY WOMEN'S L.J. 42 (1986); see also Karen J. Sneddon, *Not Your Mother's Will: Gender, Language and Wills*, 98 MARQ. L. REV. 1535, 1550-65 (2015) (analyzing descriptions of marital status and testator identity in wills).

56. Stein, *supra* note 53, at 598. Stein's study also included reviews of estate tax returns. *Id.* at 598.

57. See *id.* at 596 ("[W]e vacuumed the records—literally took off every bit of data").

58. *Id.* at 598, 599. Only about seven percent of probated estates utilized corporate fiduciaries, less in rural counties, and more with larger estates. *Id.* at 599.

59. *Id.* at 600.

60. *Id.* UNIF. PROBATE CODE § 3-719(c) (amended 2010) ("A personal representative is entitled to reasonable compensation for his services"); see, e.g., WYO. STAT. ANN. § 2-7-804 (1987) (providing for attorneys' fees in probate proceedings of approximately two percent); Lloyd G. McAlister, *Study 5: A Survey of State Statutes and Practices Regarding Fees of Executors, Administrators and Testamentary Trustees*, AM. COLL. OF TR. AND ESTATE COUNSEL, Mar. 2002, <http://www.actec.org/assets/1/6/Study5.pdf>.

61. Stein, *supra* note 53, at 600. Professor Stein did note that "[f]uneral expenses seem to be a very regressive kind of cost in estates." *Id.* at 602. See also Vanderlyn R. Pine & Derek L. Phillips, *The Cost of Dying: A Sociological Analysis of Funeral Expenditures*, 17 SOC. PROBS. 405, 409 (1970) (reviewing data from 351 funerals in the early 1960s and noting "that those at the upper status level do not spend more than those at the middle level [socioeconomic status]").

While probate costs were less than Professor Stein and the probate critic had anticipated, the durational costs were a different matter. Stein wrote: "There seems to be some validity to complaints that many probate administrations take too long."<sup>62</sup> For smaller estates, Professor Stein observed an average duration of sixteen months; for larger estates, just under three years.<sup>63</sup> Professor Stein felt that these averages represented an acceptable duration for larger estates, but that "many of the smaller estates should be completed much more quickly than they in fact are."<sup>64</sup>

#### D. Formalities and Rules of Construction in Context

##### 1. WILL EXECUTION

Under the Uniform Probate Code (UPC), three primary varieties of valid wills are recognized: attested wills, holographic wills, and wills which, although imperfectly executed, were intended by the decedent to constitute a will, when this intent was established by clear and convincing evidence.<sup>65</sup> Holographic wills are not a recent innovation—they were first introduced from civil law jurisdictions in colonial Virginia in the eighteenth century and widely used elsewhere in America by the nineteenth century.<sup>66</sup> Although holographic wills were not part of the anti-formalism reforms package of Professors Langbein and Waggoner,<sup>67</sup> holographic wills can be viewed as part of the longer term retreat from formalism. The role of holographic wills can also be keyed to general societal expectations with regards to will

---

62. Stein, *supra* note 53, at 602.

63. *Id.*

64. *Id.*

65. UNIF. PROBATE CODE §§ 2-502, 2-503 (amended 2010). Some scholars and practitioners, however, define four types of valid wills, with the fourth being an attested will containing a self-proving affidavit. UNIF. PROBATE CODE § 2-504 (amended 2010); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism, Part One: The Wills Act Formula, the Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 345 (1991). Today, a fifth can be added: notarized wills. UNIF. PROBATE CODE § 2-502(a)(1)-(3), (3)(b) (amended 2010).

66. See, e.g., *Matter of Estate of Rand*, 61 Cal. 468, 474 (Cal. 1882) (holding a partly printed and partly written instrument invalid as a holographic will pursuant to state statute); JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 198 (9th ed. 2013) (explaining that holographic wills "were introduced into this country by a 1751 Virginia statute and by the reception of the civil law into Louisiana").

67. See Langbein & Waggoner, *supra* note 6.

formalities; states which have long recognized holographic wills are likely to have commonly held expectations among the populace that if one makes out a testamentary plan all in one's own hand and signs it that the courts will recognize it as a will. It would be difficult to argue that individuals relying on these impressions should be ejected from the category of the testate. In other words, I believe holographic wills are here to stay.

