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ZOOM WILLS

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ABSTRACT

This brief essay suggests that suddenly popular online meeting platforms like Zoom can be used to execute wills while people are subject to shelter-in-place orders following the outbreak of the COVID-19 pandemic. Although will execution ceremonies using Zoom do not strictly comply with statutory formalities, Zoom-based ceremonies satisfy the two primary curative doctrines—the substantial compliance doctrine and the UPC’s harmless error rule—for admission to probate. Informed by statutes that recognize e-wills, the essay concludes that a Zoom-based execution ceremony produces a Zoom will without stretching statutory formalities beyond recognition during a period of extreme isolation.

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INTRODUCTION

Americans are rushing to do something because of COVID-19 that they, far more often than not, fail to do—make a will.¹ Gentreo, an online will company, reports that it has experienced a 143% increase in its business while similar online services are tallying a forty to fifty percent uptick in business following the onset of the COVID-19 pandemic.² This flurry of online will-making puts one aspect of estate planning directly in the crosshairs: the statutory formalities required for will execution. Traditionally, the statutory requirements for will execution include a written instrument, a testator’s signature on that instrument, and two witnesses during the signing who are present at the same time.³ But if people are generally not permitted to leave home because of shelter-in-place orders,⁴ the witnessing requirement presents a substantial obstacle to valid execution. COVID-19 may have spurred a spike in online will-making, but the validity of those online wills is dubious⁵ because of the clash between the statutory witness requirement and the reality of mandated isolation amidst a global pandemic.

Although the absence of in-person witnesses may prevent compliance with statutory formalities, an online will might be validated by the application of a curative doctrine, such as common law’s substantial compliance doctrine or the harmless error rule under the Uniform Probate Code (“UPC”).⁶ However, neither the substantial compliance nor the harmless error doctrine may be applied in a manner that avoids future litigation regarding the validity of the improperly executed instrument. The substantial compliance doctrine requires that an execution must

1. Lauren Fruen, *Americans Are Rushing to Make Online Wills with 143% Uptake During Coronavirus Outbreak – But Lawyers Warn Some Might Be Invalid*, DAILY MAIL, (Mar. 26, 2020, 8:35 AM), <https://www.dailymail.co.uk/news/article-8153405/Americans-rushing-make-online-wills-143-uptake-coronavirus-outbreak.html> [https://perma.cc/ZF2R-6EQL].

2. *Id.*

3. *See, e.g.*, FLA. STAT. ANN. § 732.502 (2019).

4. *See, e.g.*, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19*, AL. GOV., (Apr. 3, 2020), <https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf> [https://perma.cc/B4W5-LYGJ]. The order contains several exceptions, but residents are generally required to remain in their homes.

5. Fruen, *supra* note 1.

6. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. Rev. 541, 568 (1990).

substantially comply with the evidentiary, ritual, protective, and channeling purposes that justify statutory formality.⁷ But what is and is not substantial compliance, predictably, is likely to vary as courts in jurisdictions that recognize the doctrine struggle to apply it in a manner consistent with its purpose.⁸ Similarly, the UPC's harmless error standard requires clear and convincing evidence that a decedent intended an instrument to be her will,⁹ but "[t]he harmless error power might tend to encourage carelessness and breed litigation, or open up avenues for fraud."¹⁰ While the risks associated with either doctrine may be debated, few question that the application of either doctrine is likely to produce a patchwork of decisions that defy uniformity and, ultimately, predictability.

I. E-WILLS AND THE UNIFORM ELECTRONIC WILLS ACT

As an alternative to traditional in-person will execution ceremonies, some individuals may have statutory authority to create wills in electronic media, such as emails or text messages, that have different execution requirements. Specifically, four states statutorily permit an individual to engage in electronic will-making ("e-testation"): Arizona, Florida, Indiana, and Nevada.¹¹ Nevada, for example, permits individuals to create an "electronic will" that is "maintained in an electronic record" and "contains the date and the electronic signature of the testator."¹² Furthermore, Nevada requires an e-will to have either "an authentication characteristic of the testator" such as a retinal scan or facial recognition, a notary's signature "in whose presence the testator" signed the electronic record, or signatures of two witnesses affixed to the will "in the presence of the testator and in whose presence the testator placed his or her" signature on the record.¹³ Importantly, Nevada deems witnesses to be in the presence of the testator if all parties "can communicate with each other by means of audio-video communication."¹⁴ Similarly, Florida permits remote witnessing, but

7. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 515–16 (1975). For a case applying the substantial compliance doctrine, see, e.g., *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991).

8. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES*, 171–73 (10th ed. 2017). For more on the problems associated with the substantial compliance doctrine, see, Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis*, 95 OR. L. REV. 337 (2017).

