Notarized Wills

Anne-Marie E. Rhodes

Loyola University Chicago, School of Law, arhodes@luc.edu

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In 2008, the Uniform Law Commission amended the Uniform Probate Code (hereinafter "UPC"). Those amendments primarily focused on the intestacy rights of children of assisted reproduction. A lesser-known amendment to the UPC permitted a notarized will as an option to the traditional witnessed will. In the five years since the 2008 changes, several states have considered the changes, but only Colorado and North Dakota have enacted the notarized will option. The addition of the notarized will as an express choice for one of the three traditional will execution formalities is a totally new concept that may undermine the progressive reach of the UPC.

I. THE WILL FORMALITIES MATRIX: RULES AND EXCEPTIONS

American probate law has shown remarkable uniformity and stability in what are considered the three basic execution formalities: that a will be in writing, signed by the testator, and witnessed. The similarity is commonly attributed to the deep roots of our common-law history; in particular to the English Statute of Wills of 1540, the

* Professor of Law, Loyola University Chicago School of Law. The author is grateful to the participants in the Oklahoma City University School of Law conference, Wills, Trusts and Estates Meet Gender, Race and Class, held on September 28, 2013; in particular, to conference organizer Carla Spivack, William P. LaPiana, and Bridget Crawford. The author also acknowledges the research assistance of Sarah Ferguson, the assistance of Heather Figus, and the support of the Loyola University Chicago School of Law Faculty Research Fund.

2 Id. at 83 n.1.
5 See generally 3 Statutes of the Realm 744, 744-46 (1540).
English Statute of Frauds of 1677,6 and the English Wills Act of 1837.7 The general stability of these execution requirements is likely due to the legal purposes they serve. Taken together, these three formalities are commonly understood to serve four functions:8 the ritual function,9 the evidentiary function,10 the protective function,11 and the channeling function.12

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6 See generally The Statute of Frauds of 1677, 29 Car. II., ch. 3 (1676).
7 See generally Wills Act of 1837, 7 Wm. 4 & 1 Vict. ch. 26, 217 (1837).
8 Classification of Gratuitous Transfers is the leading article categorizing the functions of the traditional wills formalities. See Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1 (1941). The authors listed three such functions, namely the ritual function, the evidentiary function, and the protective function. Id. at 5-9. Professor John Langbein extended the channeling function, a well-recognized concept in the law of contracts, as a fourth function for the wills formalities. See John Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489, 493-94 (1975). Other functions have also been suggested. Professor Peter M. Tiersma suggests a "textualizing" function. See generally PETER M. TIERSMA, PARCHMENT, PAPER, PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION (2010). "The formalities of execution take ordinary words and transform them into authoritative text. . . . the writing is not just another piece of evidence of an underlying oral event, . . . it becomes the event itself." Id. at 60. Others have noted an expressive function, observing that viewing testation through a singular lens of property transmission ignores testation's self-expressive function, and that recent changes to trust law meant to bolster economic efficiency do so at the expense of testamentary freedom. See David Horton, Testation and Speech, 101 GEO. L.J. 61, 66-67 (2012). A therapeutic function is also present, as wills formalities in the estate planning process may serve to promote the psychological well-being of the testator. See Mark Glover, The Therapeutic Function of Testamentary Formality, 61 U. KAN. L. REV. 139, 142 (2012). A family protection function may be seen to exist in the tradition of requiring strict execution formalities but a less rigorous standard for revocation, thereby protecting the traditional family. Mark Glover, Formal Execution and Informal Revocation: Manifestation of Probate's Family Protection Function, 34 OKLA. CITY U.L. REV. 411, 431-40 (2009).
9 See Gulliver & Tilson, supra note 8, at 5. The ritual function addresses a court's basic concern: "to be convinced that the statements of the transferor were deliberately intended to effectuate a transfer." Id. at 3. By requiring "the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements", a court can justify a conclusion of deliberate intent. Id. at 4.
10 The evidentiary function, of all the wills execution formalities, "may increase the reliability of the proof presented to the court." Id. at 4. Gulliver and Tilson deemed the evidentiary function especially important in wills scenarios as the transferor is deceased and there may be a lengthy time lag between the will's execution and its probate. Id. at 6. The writing requirement provides permanence, the signature signals finality, and "[t]he important requirement that (the) . . . will be attested . . . has great evidentiary significance. It affords some opportunity to secure proof of the facts of execution." Gulliver & Tilson, supra note 8, at 8.
11 The protective function serves "the stated prophylactic purpose of safeguarding the testator, at the time of the execution of the will, against undue influence or other forms of imposition." Id. at 4-5. Gulliver and Tilson viewed the protective function as "difficult to justify under modern conditions," and "not sufficiently important in the present era . . . ." Id. at 9-10.
12 The channeling function for wills recognizes that "[c]ompliance with the Wills Act formalities . . . results in considerable uniformity in the organization, language, and content" for wills, thereby simplifying a court's determination that the decedent knew and intended the document to be his will. Langbein, supra note 8, at 494.
Yet, the path of will formalities was neither linear nor uniform. There have been, and continue to be, exceptions to each of these three basic formalities. The tenacious persistence of exceptions to the basic will formalities is a tangible recognition, as Holmes has observed, that the life of the law "has not been logic, it has been experience."

