UCLA LAW REVIEW

Wills Law on the Ground

David Horton

ABSTRACT

Traditional wills doctrine was notorious for its formalism. Courts insisted that testators strictly comply with the Wills Act and refused to consider extrinsic evidence to construe instruments. Yet the 1990 Uniform Probate Code revisions and the Restatement (Third) of Property: Wills and Donative Transfers replaced these venerable bright-line rules with fact-sensitive standards in an effort to foster individualized justice. Although some judges, scholars, and lawmakers welcomed this seismic shift, others objected that inflexible principles provide clarity and deter litigation. But with little hard evidence about the operation of probate court, the frequency of disputes, and decedents' preferences, these factions have battled to a stalemate. This Article casts fresh light on this debate by reporting the results of a study of every probate matter stemming from deaths during the course of a year in a major California county. This original dataset of 571 estates reveals how wills law plays out on the ground. The Article uses these insights to analyze the issues that divide the formalists and the functionalists, such as the requirement that wills be witnessed, holographic wills, the harmless error rule, the ademption by extinction doctrine, and the antilapse doctrine.

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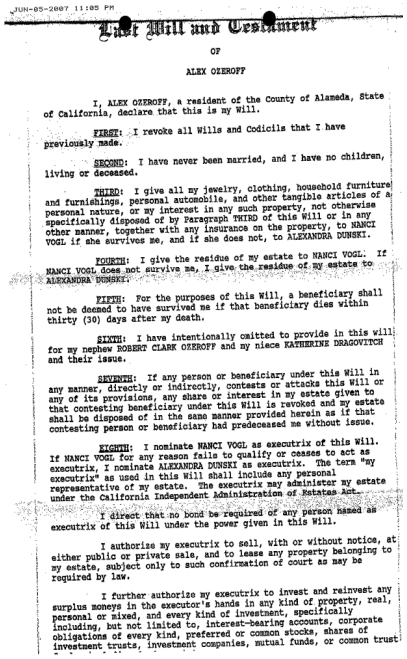
INTRODUCTION

On January 6, 2007, Alex Ozeroff died in Berkeley, California, leaving a daughter, a granddaughter, over $1,000,000 in property, and two different documents that purported to be his will.[1] The first, which he had signed in 1991, was typewritten but entitled "Holographic Last Will and Test[a]ment."[2] It gave his assets to his ex-girlfriend, "for her use, distribution, and disposal as she chooses."[3] The second instrument was dated a year later and looked more official: It was on legal-size paper, it featured estate planning jargon, and it had been subscribed by Alex and two witnesses.[4] Although this 1992 will also made his former girlfriend the major beneficiary, it falsely recited that he "ha[d] no children."[5] How should a court distribute Alex's estate?

1. Holographic Last Will and Testement of Alex Ozeroff, dated June 19, 1991, No. RP07311595 (Super. Ct. Cal., Alameda Cnty. Apr. 19, 2007) [hereinafter 1991 Ozeroff Will].
2. *Id.*
3. *Id.*
4. Last Will and Testament of Alex Ozeroff, No. RP07311595 (Aug. 12, 1992).
5. *Id.*

Alex Ozeroff's Purported Wills



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Last Will and Testament

OF

ALEX OZEROFF

I, ALEX OZEROFF, a resident of the County of Alameda, State of California, declare that this is my Will.

FIRST: I revoke all Wills and Codicils that I have previously made.

SECOND: I have never been married, and I have no children, living or deceased.

THIRD: I give all my jewelry, clothing, household furniture and furnishings, personal automobile, and other tangible articles of a personal nature, or my interest in any such property, not otherwise specifically disposed of by Paragraph THIRD of this Will or in any other manner, together with any insurance on the property, to NANCI VOGL if she survives me, and if she does not, to ALEXANDRA DUNSKI.

FOURTH: I give the residue of my estate to NANCI VOGL. If NANCI VOGL does not survive me, I give the residue of my estate to ALEXANDRA DUNSKI.

FIFTH: For the purposes of this Will, a beneficiary shall not be deemed to have survived me if that beneficiary dies within thirty (30) days after my death.

SIXTH: I have intentionally omitted to provide in this will for my nephew ROBERT CLARK OZEROFF and my niece KATHERINE DRAGOVITCH and their issue.

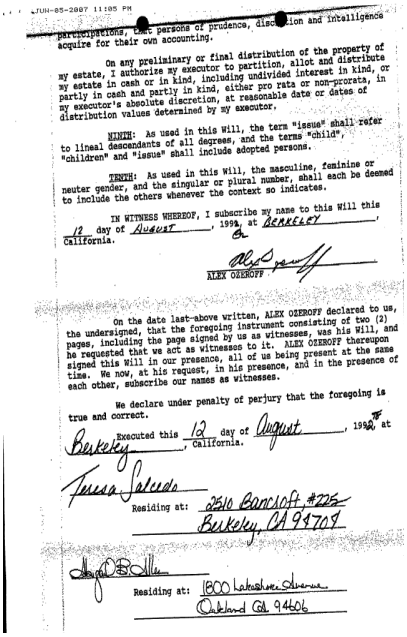
SEVENTH: If any person or beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will or any of its provisions, any share or interest in my estate given to that contesting beneficiary under this Will is revoked and my estate shall be disposed of in the same manner provided herein as if that contesting person or beneficiary had predeceased me without issue.