#### A. The Attestation Formality with Non-Holographic Wills

Professor Horton finds that although California has retained a relatively archaic continuous presence requirement for witnesses when the testator signs or acknowledges her will, none of the twenty will contests in his sampling turned on whether witnesses were present.<sup>68</sup> Formalists would predict that a formality prerequisite such as California's presence attestation requirement would result in a "well-spring of litigation" and frequently thwart testators' intent.<sup>69</sup> In the sixteen will contests in Horton's sampling, four focused on faulty execution (e.g., lack of two witnesses), but none focused on the presence requirement of attestation.<sup>70</sup> Thus, Horton concludes, although there is evidence to support the function of the witness requirement for non-holographic wills, there is "no evidence that the presence prong regularly impedes decedents' intent" or performs any significant evidentiary or other function.<sup>71</sup>

The presence requirement of non-holographic wills may serve a ritualistic function, elevating the ceremony of will executions and thereby impressing upon the testator the seriousness of the testamentary act while confirming for the factfinder the finality of the testator's intent, but the degree to which this function successfully operates would be difficult, if not impossible, to gauge empirically from probate files. The presence requirement would seem to fulfill an evidentiary function since the witnesses to the instrument would be capable of offering more complete testimony about the manner and sequence of the execution of the will than witnesses who only viewed a smaller segment of the events. No wills in Professor Horton's sampling were

---

68. Horton, *supra* note 1, at 1131; *see also* CAL. PROB. CODE § 6110(c)(1) (2010).

69. Horton, *supra* note 1, at 1131.

70. *Id.*

71. *Id.* at 1129-30.

held invalid on account of the witnesses not being present.<sup>72</sup> Yet, one would think that at least a few wills in a sample of this size would be invalidated for violation of the presence formality. The fact that none were suggests, whether one agrees with the presence formality requirement or not, that the requirement is not operating as it was intended.

I suspect that the original purpose of the presence requirement is being lost on account of the introduction of the self-proving affidavit.<sup>73</sup> A self-proving affidavit is similar to an attestation clause, except that it is phrased in the past tense.<sup>74</sup> Its effect is to eliminate the need to summon witnesses to reaffirm the sequence and manner of will execution events.<sup>75</sup> In today's world of self-proving affidavits, potential will challengers can spot defects in execution from their review of the instrument, such as an interested witness, a blank where a signature should be, or even a forged or uncertain signature. However, a defect in the presence requirement would only be ascertainable upon deposing the witnesses, assuming that the witnesses even recalled the specific sequencing of the will ceremony. For decades past, the witnesses would be called before the court as a matter of course, and doubtless examined about their adherence or non-adherence to the presence requirement. The introduction of self-proved wills (as early as the nineteenth century) eliminated this requirement.<sup>76</sup>

Traditionally, a will proponent must offer the testimony of at least one attesting witness in court to effectively probate a will. Commonly, witnesses are required to testify to "the assertions of the standard attestation clause—that the testator signed the will freely in their presence or acknowledged his or her signature to them, that they signed the will in the testator's presence, and that the testator appeared to be of the requisite age and of sound mind." However, when authorized by state statute, a self-proved will may be admitted to probate without the testimony of any of the attesting witnesses.<sup>77</sup>

---

72. See generally Horton, *supra* note 1, at 1094.

73. See UNIF. PROBATE CODE § 2-504(a) (amended 2010) (providing that wills "may be simultaneously executed, attested, and made self-proved, by acknowledgement thereof by the testator and affidavits of the witnesses").

74. Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L. Q. 39, 41 (1985).

75. *Id.* "Self-proving affidavits thus simplify probate by eliminating the need to secure testimony from the attesting witnesses."

76. See Betsy Dupree-Kyle, Comment, *Michigan Self-Proved Wills: What Are They and How Do They Work?*, 2000 L. REV. MICH. ST. U. DET. C.L. 829, 832 (2000).