In thinking about how to construct any legal system, including how to dispose of a decedent's property at death, it is hardly surprising that the systemic desire for clear and certain rules might conflict with a just resolution in a particular case. Life is not neat and tidy, and people, even careful people, fall short. Equitable principles seek to limit the unjustness of strict application of rules, often by insisting that one's acts are to be interpreted in line with one's intent.

In the context of controversies over will formalities, however, the statutorily-required acts were heavily weighted, to the virtual exclusion of intent. For judges, the specter of fraud and manipulation of vulnerable people would hang heavy over their decisions due to the simple reality that the decedent is no longer present to confirm his intent to the court. Consequently, one's act of signing a will before disinterested witnesses was deemed confirmatory of one's testamentary intent and volition.

Even with this act-heavy predisposition, however, common-law exceptions to each of the basic formalities, often grounded in equity, were well-recognized. In essence, there were two approaches

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13 See infra text accompanying notes 19-45.  
15 The rules and standards, and formalities and formalism, discussion has been extensive in the academic literature and in the particular context of wills and trusts law. See generally Emily Sherwin, Clear and Convincing Evidence of Testamentary Intent: The Search for Compromise Between Formality and Adjudicative Justice, 34 CONN. L. REV. 453, n.1 (2002) (for a representative listing of significant articles in that discussion).  
16 One example in the wills context is the requirement of a testator having animus testandi despite there being no such stated requirement in the execution formalities statute. See Lister v. Smith, 164 Eng. Rep. 1282, 1284 (1863) where the court refused probate for a codicil where it was proven by clear and convincing evidence that the testator executed the codicil without any intent to have it function as a codicil. See id. at 1285-86.  
17 See In re Pavlinko's Estate, 148 A.2d 528, 531 (1959); see also Gulliver & Tilson, supra note 8, at 8. The court in Pavlinko, over a vigorous dissent, refused probate when a husband and wife each mistakenly signed the will prepared for the other, noting that "[o]nce a Court starts to ... make exceptions to clear, plain and unmistakable provisions of the Wills Act ... to accomplish equity and justice ..., the Wills Act will become a meaningless, although well intentioned, scrap of paper, and the door will be opened wide to countless fraudulent claims ...." Pavlinko, 148 A.2d at 531.  
18 See Lister, 164 Eng. Rep. at 1286. In Lister, the hard question was whether the court should have heard any evidence regarding lack of testamentary intent when the codicil was duly executed in point of form. Id. at 1285.
to wills—a formal process and another less formal one.

A. In Writing

Writing requires literacy; but for much of early common-law history illiteracy was the norm. Consequently, all legal transactions had oral traditions, including wills. In Anglo-Saxon times, for example, a testator spoke of his death-time property transfers before witnesses. When a written copy existed, it was often seen as a record of the oral transaction. It was not an operative or dispositive document on its own. Over time, as literacy became more common, the oral act became secondary to the written act, and then nearly displaced it altogether.