9. UNIF. PROB. CODE § 2-503 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2019).

10. Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 829 (2014).

11. ARIZ. REV. STAT. ANN. § 14-2518 (West 2019); FLA. STAT. ANN. § 732.522 (West 2019); IND. CODE § 29-1-21-4 (2019); NEV. REV. STAT. § 133.085 (2017).

12. NEV. REV. STAT. § 133.085(1) (2017).

13. *Id.*

14. NEV. REV. STAT. § 133.088 (2017).

only so long as the signing is supervised by a notary public.¹⁵ Indiana and Arizona, on the other hand, require witnesses to be in the testator's physical presence for a valid execution of an e-will/codicil in much the same manner as a paper will.¹⁶ Given the statutory requirements and shelter-in-place orders, the challenge of executing an e-will is not all that different from executing a paper will. In fact, executing an e-will may be impractical or impossible—unless people in Nevada have access to retinal scanning or facial recognition technology in their homes.

The low number of e-testation statutes in an increasingly online world suggests the presence of deeper concerns that impede widespread adoption of such wills. As a doctrinal matter, the laissez faire nature of communicating by electronic means may cast doubt on whether or not the individual intended the electronic record to be a will—the individual may lack testamentary intent.¹⁷ One can only imagine the difficulty of interpreting the testamentary intent of a text message containing emojis. In addition to finding testamentary intent, another obvious problem with e-testation is the risk of fraud in the form of creating, modifying, or deleting an e-will of another person.¹⁸ Indeed, the risk that an online account will be hacked is ever-present and biometric protections can be spoofed by individuals wishing to go to extreme lengths to engage in fraudulent acts.¹⁹ Furthermore, an electronic record may be permanently deleted after mistaken clicks, which makes an e-will just as easy to lose, if not more so, than a paper will.²⁰ In a Newtonian sense, the possibility of e-testation is the result of technological advances in the modern world, but technological advances also reduce the reliability of e-instruments.

Despite the limited recognition of e-testation by statute, the Uniform Law Commission promulgated the Uniform Electronic Wills Act

15. FLA. STAT. ANN. § 732.522(2)(a) (2019).

16. IND. CODE §§ 29-1-21-3(1), 29-1-21-4(a) (2019); ARIZ. REV. STAT. ANN. § 14-2518(A)(3)(a) (2019).

17. Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. g (AM. LAW INST. 2019).

18. David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 573 (2017). For a more robust argument against e-wills, see, e.g., Scott S. Bodery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 198 (2012).

19. See, e.g., Bozhao Tan & Stephanie Schuckers, *Spoofing Protection for Fingerprint Scanner by Fusing Ridge Signal and Valley Noise*, 43 PATTERN RECOGNITION 2845 (2009) (observing that “it is possible to spoof a variety of fingerprint scanners using artificial fingers from Play-Doh, gelatin and silicone molds”); Javier Galbally et al., *Biometric Antispoofing Methods: A Survey in Face Recognition*, 2 IEEE ACCESS 1530 (2014), https://www.researchgate.net/publication/273177025_Biometric_Antispoofing_Methods_A_Survey_in_Face_Recognition [<https://perma.cc/EGS9-VZXA>] (defining “spoofing” as “the ability to fool a biometric system into recognizing an illegitimate user as a genuine one by means of presenting a synthetic forged version of the original biometric trait to the sensor”).

20. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 893–95 (2007).

(“UEWA”) in 2019.²¹ According to its Prefatory Note, the UEWA seeks to promote uniformity across state lines as jurisdictions begin to consider statutory recognition of e-wills.²² While existing law may provide safe-harbor for e-wills by application of curative doctrines, the results are likely to be “haphazard” and lead to increased costs for both individuals and courts as legal disputes arise over the admissibility of an e-will to probate.²³ Fundamentally, the UEWA seeks to reduce costs by reconciling the conflict between traditional execution requirements and the modern e-world as “people increasingly turn to electronic tools to accomplish life’s tasks, including legal tasks.”²⁴

While UEWA’s writing and signature requirements are similar to those of existing e-testation statutes,²⁵ its witness requirement lowers obstacles that might prevent an instrument from being admitted to probate when compared to extant statutory frameworks. The UEWA requires signatures of two witnesses who are permitted to be in the “electronic[] presence” of the testator so long as they are all located in the same state.²⁶ In other words, the witness requirement is satisfied even if a testator and the two witnesses are located in different physical spaces within the jurisdiction where the e-will is executed.²⁷ Furthermore, UEWA not only recognizes remote witnessing for execution purposes, but also permits witnesses to affix their signatures to the instrument within a “reasonable time” after witnessing the testator sign or acknowledge her signature on the document.²⁸ The UEWA does not define the duration of time that equates to a “reasonable time;” therefore, a jurisdiction’s common law will determine the reasonable time within which witnesses must sign the instrument.