77. *Id.*



In a formal testacy proceeding, a self-proved will may be probated absent the testimony of any of the subscribing witnesses.<sup>78</sup>

The introduction of the self-proving affidavit eliminated the need to call the will's witnesses and at the same time eliminated the function that the presence requirement had formerly served.<sup>79</sup>

## B. Holographic Wills

About half of the states' probate codes now recognize holographic wills as an alternative to attested wills.<sup>80</sup> Holographic wills are those where "the signature and material portions of the document are in the testator's handwriting."<sup>81</sup> Holographic wills are typically ones made by individuals without the assistance of an attorney and therefore suffer from ambiguities or incompleteness in greater frequency than attested wills.<sup>82</sup> Horton found, for instance, that of the thirty-two holographs in his sample, twenty either failed to name a personal representative or lacked a residuary bequest.<sup>83</sup> They are often "rough and tumble instruments," which tend to breed litigation or at least the need for judicial clarification.<sup>84</sup> Yet, they fill an important role for those individuals intent on the do-it-yourself model or those who procrastinate until, at their last gasp, they quickly scrawl out their testament. In the case of Cecil Harris, a farmer mortally injured in a tractor mishap, a will was scratched into the tractor's fender with a knife; the fender was cut away and admitted to probate.<sup>85</sup> Today, the fender is on display at the University of Saskatchewan College of Law.<sup>86</sup>

---

78. *Id.*

79. See Douglas R. Wright, *Uniform Probate Code: Self-Proving Wills Made Easier*, 1985 ARMY L. 18, 18 (1985) (noting "self proving statutes allow wills using specific provisions to be accepted without requiring any of the witnesses to testify").

80. DUKEMINIER & SITKOFF, *supra* note 66, at 197.

81. UNIF. PROBATE CODE § 2-502(a) (amended 2010).

82. See, e.g., *Estate of Duke v. Jewish Nat'l Fund*, 352 P.3d 863, 870 (Cal. 2015) (construing a holographic will which provided for the testator's wife if she survived him and several charities if they died simultaneously but no provision for the contingency—which occurred—of his wife predeceasing him). *Duke* is also notable for rejecting the longstanding rule that extrinsic evidence is inadmissible to reform an unambiguous will. *Id.* at 874 (citing Langbein & Waggoner, *supra* note 6, at 569).

83. Horton, *supra* note 1, at 1135.

84. *Id.* at 1134.

85. Jim D. Sarlis, *From Tractor Fenders to iPhones*, 86 N.Y. ST. B.J. 10, 11 (2014). The will stated: "In case I die in this mess, I leave all to my wife. Cecil Geo. Harris."

86. *Id.*

Horton highlights the authenticity functionality of holographic wills: the handwriting can be analyzed against exemplars to confirm authenticity not just of the signature, but of the body of the document as well.<sup>87</sup> Moreover, the style, voice, tone, and idiom of the decedent oftentimes shines through a holographic will.<sup>88</sup> A holographic will may contain jokes or personal references, e.g., nicknames. Surviving family members might recognize a decedent's characteristic misspellings. Both the handwriting and the phraseology provide indications of authenticity as substitutes for the attestation formality of non-holographic wills.<sup>89</sup> The evidentiary function of attested wills (the witnesses can recall the testator's conduct and frame of mind) is qualitatively different with holographs (the more personalized document can better reveal authenticity from its tone and phraseology). The ritual function can also be contrasted; the greater formality of attested wills typically better discharges the ritual function than holographs; with many holographs, it is very much in doubt whether the testator was preserving testamentary intent or sketching out an idea.<sup>90</sup>

As to the "protective function," Gulliver and Tilson felt that holographic wills were "as obtainable by compulsion as a ransom note," but, the author of this Article wonders.<sup>91</sup> It seems that a scoundrel bent on pushing an elderly man into signing a will would prefer a procedure by which a single signature from the man was all that it took, supported by some clueless, disinterested witnesses. Professor Horton's sampling of Alameda County decedents' estates revealed that one in ten wills were holographs, but more than two times as many holographs as non-holographs triggered disputes among the heirs on account of ambiguous phrases or questions about whether the writing actually reflected testator intent or mere musings; Professor Horton's article does not break down holographic disputes by category.<sup>92</sup> One would think that wrongdoers bent on undue influence

---

87. Horton, *supra* note 1, at 1136.

88. See John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 301 (1934) (quoting a holographic will in a recipe book ending: "Chop tomatoes, onions and peppers fine . . . Measure tomatoes when peeled. In case I die before my husband I leave everything to him."); see also *In re Estate of Williams*, 66 Cal. Rptr.3d 34, 39, 49 (Cal. Ct. App. 2007) (affirming validity of holographic instrument titled "Last Will Etc. or What?").