One remnant of this oral tradition remains in the statutory law in less than half of U.S. jurisdictions. For those in extremis or

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19 TiERSMA, supra note 8, at 50, 56 (noting that the Anglo-Saxons were "mostly illiterate," while after the Norman Conquest of 1066, "people grew increasingly comfortable with literacy . . . written records started to proliferate").
20 TiERSMA, supra note 8, at 51. "During the early Anglo-Saxon period, therefore, legal transactions would have been entirely oral. This situation began to change . . . around the year 600 . . . . Before long, written compilations of laws began to appear. Not too much later we begin to see charters, wills, writs, and other legal documents." Id.
21 See id. at 52.
22 See id. at 52. "There are a number of indications that Anglo-Saxon wills were merely records of oral transactions." Id. Tiersma notes that the primary meaning of the Old English word for a will is "to speak." TiERSMA, supra note 8, at 52. Also there was "no signature or seal or other type of authentication." Id. Moreover the names of witnesses were included in the document. Id. Most importantly, linguistic evidence supports the oral tradition; for example, "[h]ere in this document it is declared how the [person] . . . declared his will . . . ." Id.
23 Id. at 52.
24 Id. at 55-56. "Although the historical details are complex, the English law of wills came to require that the performative or dispositive act, which in the past consisted of the speaking of certain words, should now consist of writing those words. The text was no longer just a record of an oral will. It was now the will itself." TiERSMA, supra note 8, at 56. "A person's will is no longer what is in his mind or in the memories of witnesses, but a text that has been formally executed by being signed, acknowledged, and witnessed." Id. at 57.
26 See IND. CODE § 29-1-5-4 (2013) (only for a person in imminent peril of death who actually dies from that impending peril, with an amount not to exceed $1,000, but $10,000 if in active military war service); KAN. STAT. ANN. § 59-608 (2013) ("in the last sickness"); MISS. CODE ANN. § 91-5-15 (2014) (requiring the will to be made at the testator's home during the last illness); MO. REV. STAT. § 474.340 (2014); N.C. GEN. STAT. § 31-3.5 (2012); TENN. CODE ANN. § 32-1-106 (2014) (similar to Indiana); WASH. REV. CODE § 11.12.025 (2013).
for soldiers and sailors in military service, there is the limited possibility of an oral, or nuncupative, will. This exception to the writing requirement has an ancient common-law history. Its applicability is modest as it is limited qualitatively to those in extreme circumstances or in the military, and often quantitatively to small amounts, such as one thousand dollars. The exception is most likely an historic anomaly that is harmless in today's practice. The oral will is not expressed as a choice; rather, it is a separately stated exception, available in limited circumstances, to the basic writing requirement for a formal will.

B. Signature by Testator

The act of signing is the testator's formal signaling of assent to the written will as the final expression of his dispositive wishes. Without the testator's signature, the written will is no more than a draft; a tentative expression of dispositive wishes. If the testator did not sign, the will would fail.

28 See The Statute of Frauds supra note 6, at sec. XIX (allowing for nuncupative wills for those in their "last sickness"); but see W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book 2, ch. 32, 501 (1765), available at http://www.lonang.com/exlibris/blackstone/bla-232.htm (noting that the requirements for oral wills were "so numerous" that they had "fallen into disuse"); see also ATKINSON, supra note 25, at 368-74 (a brief history of soldiers' and sailors' wills, starting with Julius Caesar).
29 See IND. CODE § 29-1-5-4 (2013) (with a $1,000 limitation, raised to $10,000 if in active military service); VT. STAT. ANN. tit. 14, § 6 (2013) (with a $200 limit).
31 See e.g. KAN. STAT. ANN. §69-608 (2013); MISS. CODE ANN. §91-5-15 (2014).
32 See Gulliver & Tilson, supra note 8, at 5-6.
33 SUSAN GARY ET AL, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 450 (2011) (The signature "serves to distinguish the final will from a preliminary draft, an incomplete document or simply notes . . . ").
34 See Allen v. Dalk, 826 So. 2d 245, 248 (Fla. 2002) ("While it is probable that the decedent read the will and intended to sign her name, this Court has no way of knowing why she did not do so, nor do we know that the will properly reflects her testamentary intent."). In those jurisdictions that have adopted the UPC's Harmless-Error Rule, whether a will must contain the testator's signature is now a new question. For example, in In re Probate of Will and Codicil of Macool, 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010), the New Jersey Appellate Division agreed with the trial court that the unreviewed and unsigned document
Or, rather, it would fail with one notable exception. The law has long provided that a will signed by another person, at the testator's request and in the testator's presence, would be deemed valid. This exception for a proxy signature is presumably a common law and common sense response to a circumstance found throughout history—someone unable to sign either due to physical infirmity or illiteracy. Proxy signature is provided for in the same section that requires the testator’s signature. It is not expressed as an exception, nor is there an express limitation on the proxy signing to a testator who is unable to sign. Nevertheless, like the oral will, proxy signing has an established common-law history, and though not expressly limited to those testators who are unable to write their names, it is