II. ZOOM-BASED WILL EXECUTION CEREMONIES

Regardless of its impact on state statutory law, UEWA’s understanding of the witness requirement in a modern online world represents a blueprint to execute a will during a time when people cannot meet in one physical space. Suddenly popular platforms like Zoom, which is being used

21. UNIF. ELECT. WILLS ACT at *Prefatory Note* (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2019).

22. *Id.* (identifying the District of Columbia, California, New Hampshire, Texas, and Virginia as jurisdictions that have considered recognition of e-wills).

23. *Id.*

24. *Id.*

25. *Id.* at § 5 cmt.

26. *Id.* at § 5(a)(3).

27. *Id.* at § 5 cmt.

28. *Id.*

as an online meeting place for purposes ranging from the NFL Draft²⁹ to law school classes, could be employed to execute wills during a time of social isolation. Using Zoom, a testator could, for example, sign a will while the testator and two witnesses occupy the same electronic meeting space. After the witnesses see the testator sign the instrument, the testator may then scan and email the document to witness #1 for a signature, witness #1 signs, scans, and emails the instrument to witness #2, and witness #2 signs, scans, and emails the document back to testator. A testator can then display the instrument to the witnesses, and all can attest to their signatures. All of this could occur during one uninterrupted Zoom session that could be recorded for future reference. Once executed, the Zoom meeting may end, and the testator would retain the will for safekeeping.

Because the testator and witnesses would not occupy the same physical space during a Zoom-based execution ceremony, the ceremony would not strictly comply with the statutory requirements for execution.³⁰ As a result, a curative doctrine, such as substantial compliance, would have to be deployed to admit the instrument to probate. Zoom-based execution ceremony provides evidence that satisfies, albeit imperfectly, the traditional justifications for the statutory formalities of will execution. A Zoom will execution ceremony involves one instrument that is viewed, signed, and emailed during an uninterrupted and continuous Zoom meeting. Witnesses could help establish that the individual signed an instrument that memorialized her wishes (the evidentiary function) and that the executed instrument was recognizable as a will (the channeling function). By communicating with the testator during the Zoom execution, witnesses could provide evidence that the testator understood the importance of the ceremony (the ritual function) and that the individual voluntarily executed the will (the protective function).³¹ If the goal of substantial compliance is to validate an instrument that represents a decedent's intent where the manner of the faulty execution nevertheless serves the purposes of wills statutes, then a Zoom-executed instrument may readily become a Zoom will.

29. Jordan Dajani, *NFL Draft 2020: Can the Fully Virtual Draft Be Hacked? A Network Security Expert Weighs In*, CBSSPORTS, (Apr. 21, 2020, 8:57 AM), <https://www.cbssports.com/nfl/news/nfl-draft-2020-can-the-fully-virtual-draft-be-hacked-a-network-security-expert-weighs-in/> [<https://perma.cc/U3K9-WMG9>].

30. See, e.g., W. VA. CODE § 41-1-3 (“[T]he signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other . . .”).

31. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6-9 (1941) (describing the evidentiary, ritual, and protective justifications for the statutory formalities associated with will execution). Furthermore, a Zoom execution ceremony allows witnesses to sign wills in a single, synchronous Zoom meeting. As a result, the placement of witness signatures during a Zoom will execution ceremony arguably more closely comports with traditional signing protocol than UEWA's authorization of witness signatures after a “reasonable time.”

Although the applicability of the UPC's harmless error rule to e-wills has been questioned,³² such doubts do not impact Zoom wills because they are not e-wills. Instead of dispositive plans recorded in emails, text messages, or on tablets with no paper equivalent, a Zoom will is a paper will that has been scanned and delivered to the testator and witnesses during the execution ceremony. As a result, the harmless error standard's central inquiry that requires clear and convincing evidence that a decedent intended an instrument submitted for probate to be her will should be readily satisfied by a Zoom execution ceremony.³³ The remote witnesses could verify that the individual intended the instrument to be a will by talking to and observing the testator during the entirety of the ceremony. At the conclusion of the transfers, a testator could display the final document or read it aloud, acknowledge it to be her will, and each party could acknowledge the signatures on the paper. Given that a Zoom ceremony permits all parties to occupy the same e-space continuously, the witnesses have sufficient opportunity to provide clear and convincing evidence that a decedent intended the instrument transferred during the ceremony to be a will.