89. Horton, *supra* note 1, at 1136.

90. "The key inquiry in virtually all holograph litigation is whether the testator wrote the document with testamentary intent." Mann, *supra* note 74, at 50.

91. Gulliver & Tilson, *supra* note 28, at 14.

92. Horton, *supra* note 1, at 1134-35.

would prefer to steer their victim towards an attested document as it requires less cooperation from the victim than a holographic will. A line of empirical inquiry could disprove or bear this out.

Gulliver and Tilson argued for relaxation of the will execution formality requirements in general, reasoning that while in 1676 (when the Statute of Frauds was applied to wills) it was reasonable to assume that “wills were usually executed on the death bed,” today, “wills are probably executed by most testators, in the prime of life and in the presence of attorneys.”<sup>93</sup> The “usually” and “probably” qualifiers are put to the test by Professor Horton.<sup>94</sup> His sampling demonstrates that on average, testators made their last wills a decade before dying.<sup>95</sup> Yet, nine perished within a week of signing their wills; three died the same day.<sup>96</sup> Deathbed wills still do occur, though, relatively rarely.<sup>97</sup>

The timing of a will execution in proximity to one’s final earthly departure suggests a greater need for protective functions in the law of wills, but individuals on their deathbeds may, in fact, be acting with clarity and stubborn independence. A better measure for the need of the protective function of will formalities would consider the number of testators suffering from diminished capacity when their will was executed. This kind of empirical approach is certainly easier said than done. The methodology by which one would assess the capacity of testators from probate files is unclear since testators may have suffered from diminished capacity without a claim for testamentary incapacity being raised.

Professor Horton assumes that testators who make deathbed wills do not have the opportunity to execute a conventional testamentary instrument and that holographic wills are typically, or even uniformly, free from any attorney oversight or guidance.<sup>98</sup> Neither assumption is necessarily true in all cases. Some attorneys use the holographic format for their clients in exigent or rushed circumstances.<sup>99</sup> A poll conducted of the American College of Trust and Estate Counsel (ACTEC) fellows in South Dakota confirmed this practice.<sup>100</sup>

---

93. Gulliver & Tilson, *supra* note 28, at 10.

94. Horton, *supra* note 1, at 1129-32.

95. *Id.* at 1129.

96. *Id.* at 1130.

97. *Id.* at 1113.

98. *Id.* at 1102.

99. *Id.*

100. The author of this Article is one of fifteen South Dakota ACTEC fellows. *Find an ACTEC Fellow*, ACTEC, <http://search.actec.org/public/roster/ShowOneAttorney.asp?FellowNo=5235> (last visited Dec. 5, 2015). All but one responded

The majority utilized the format of holographs for their clients in exigent circumstances.<sup>101</sup> The practice of attorney-supervised holographs has occurred for nearly ten years, but some attorneys have never adopted the practice out of caution. Then again, if I ever received a call from a client like Cecil Harris, wanting to make a will with only minutes to live, I would make an exception.<sup>102</sup> Thus, holographs fill a broader need than “do-it-yourselfers” who wish to avoid contact with lawyers.

### C. Harmless Error: “Clear and Convincing Wills”

The harmless error rule exemplifies, in the states in which it has been adopted,<sup>103</sup> a willingness to endure the fallout of contested probates that result. Functionalists predicted that allowing imperfectly executed wills when a heightened burden of proof was met would result in a flood of litigation.<sup>104</sup> Professor Horton’s sampling overlaps California’s adoption of the harmless error rule, but he found no contests involving the harmless error rule.<sup>105</sup> So much for predictions of a flood.

The UPC’s phrasing of the harmless error rule reads:

Although a document or writing added upon a document was not executed in compliance with [the section describing attested and holographic wills], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evi-

---

quickly to the e-mail poll which Professor Simmons conducted in late July 2015. Professor Simmons excluded a retired attorney who had practiced in a non-holographic wills state and did not poll himself. Of the remaining twelve, four indicated they were unaware of any attorney use of holographs (at least prior to the poll), one reported reviewing the validity of a holograph at a client’s request and the rest (fifty-eight percent) reported employing the holographic format for their clients in emergency, “stop gap” or “band aid” circumstances. E-mail responses on file with author.

101. See ROSS, *supra* note 27, at 5-6 (cautioning that “the making of olographic wills should not be encouraged, for the propriety of a person, especially a layman, drawing his own will is always doubtful, while it certainly is never the part of wisdom, though the law permits it in the case of olographs, to execute a will without witnesses”) (archaic spelling in original).