was not admissible as Mrs. Macool’s will because the decedent lacked the opportunity to review the document. Macool, 3 A.3d at 1265. Significantly, however, the Appellate Division “in the interest of completeness” addressed the trial court’s determination that, under the Harmless-Error Rule, the testator must have signed the document. Id. The three judge panel disagreed with the trial court: “we are satisfied that a writing offered under N.J.S.A. 3B:3-3 need not be signed by the testator in order to be admitted to probate.” Id. at 1266. One participating judge has subsequently expressed reservation. In re Estate of Ehrlich, 47 A.3d 12, 23 (N.J. Super Ct. App. Div. 2012) (Skillman, J.A.D., dissenting) (“Although I was on the panel that decided Macool, upon further reflection I have concluded that that opinion gives too expansive an interpretation to N.J.S.A. 3B:3-3; specifically, I disagree with the dictum that seems to indicate a draft will that has not been either signed by the decedent or attested to by the witnesses can be admitted to probate . . . .”). On the other hand, some states that have adopted the Harmless-Error Rule have modified the UPC language to require the testator’s signature on the proffered document. California, for example, included the language “at the time the testator signed the will, the testator intended the will to constitute the testator’s will.” CAL. PROB. CODE § 6110(c)(2) (West 2008). The legislature may have presumed that the testator’s signature serves as the best evidence of the testator’s intent. See generally Peter T. Wendel, California Probate Code Section 6110(C)(2): How Big Is the Hole in the Dike?, 41 SW. L. REV. 387, 401-04 (2012). In adopting the Harmless-Error Rule, references to other countries’ experiences with a dispensing power were cited. One such country was Israel. Recent amendments to Israeli law may weaken support for an expansive interpretation of the Harmless-Error Rule. See Samuel Flaks, Excusing Harmless Error in Will Execution: The Israeli Experience, 3 EST. PLAN. & CMYT. PROP. L. J. 27, 43-45 (2010). What constitutes the testator’s signature is a separate question. See Taylor v. Holt, 134 S.W. 3d 830, 833 (Tenn. Ct. App. 2003) (holding that a computer generated cursive signature was acceptable as the testator’s signature).

35 The Statute of Frauds of 1677, supra note 6, sec. V (“all devises . . . shall be . . . signed by the party . . . or by some other person in his presence and by his express directions . . . .”); Wills Act of 1837, 1 Vict., ch. 26, sec 9 (“no Will shall be valid unless . . . it shall be signed . . . by the Testator, or by some other Person in his Presence and by his Direction.”) Forty-eight states specifically provide by statute for proxy signature. See EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 5:3 (2d ed. 2013). Neither Connecticut nor Louisiana was listed, but Louisiana does provide for proxy signature for one who is unable to sign. See LA. CIV. CODE ANN. art. 1578 (1999).

36 See Welch v. Kirby, 255 F. 451, 453 (8th Cir. 1918) (a blind testator’s will was upheld where her signature was by proxy “because she could not do so”).

37 See, UNIF. PROBATE CODE § 2-502(a)(2) (1969) (amended 2010) (“signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction.”).
most likely so limited in practice.38

C. Witnessed

From the beginning, the common law system required witnesses to a will.39 When wills were oral, the witnesses' role was evidentiary. When the decedent died, they were called to repeat what the decedent had spoken to them.40 When wills became written, witnesses were retained to attest the testator's signing, capacity, intent, and freedom from undue influence and duress at the time of the will's execution.41 A will that was not witnessed was fatally flawed.42

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38 See Muhlbauer v. Muhlbauer, 686 S.W.2d 366 (Tex. App. 1985) (refused probate for a will of a blind decedent when his third wife guided his hand in signing). The proffered document would have substituted his wife for his children as sole beneficiary. Id. at 377. There was "no believable testimony" that the decedent had requested assistance; but there was evidence that the decedent had the physical ability to smoke and use his watch. Id. at 377.