As a practical addendum in jurisdictions where it is available, remote notarization should be the final act of a Zoom-based will execution ceremony. Notarization is not required to execute a valid will, but a notary's stamp is often needed to validate a self-proving affidavit, which permits a will to be admitted to a probate court without the necessity of witness testimony.³⁴ The challenge of obtaining notarization during periods of self-isolation is, of course, the exact same as that which plagues the witness requirement—a notary public cannot occupy the same physical space as the testator and witnesses. Recognizing the challenge presented by quarantine and the necessity of a notary's stamp on a variety of documents, twenty-three states have authorized remote notarization.³⁵ In those states, a

32. Sitkoff & Dukeminier, *supra* note 8, at 191 (noting that the UPC's harmless error rule refers to a "document" whereas other provisions refer to a "writing," which suggests that the UPC may not apply to e-wills). Despite arguments about its applicability and textual inconsistencies, courts have validated e-wills under the UPC. *See, e.g., In re Estate of Horton*, 925 N.W.2d 207 (Mich. App. 2018). Furthermore, UEWA §6 contains two alternatives of the UPC's harmless error standard. Alternative A applies to "a record readable as text" and not to a "document" or a "writing," which may be an express recognition about the uncertainty of the application of the harmless error doctrine to e-wills. Alternative B is to be adopted by jurisdictions that currently utilize the UPC's harmless error standard. As a result, any jurisdiction that adopts the UEWA but does not currently apply the UPC would adopt a harmless error rule unless modified during the legislative process. *See Hirsch, supra* note 10, at 841; UNIF. ELECT. WILLS ACT § 6 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2019).

33. UNIF. PROB. CODE § 2-503 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2019).

34. At present, forty-seven states recognize self-proving affidavits. For a list of states and accompanying statutes, see *Self-Proving Affidavit Form*, EFORMS, <https://eforms.com/wills/self-proving-affidavit/> [<https://perma.cc/885S-L9JT>].

35. Theodora McCormick, *The Race to Embrace Remote Online Notarization ("RON") in Response to the COVID-19 Pandemic*, THE NAT'L L. REV. (Mar. 31, 2020), <https://www.natlawreview.com/article/the-race-to-embrace-remote-online-notarization-ron-in-response-to-the-covid-19-pandemic>.

notary public could be invited to the Zoom execution ceremony and the relevant signatures and stamp could be affixed in much the same manner as the ceremony itself. Thereafter, the testator would be the only party to have the notarized will. In states that have yet to authorize remote notarization, on the other hand, a Zoom-based execution ceremony would still result in a valid will eligible for probate, but the testator and witnesses will have to visit a notary once spatial restrictions are lifted to execute the self-proving affidavit. And without a self-proving affidavit, the increase in will-making during the pandemic will be accompanied by increased court time as witness testimony will be required to prove those wills—and those same witnesses may have fallen victim to COVID-19 in the interim.

CONCLUSION

The COVID-19 emergency has created a world where decisions must be made among imperfect alternatives. A number of options exist for people seeking to draft wills amidst the risks associated with the current global pandemic. Individuals could ignore shelter-in-place orders to conduct in-person execution ceremonies, pen holographic wills, or use email or text messages to outline how property should be distributed at death. Each of those options, however, is suboptimal. Ignoring shelter-in-place orders risks one's health and that of others, holographic wills are not uniformly recognized, and few states recognize the validity of e-wills.³⁶ Rather than pursue those alternatives, an increasing number of individuals have turned to online will-making services, but those online wills may fail to be executed with due statutory formality given current travel and business restrictions. Although those statutory requirements have been historically resistant to change, the isolation associated with COVID-19 presents an opportunity to harness technology to expand the law of wills in a manner that promotes its fundamental goal—giving effect to a decedent's intent. A Zoom-based will execution ceremony with remote witnesses and remote notarization provides an alternative that allows individuals to memorialize plans for property distribution at death without reshaping statutory formalities beyond recognition.³⁷ And in a socially distant world of

.com/article/race-to-embrace-remote-online-notarization-ron-response-to-covid-19-pandemic [https://perma.cc/4499-C3TN] (noting that states differ on the beginning and duration of recognition).

36. For a graphic displaying the number of states that recognize holographic wills, see Sitkoff & Dukeminier, *supra* note 8, at 198 (showing that a little more than half of states recognize holographic wills).

37. Notably, the Governor of New York recently issued an Executive Order permitting remote will executions through May 7, 2020. See, N.Y. Exec. Order No. 202.14 (Apr. 7, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf [https://perma.cc/KC2B-MR36].

imperfect alternatives, a Zoom will may represent the best expression of a testator's intent.