102. See *supra* notes 84-85 and accompanying text for mention of Cecil Harris’ holographic will.

103. Horton, *supra* note 1, at 1119-20.

104. See Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 878 (2012) (noting that the adoption of the “harmless error” rule for wills “could [also] affect the incentives of a testator” so that “if a testator knows a court can apply the harmless error rule to correct a mistake, the testator might exercise a lower level of care in executing the will”).

105. Horton, *supra* note 1, at 1120.

dence that the decedent intended the document or writing to constitute:

- (1) the decedent's will,
- (2) a partial or complete revocation of the will,
- (3) an addition to or an alteration of the will, or
- (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.<sup>106</sup>

Although the UPC harmless error rule does require "a document or writing added upon a document" as a minimum threshold formality requirement (e.g., verbal wills would not be recognized under the harmless error rule even if testator intent were established beyond any doubt), nothing in the language of the rule seems to preclude probating an unsigned instrument.<sup>107</sup> The UPC comments confirm this, but note that "the lack of a signature is the hardest to excuse."<sup>108</sup> Although the lack of a signature almost always indicates the decedent had not finalized her intent, a testator could conceivably intend that an unsigned document constitutes her will. Professor Horton points to one unsigned joint document in his data which might satisfy the clear and convincing evidence requirement, a handwritten instrument on four pages of ragged gray paper titled "our last will and testament" for Eli and Juanita Ramirez.<sup>109</sup>

The fourth page of the Ramirez document "ends abruptly" seemingly without a period, but at the conclusion of a sentence, and there is a blank space occupying about half of the page.<sup>110</sup> The document appears on its face to be unfinished and the lack of signatures of either spouse adds to this impression, but perhaps the Ramirezes were "confused about how one executes a joint holographic will—a seemingly impossible task given the requirement that a holograph be largely in a single" person's hand.<sup>111</sup> Perhaps. The document was denied probate in the estate proceedings of Eli Ramirez, despite the fact that the conclusion of the probate preceded the enactment of California's version of the harmless error rule.<sup>112</sup> An unsigned document, "the hardest to

---

106. UNIF. PROBATE CODE § 2-503 (amended 2010).

107. *See id.*

108. *Id.* cmt.

109. Horton, *supra* note 1, at 1145-46.

110. *Id.*

111. *Id.* at 1146.

112. E-mail from David Horton, Professor of Law, University of California, Davis, School of Law, to Thomas E. Simmons, Assistant Professor of Law, University of South Dakota School of Law (July 26, 2015, 10:14 AM CST) (on file with author). "The probate court ruled on the pleadings that the purported will was invalid for being unsigned."

excuse," would seem to require some evidence that the decedent's attempt to comply with the signature requirement was frustrated, such as in the case of Louise Macool who died before she was able to schedule an appointment with her attorney to sign the will (assuming she had given final approval to the draft)<sup>113</sup> or in the case of Theodore Dwight, founder of Columbia Law School, who supposedly died after having written "Theodore W. Dwi" on his Last Will and Testament.<sup>114</sup>

#### 1. WILL CONSTRUCTION: PRESUMED MAJORITARIAN INTENT FOR IMPERFECTLY DRAFTING

The two rules of construction examined by Horton are ademption by extinction (where a specifically devised asset is not a part of the testator's estate) and antilapse (where a devisee predeceases the decedent).<sup>115</sup> These rules are designed to provide predictable and easy-to-apply outcomes for imperfectly drafted instruments based on what legislators anticipate the majority of individuals would desire. As such, they are rules which could benefit from an empirical analysis if it can illuminate whether these predictions are, in fact, accurate. Yet, because there is no reliable or practical way to gauge the actual desires of the decedents in Horton's sampling, his assessments are necessarily circumstantial.

#### A. Ademption by Extinction

Ademption by extinction is the doctrine which applies when, for example, a testator leaves his Buick to his sister, but does not own his Buick when he passes away and has failed to address this contingency in his will.<sup>116</sup> The formalistic and earlier approach simply asked whether the Buick was part of the decedent's estate; if it was not, the

---

113. *In re Probate of Will & Codicil of Marcool*, 3 A.3d 1258, 1262 (N.J. Super. Ct. App. Div. 2010).