39 The Statute of Frauds of 1677, supra note 6, sec V ("and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses . . . ."); Wills Act of 1837, 1 Vict., ch. 26, sec 9 ("in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator . . . ."); but cf. 20 PA. CONS. STAT. § 2502 (1994) (sole U.S. exception to the witness requirement for formal wills, requiring only that the will be in writing and signed at the end by the testator).

40 See TiERSMA, supra note 8, at 52 (noting that the witnesses' "function was to remember the contents of the testator's will, on the basis of what the testator said.").

41 See id. at 55 ("By the end of the [13th] century, wills were being read in court. And the function of witnesses was also evolving: they were increasingly being questioned about the authenticity of the seal . . . . Witnesses were being demoted to guarantors of the authenticity of the document."). What "attested" means in the witness requirement has been a source of debate with varying interpretations:

While the word attestation is sometimes used to include the subscription of the witness's name, it is not so used in the English statutes. Surely to attest connotes more than merely to sign. Indeed the strict meaning of the two words is quite different. To attest means to bear witness, or to see and hear as distinguished from signing. To what must the witness bear witness? The Statute of Frauds clearly indicates that it is the will which must be attested. It does not give any further clue, however, as to how this may be done. Possibly the English Wills Act also so intends, although it certainly is subject to the construction that it is the testator's signature rather than the will which is to be attested. The latter statute makes up for the ambiguity in part by reciting certain details of the execution, which bear on the matter of attestation.

ATKINSON, supra note 25, at 321-22. Atkinson also posits that a witness's attestation must include the intent to be a witness, the animus attestandi:

Whether or not attestation includes the idea of subscription, it surely connotes something more than the physical acts of signing or seeing. Attestation is, in part at least, a state of mind . . . . Regardless of what it is that is attested, the witnesses must intend to act as witnesses, or the will is not valid.

Id. at 330-31.

42 Id. at 310 ("It should be noticed that the requirement of attesting witnesses is a provision
Or perhaps it was not fatal, if it qualified as a holographic will—that is, a will that was written and signed wholly in the handwriting of the testator. The traditional rationale is that a will that is proven to be wholly in the handwriting of the testator is sufficient protection against fraud. Holographic wills are an exception to the written will requirement in slightly more than half of U.S. jurisdictions. This exception may be set forth in a separate section or, in newer UPC-based versions, in a separate subsection within the wills formalities section.

II. FITTING THE NOTARIZED WILL INTO THE FORMALITIES MATRIX

With these formalities, rules, and exceptions as background, this article will focus on a very narrow issue: does making the notarized will a choice within the basic wills formalities section rather than an exception to those formalities carry any significance for wills formalities? In other words, does placement matter? At first blush,
this does seem like a niggling, angels-dancing-on-the-head-of-a-pin type of question, but the notarized will—structured as a choice within the basic will formalities—signals the UPC’s march towards eliminating witness attestation altogether.\textsuperscript{49} Four reasons suggest this.

First, offering a clear and visible choice suggests that the particular requirement is not deemed as important to the law as the other two non-choice requirements. While choice may be seen as a welcome measure of flexibility, merely having a choice suggests the requirement is not as firm or as important to the law as non-negotiable requirements. It weakens the requirement. In a larger sense, it also weakens the other formalities. Individually assessing the need for any one formality, whether it be writing, signature, or witnesses, a case can be made for the elimination of each such requirement. The strength of the traditional formalities and the functions they serve come largely from viewing them jointly, taking them together. In short, the whole is greater than the sum of the parts.