114. Horton, *supra* note 1, n. 309, *citing* SAMUEL F. HOWARD & JULIUS GEOBEL, JR., *A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY* 132 (1955); *but cf* Appeal of Knox, 131 Pa. 220, 231 (Pa. 1890) (holding that a lead-pencil holograph signed only "Harriet" was sufficient in view of "the habit of the individual"); *cf* Re: Yu, Qd R, Order (Nov. 6, 2013), [http://www.queenslandreports.com.au/docs/db\\_keydecisions/QSC13-322.pdf](http://www.queenslandreports.com.au/docs/db_keydecisions/QSC13-322.pdf) (ruling the testamentary directions typed on the Notes app of an iPhone as a valid will where the decedent typed his name at the end to serve as a signature and shortly thereafter committed suicide).

115. Horton, *supra* note 1, at 1147, 1151.

116. *See, e.g.*, *In re Estate of Wolfe*, 208 N.W.2d 923, 923-24 (Iowa 1973). There, the decedent had specifically devised his 1969 Buick Electra to his brother; the testator was killed in crash in which the Buick was totaled.

sister would not receive it. The rule was simple, predictable, and harmonious with the idea of treating the will language as sacrosanct; the sister would not receive the gift if the gifted item did not exist, regardless of the reason for its disappearance:

[A]demption means a taking away. It occurs when property which has been specifically given under a will is later destroyed or disposed of so that it does not exist as part of the estate at the testator's death. The general rule is that nothing else may be substituted for that which<sup>117</sup> was originally given, and the gift is then said to have adeemed.

The rule was also typically consistent with testator presumed intent; the testator who voluntarily sells his Buick is deemed to know that this will alters his testamentary plan insofar as the gift to his sister is concerned. One cannot devise what one does not have.<sup>118</sup>

Two related reforms have taken hold in the last decades to more accurately target probable testator intent in the ademption context. The first reform is a set of specific factual circumstances in which ademption is avoided.<sup>119</sup> If the Buick was destroyed as a result of a fiery accident which took the owner's life and the owner's insured is prepared to issue payment equal to the value of the destroyed automobile, those funds should be distributed to the devisee in lieu of the car itself.<sup>120</sup> Or, if the owner survived the accident, but lapsed into a long-term coma, during which his conservator sold the car, these circumstances also describe reasonable and legislatively achievable exceptions to ademption.<sup>121</sup> In these cases, the devisee cannot receive the Buick, but she can receive the cash equivalent (reducing by that sum the amounts which will be distributed to the residual heirs).

The second aspect of ademption reform simply opened the courtroom doors to testimony about what the testator may have wanted. In its most controversial form, one version of the UPC even went so far as to eliminate ademption "unless the facts and circumstances indicate that ademption" is what the testator intended.<sup>122</sup> Responding to negative responses, the Uniform Law Commissioners re-

---

117. *Id.* at 924.

118. *See, e.g.,* *In re Pape's Estate*, 297 P. 845, 846 (Or. 1931) (applying ademption and noting that "He could not devise what he did not have at the time of his death.") (citation omitted).

119. *See* UNIF. PROBATE CODE § 2-606(a)-(b) (amended 2010).

120. UNIF. PROBATE CODE § 2-606(a)(3) (amended 2010).

121. UNIF. PROBATE CODE § 2-606(b) (amended 2010).

122. UNIF. PROBATE CODE § 2-606(a)(6) amend. (1997) (amended 2010), 8 U.L.A. 265 (2013).

versed the burden of proof in 1997, but would allow the disappointed sister to introduce proof that her brother would have wanted her to receive the cash equivalent of a Buick even if he had sold it on his own volition several years before his death.<sup>123</sup> Monkeying with the ability to introduce evidence on testator intent was again predicted to result in an increase in litigation, something easily put to an empirical test, but it was also hoped to better achieve testator intent (a prediction much more difficult to evaluate empirically from a review of probate files).