Second, in deciding which choice to select, a testator could logically ask which is easier to do. On a purely visual basis, the statutory choice is compelling: forty-one words in seven lines for the traditional witnessed will compared to seventeen words in four lines for the notarized will. More directly, the requisite statutory act for the notarized will is actually that of the testator’s, the will is to be “acknowledged by the testator before a notary public.”\textsuperscript{50} Presumably, the evidence of that acknowledgement would be the notary’s signature and seal. In the case of the traditional will, the required act is that

\textsuperscript{49} James Lindgren, \textit{Abolishing the Attestation Requirement for Wills}, 68 N.C. L. REV. 541 (1990) (the seminal article directly attacking the attestation requirement). In making his case for abolition, Professor Lindgren argues, in part, from the UPC amendments that eliminated the “disinterested” requirement for witnesses: “The official comments are almost too persuasive for their purpose. In undercutting the disinterested witness requirement, they have unwittingly undercut the witness requirement altogether. Once the attestation requirement has been gutted, it should no longer be mandatory.” \textit{Id.} at 562; see also Adam J. Hirsch, \textit{Inheritance and Inconsistency}, 57 OHIO ST. L. J. 1057, 1075-76 (1996). For more recent support in favor of abolishing attestation, see Clowney, \textit{supra} note 45, at 62; and Reid Kress Weisbord, \textit{Wills for Everyone: Helping Individuals Opt Out of Intestacy}, 53 B.C. L. REV. 877, 880 (2012) (“If inheritance law is committed to testamentary freedom, then the will-making process must be rendered universally accessible . . . . In particular, transaction costs should be lowered by eliminating the need for legal draftsman and witness attestation.”). For an intermediate position, see Daniel B. Kelly, \textit{Toward Economic Analysis of the Uniform Probate Code}, 45 U. MICH. J.L. REFORM 855, 891 (2012) (noting that “[t]he continuing relevance of attestation thus depends to a certain extent on predictions about how testators, potential wrongdoers, and others are likely to act if attestation were abolished”).

the will is to be "signed by at least two individuals." With a notarized will, the testator can be the sole actor; with the traditional will, the acts of others are statutorily required. The advantage of ease favors notarized wills over witnessed wills.

Third, by offering a choice, testators can fairly assume that whatever the purpose of the statute is, it can be achieved by either option. This makes one wonder what the purpose of the requirement is. The historic purposes of the witness requirement to a written will are seen as fulfilling all the functions of the will formalities. Having to gather together witnesses suggests a seriousness of purpose on the testator’s part; and the witnesses having to attest to the testator’s capacity, intent, and freedom from undue influence and duress at the time provides some protection against fraud. Witnesses are essentially the public interface for this private transaction, deemed structurally important because of the time lag between a will’s execution and the will’s operation.

51 Id. § 2-502(a)(3)(A).
52 Lindgren, supra note 49, at 554 (“although attestation serves all the purposes of formalities,” the main purpose is the protective function.) However, it is important not to discount the ongoing significance of the ritual and the evidentiary functions for witnesses. See Gulliver & Tilson, supra note 8, at 5 (“Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value . . . .”). As for the evidentiary function:

The provision . . . that the will be signed or acknowledged by the testator in the presence of the attesting witnesses may be justified as having some evidentiary purpose in requiring a definitive act of the testator to be done before the witnesses, thus enabling them to testify . . . that the will was intended to be operative.

Id. at 8-9.
53 While there may be technical ambiguity in what attestation requires, the modern view provides a robust view of what it is that a witness is attesting. See supra text accompanying note 41. The self-proved will sanctioned by UPC § 2-504 provides a model affidavit form that includes references to the testator’s intent, capacity, and freedom from duress and undue influence:

We, ________ (name), ________ (name), the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as (his)(her) will and that (he)(she) signs it willingly (or willingly directs another to sign for (his)(her)), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator’s signing, and that to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

_______
[Witness]

_______
[Witness]

54 See Gulliver & Tilson, supra note 8, at 3.
Does an acknowledgement before a notary serve the same ritual and protective functions? The Supreme Court has categorized the notarial act as clerical and ministerial.\textsuperscript{55} An acknowledgement before a notary public means that the document signer acknowledges his signature on the document; it is an authentication of the signature only.\textsuperscript{56} There is no requirement or duty to determine capacity, intent, or freedom from undue influence or fraud at the time of acknowledgement.\textsuperscript{57} This asymmetry in functions undermines the requirement.