Professor Horton's analysis finds "ademption unlikely to be a fount of litigation" given its rarity and the number of low-value "curios and bric-a-brac" occupying the list of vanished items.<sup>124</sup> His data also classifies the occurrence of ademption by asset type: sixty-three percent personal property and vehicles, twenty-one percent accounts and life insurance proceeds, sixteen percent real property.<sup>125</sup> When a testator devises an Elvis Presley plate, for example, the operation of ademption is more straightforward, since one reasonably expects that the testator who sold or gave away the plate intended ademption.<sup>126</sup> The devise of life insurance proceeds or a bank account seems different: "Testators likely make specific bequests of these assets to confer an economic benefit, not because of any emotional tether between the property and the beneficiary."<sup>127</sup> Perhaps a better rule would presume ademption with items like Elvis plates and other personality, but reverse the presumption as to accounts and life insurance proceeds.<sup>128</sup>

## B. Antilapse

Antilapse is the doctrine which applies when a named devisee predeceases the testator leaving surviving issue and it is unclear whether the testator desired that the gift "lapse" and pass to other named devisees or that the gift be directed instead to the deceased devisee's issue.<sup>129</sup> Where a testator executes a will leaving "\$1000 to my

---

123. UNIF. PROBATE CODE § 2-606(a)(6) (amended 2010).

124. Horton, *supra* note 1, at 1148-49.

125. *Id.* at 1149.

126. *Id.*

127. *Id.* at 1150.

128. *Cf.* UNIF. PROBATE CODE § 2-605 (regarding accessions to bequests of securities).

129. There are several possible results to a testamentary gift that are not subject to anti-lapse treatment. The first and probably most common result is that the specific devise lapses and passes according to the residuary clause in the will.



uncle, everything else to my children” and the uncle predeceases with a child (the testator’s nephew) surviving, should the nephew take the \$1000 or the testator’s children? Antilapse statutes reason that in the absence of governing language in the will, the nephew should receive the \$1000 and applies the same rule to any devisee who is related to the testator.<sup>130</sup>

So far so good. But, what if the testator’s will read instead: “\$1000 to my uncle if he survives me?” An estate planning attorney would effortlessly interpret the survivorship contingency as shorthand for avoiding antilapse. Survivorship language is typically seen as a way of expressing: “and if he does not survive me this gift shall lapse and pass to the residue” (that is, pursuant to the “everything else” clause benefitting the testator’s children in our example).<sup>131</sup> Any wills drafting attorney worth her salt would draft in the longhand fashion and resolve any possibility of ambiguity, but the rules of construction govern cases where do-it-yourselfers or less experienced attorneys have crafted the instrument and the named devisee has predeceased with issue surviving. Recent amendments to the UPC have expanded antilapse treatment even to shorthand survivorship language, reasoning that it could just as well be that “the words of survivorship are in the testator’s will merely because the testator’s lawyer used a will form with words of survivorship.”<sup>132</sup> Only testimony which “establishes that the lawyer did discuss the question with the client” would permit the residual devisees to receive the \$1000 gift.<sup>133</sup>

---

UNIF. PROBATE CODE § 2-606(a). The second result is that the devise lapses and passes by intestacy because the will lacks a residuary clause or because the residuary clause itself has lapsed. UNIF. PROBATE CODE § 2-101. The third applies to class gifts. *See* UNIF. PROB. CODE § 2-603(b)(2) (amended 2010), 8 U.L.A. 243 (2013) (applying anti-lapse treatment to class gifts when the predeceasing devisee is related to the testator as a grandparent, a descendant of a grandparent, or a step-child, except for class gifts to “issue,” descendants,” heirs,” etc.).

130. UNIF. PROBATE CODE § 2-603 (amended 2010).

131. For example, a form book suggests, as a way of avoiding anti-lapse treatment (at least with regard to cousins since spousal bequests are presumed to lapse):

to my wife, Mary Brown, and if she does not survive me, to my cousins, Tom Jones and Richard Smith, in equal shares if both of them survive me, and if only one of them survives me, one-half to such survivor and the other half to \_\_\_\_\_ College, and if neither of them survives me, then all to said College.

JULE E. STOCKER ET AL., STOCKER & RIKOON ON DRAWING WILLS AND TRUSTS § 2:5.1 (12th ed. 2009) (blank in original).