Fourth, in framing the notarized will as a choice, the UPC is directly confronting a stubbornly troublesome basic formality. One policy of the UPC is to discover and make effective the intent of the decedent.\textsuperscript{58} Cases in which a formalistic interpretation of the statutory formalities has defeated the testator's clear intent—without the circumstances suggesting any type of fraud—are well known.\textsuperscript{59}

The fact that our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so must accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified, seems to furnish the chief justification for requirements of transfer beyond evidence of oral statements of intent.\textsuperscript{60}

Id.\textsuperscript{61} See Bernal v. Fainter, 467 U.S. 216, 225 (1984) ("[A] notary's duties ... are essentially clerical and ministerial.").\textsuperscript{62} See Klint L. Bruno, To Notarize, or Not to Notarize ... Is Not A Question of Judging Competence or Willingness of Document Signers, 31 J. MARSHALL L. REV. 1013, 1021 (1998). In this regard, consider the format for the notary's clause in section 2-504 of the UPC titled Self-proved Will affidavit:

State of ______
County of ______

Subscribed, sworn to and acknowledged before me by ______, the testator, and subscribed and sworn to before me by ______, and _______, witness, this _____day of ______.

(Seal)

(Signed)

(Official capacity of officer)


See UNIF. PROBATE CODE § 1-102(b) (1969) (amended 2010) ("The underlying purposes and policies of this Code are: ... (2) to discover and make effective the intent of the decedent in the distribution of his property.").

See Stevens v. Casdorph, 508 S.E.2d 610, 613-14 (W.Va. 1998) (Workman, J., dissenting) ("There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation ... [that the decedent] did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the
Many of those cases arose in the context of the witness requirements, often the “presence” requirement. The UPC addressed that difficulty directly by eliminating the presence requirement from its witness requirement. But will execution problems persisted. In 1990, a more global approach was utilized with the addition of the Harmless-Error Rule. Under this rule, a document that does not strictly comply with the formalities may, nevertheless, be admitted as the decedent’s will if the proponent proves by clear and convincing evidence that the decedent intended the document to be his will. Ten states have adopted some version of the Harmless-Error Rule.

These measures have not eliminated missteps in the witness requirements or prevented newer concerns from emerging. According to the UPC comments, one such newer case is the unwitnessed notarized will, which develops out of two fact patterns. Sometimes in the confusion of executing multiple estate planning documents at the same time, gaps in execution occur. A witness may not sign but the notary does. In a similar vein, some testators mistakenly believe (sometimes along with their attorneys) that a notary’s signature is all that is required. In jurisdictions without the Harmless-Error Rule or a judicial rule of substantial compliance (which is most jurisdictions), that belief is fatal. The UPC response
was relatively quick, simple, and unprecedented—make the notarized will as valid as the witnessed will. Equate the two approaches, right within the wills formalities section, and thereby provide an easy method to defeat persistent witness problems altogether by bypassing witnesses altogether. Was this wise? This option, concededly motivated by the policy of giving effect to the testator’s intent, significantly undermines the ritual and protective functions. Equally important, it may lessen the desirability of the UPC as model legislation. All of these would be regrettable outcomes.

III. FIVE CONCERNS WITH A NOTARIZED WILL OPTION

One reason proffered for the unwitnessed, notarized will is that many estate planning documents that transfer property either do not require any witnesses at all, or only require a notary.\(^6\) There is truth to that.\(^6\) The logical question then is why does a will need witnesses if these other documents do not. For the simple reason that a will does not transfer property now, but only at death when the testator is deceased. In many of the non-testamentary estate planning documents that a person will sign, something happens right now and an independent third party actor is often involved. For example, a bank account is opened, a life insurance policy is purchased, a deed is signed and recorded, or a trust is created and property is transferred into it. Those actions are taken and responded to, documents are sent back and forth, and the testator will have current confirmation that the transfers have occurred. There are transactional and procedural formalities that serve the ritual and protective functions by giving current notice of ownership or change in ownership.