132. UNIF. PROBATE CODE § 2-603 cmt. (amended 2010).

133. *Id.*

Professor Horton reasons that survivorship provisions are salient to the majority of testators since most of the wills with bequests to predeceased family members in his sample used longhand unambiguous language which clarified the testator's intent, avoiding any need for the application of the antilapse rule of construction.<sup>134</sup> Of the five testators (seven percent of the sample) who employed shorthand survivorship language, only two were bequests to relatives, the other three were outside the scope of the antilapse rule anyway.<sup>135</sup> On this basis, Horton reasons, "decedents do not blithely use survivorship conditions."<sup>136</sup>

Perhaps. However, the empirical data from Alameda County neither confirms nor negates the extent to which decedents are blithely using survivorship conditions, only the extent to which bare survivorship conditions are being employed in those wills: relatively rarely (in just two cases where it mattered).<sup>137</sup> The rarity of the imperfectly drafted will in the context of antilapse does not necessarily argue against an intelligently framed rule of construction. A single rule providing guidance in two separate matters with regards to individuals dying in one year in one county speaks to the relevance of the rule, not its insignificance.

The conclusions of Professor Horton, which follow his assessments of the ademption and antilapse doctrines in the Alameda County probate files, highlight the limitations of empirical assessments which depend on the degree to which actual testator intent is being achieved. Empirical probate file analysis is not particularly well-suited to answering a fundamental question—are our rules generating outcomes which accurately assess and enforce testator intent? As Professor Horton acknowledges in the context of asking whether intestacy statutes are hitting the mark of probable intent, "there is no way to gauge the desires of intestate decedents, who leave no record of their intent."<sup>138</sup> Similarly, the Alameda County probate files do not reveal whether the two testators employing bare survivorship language or the roughly three testators whose bequests of bank accounts were adeemed would have truly desired the results imposed by will construction rules. The only way to know that for certain would be to

---

134. Horton, *supra* note 1, at 1153.

135. *Id.* at 1154.

136. *Id.* at 1104.

137. *Id.* at 1154.

138. *Id.* at 1125.

ask them. And we cannot. Nor can we know whether Eli Ramirez intended for four ragged pages to document his final testamentary wishes. Perhaps a survey of the living would provide the kind of majoritarian data that would better inform the construction of the default rules by which imperfect wills are interpreted.<sup>139</sup>

### III. Conclusion

Two and a half million people die annually in the United States.<sup>140</sup> The importance of rules of construction and will formality requirements, even if only affecting one death in a thousand amounts to 2500 affected estates each year.<sup>141</sup> A significant part of wills law is taken up with formality requirements and construction presumption rules premised on untested predictions of what the majority of individuals would want or expect. Empirical research in the electronic age should be employed to test these assumptions, if not against a database of the probates of the dead, then perhaps from the opinions of the living. Professor Horton's intelligent and far-reaching analyses demonstrate the value of this kind of future scholastic effort. Looking ahead of his impressive study contained in *Wills Law on the Ground*,

---

139. See, e.g., Naomi Cahn & Amy Zietlow, "Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System, 22 ELDER L.J. 325, 334 (2015) (utilizing sixty-three interviews of survivors identified from a Baton Rouge Newspaper's obituaries); Deidre G. Drake & Jeanette A. Lawrence, *Equality and Distributions of Inheritance in Families*, 13 SOC. JUST. RES. 271, 272 (2000) (analyzing a survey of eighty-nine Australians who were presented with a vignette designed to test their attitudes concerning inheritance rights of children with varied levels of need and deservedness); Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409, 421-36 (2010) (describing a telephone survey of 202 individuals to study probable intent in view of, *inter alia*, nonprobate designations); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 31-35 (1998) (utilizing telephone surveys of 256 individuals to study attitudes towards intestacy rights of unmarried partners). See also Contemporary Studies Project, *supra* note 53, at 1053-54 (describing a poll of 600 individuals to assess responses to hypothetical intestacy scenarios and other questions); *Id.* at 1049 (highlighting the problems with the use of hypothetical questions to study inheritance preferences).

140. *Deaths and Mortality*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/deaths.htm> (last visited Dec. 5, 2015) (quoting statistics from 2013). The actual number: 2,596,993. *Id.*

141. See Drury, *supra* note 19, at 313 (noting that eight-five percent of decedents' estates were not probated in the author's survey of deaths (57,000) and probates (8070) in Cook County, Illinois in 1969); Stein, *supra* note 53, at 597 (observing that seventy percent of decedents' estates were not probated out of the 8000 annual deaths in urban Hennepin County, Minnesota in the author's data from the same year; but just forty-two percent in a rural county with "rich farmland").

370 *The Elder Law Journal*

VOLUME 23

perhaps the next step in empirical probate research will assess wills above ground by studying the true intent and preferences of individuals who make wills.