A second concern is the confusion that can arise in having the notary’s acknowledgment for purposes of wills requirements. In the civil law tradition the notary serves a much different function than the notary public in the U.S.\(^7\) For many U.S. citizens and residents

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\(^6\) Lindgren, supra note 49, at 556-57 ("Most property is passed outside of probate ... Most of these non-probate transfers require writing and signature, but not attestation by witnesses."); see also UNIF. PROBATE CODE § 2-502 cmt (1969) (amended 2010) ("Other uniform acts affecting property or person do not require either attesting witnesses or notarization."); see, e.g., UNIF. TRUST CODE § 402(a)(2) (2010); UNIF. POWER OF ATTORNEY ACT § 105 (2006); UNIF. HEALTH-CARE DECISIONS ACT § 2(f) (2005).

\(^6\) And yet at the state level – closer to every day practice of law – some jurisdictions do require witnesses, notaries, or both. See 755 ILL. COMP. STAT. 45/3-3 (2011) (requiring at least one witness and notarization).

\(^7\) Waggoner, supra note 1, at 85.

The American notary does not serve the same function as the notary in the European civil-law countries. The civil-law notary supervises the execution of an ‘authenticated will,’ in which the notary is a quasi-
with a civil-law heritage, a notary is mistakenly perceived to be the equivalent of a lawyer. Some states' notary public statutes include a lengthy and detailed section on notaries who advertise their services in a language other than English. Those ads must disclose in large type that the notary is not a lawyer and does not provide legal advice. Having the notarized will option may only continue to confuse the legitimate boundaries of a notary public. Presumably, a notary public could now advertise that a testator can finalize a will before her. The notarized will causes confusion, and invites exploitation of legal-cultural differences.

Equally troublesome is the scenario of the internet-form will or trust that can be filled in, printed out, signed by the testator without any advice, understanding, or sense of seriousness, and then taken to the notary for acknowledgement. Think of this as the “whatever” will. I doubt this is the intent of the UPC, but it may be a practical impact.

More troublesome is the potential for increased fraud and overreaching in the future. If witnesses are deemed optional, those judicial officers who determines whether the testator has mental capacity and is free of duress and undue influence.


71 See 5 ILL. COMP. STAT. 312/3-103(a) (“A notary public shall not ... literally translate from English into another language terms or titles ... that implies the person is an attorney. To illustrate, the word ‘notario’ is prohibited under this provision.”).

72 Id. (“Every notary public who is not an attorney or an accredited immigration representative who advertises the services of a notary public in a language other English ... shall state: ‘I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN ILLINOIS AND MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE.’”).

73 Id.

74 A similar issue arose in the context of commercially-prepared preprinted will forms that were available at stationery stores and elsewhere.
who prey on vulnerable people may attempt to exploit the wills process more frequently. It is impossible to know what the ex post impact of the notarized will option will be, but it is worth remembering that the real world is dynamic and people – good and bad – respond to changes.  

Finally, to the extent that the notarized will is seen as too radical, support for the UPC erodes, and that could jeopardize future considerations and enactments. The fact that only two states have enacted the notarized will in five years, and only ten states have enacted the Harmless-Error Rule in twenty-three years, suggests that the relevance issue is real.

IV. CONCLUSION

The problem of errors in execution of wills is real, longstanding, and frustrating. The UPC purpose and policy of discerning and giving effect to the decedent’s intent is a significant and correct recalibration of the historic emphasis on statutory acts. The Harmless-Error Rule is an equitable approach that allows a court to judge a particular case in light of the wills formalities and, sub silentio, in light of all the functions those formalities serve. It is dispiriting that only a handful of states have adopted the rule.

The introduction of a notarized will option creates a presumption of legitimacy that may not be warranted in light of the traditional functions that the witness requirements serve, especially in the scenario of a testator-drafted will. In a rather curious fashion, the notarized will option undermines the Harmless-Error Rule. It may be better to place more faith in that rule, even as modified by enacting legislatures, than to create an unprecedented new option in the wills formalities. It will be interesting to see if jurisdictions, especially those without the Harmless-Error Rule and holographic wills, decide that the notarized will’s benefits outweigh the difficulties.

75 Kelly, supra note 49, at 891 (“Knowing there is no attestation requirement, parties may have different incentives ex ante. For example, if attestation were abolished, more wrongdoers might attempt to engage in fraud, thereby reviving the relevance of the protective function.”).