EIGHTH: I nominate NANCI VOGL as executrix of this Will. If NANCI VOGL for any reason fails to qualify or ceases to act as executrix, I nominate ALEXANDRA DUNSKI as executrix. The term "my executrix" as used in this Will shall include any personal representative of my estate. The executrix may administer my estate under the California Independent Administration of Estates Act.

I direct that no bond be required of any person named as executrix of this Will under the power given in this Will.

I authorize my executrix to sell, with or without notice, at either public or private sale, and to lease any property belonging to my estate, subject only to such confirmation of court as may be required by law.

I further authorize my executrix to invest and reinvest any surplus moneys in the executor's hands in any kind of property, real, personal or mixed, and every kind of investment, specifically including, but not limited to, interest-bearing accounts, corporate obligations of every kind, preferred or common stocks, shares of investment trusts, investment companies, mutual funds, or common trust



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participations, that persons of prudence, discretion and intelligence acquire for their own accounting.

On any preliminary or final distribution of the property of my estate, I authorize my executor to partition, allot and distribute my estate in cash or in kind, including undivided interest in kind, or partly in cash and partly in kind, either pro rata or non-prorata, in my executor's absolute discretion, at reasonable date or dates of distribution values determined by my executor.

NINTH: As used in this Will, the term "issue" shall refer to lineal descendants of all degrees, and the terms "child", "children" and "issue" shall include adopted persons.

TENTH: As used in this Will, the masculine, feminine or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

IN WITNESS WHEREOF, I subscribe my name to this Will this 12 day of AUGUST, 1991, at BERKELEY, California.

ALEX OZEROFF

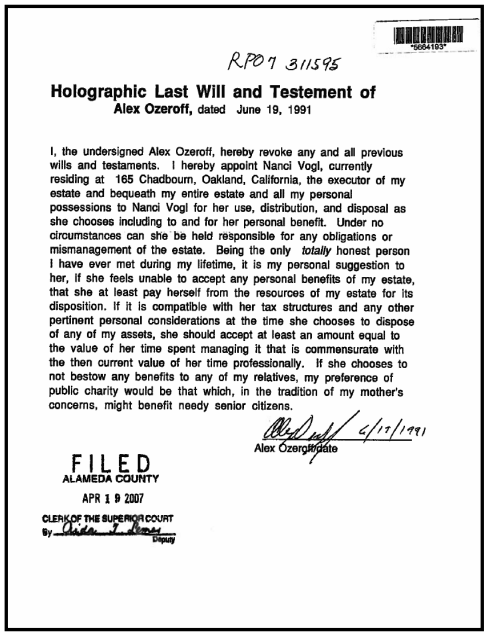
On the date last-above written, ALEX OZEROFF declared to us, the undersigned, that the foregoing instrument consisting of two (2) pages, including the page signed by us as witnesses, was his Will, and he requested that we act as witnesses to it. ALEX OZEROFF thereupon signed this Will in our presence, all of us being present at the same time. We now, at his request, in his presence, and in the presence of each other, subscribe our names as witnesses.

We declare under penalty of perjury that the foregoing is true and correct.

Executed this 12 day of August, 1991, at Berkeley, California.

Teresa Salcedo
Residing at: 2510 Bancroft #225
Berkeley, CA 94709

Residing at: 1600 Lakeshore Avenue
Oakland CA 94606



RP07 311595

Holographic Last Will and Testement of
Alex Ozeroff, dated June 19, 1991

I, the undersigned Alex Ozeroff, hereby revoke any and all previous wills and testaments. I hereby appoint Nanci Vogl, currently residing at 165 Chadbourn, Oakland, California, the executor of my estate and bequeath my entire estate and all my personal possessions to Nanci Vogl for her use, distribution, and disposal as she chooses including to and for her personal benefit. Under no circumstances can she be held responsible for any obligations or mismanagement of the estate. Being the only *totally* honest person I have ever met during my lifetime, it is my personal suggestion to her, if she feels unable to accept any personal benefits of my estate, that she at least pay herself from the resources of my estate for its disposition. If it is compatible with her tax structures and any other pertinent personal considerations at the time she chooses to dispose of any of my assets, she should accept at least an amount equal to the value of her time spent managing it that is commensurate with the then current value of her time professionally. If she chooses to not bestow any benefits to any of my relatives, my preference of public charity would be that which, in the tradition of my mother's concerns, might benefit needy senior citizens.

Alex Ozeroff date 6/19/1991

FILED
ALAMEDA COUNTY
APR 19 2007
CLERK OF THE SUPERIOR COURT
By Linda T. Harris Deputy

That question exposes a deep schism in U.S. wills law. For hundreds of years, wills doctrine was infamous for its formalism.[6] The Wills Act required testators to sign their wills or acknowledge their signatures to two witnesses who were "present at the same time."[7] Courts took this attestation mandate to quixotic extremes, refusing to enforce purported wills for slight defects in the execution process.[8] Against this unforgiving backdrop, Alex's unwitnessed 1991 document would fall well short of the mark. To be sure, roughly half of the states recognize holographic wills, which can be unattested if they are largely handwritten.[9] But even under that rubric, Alex's self-described "Holographic Last Will and Test[a]ment" would fail because it was entirely typewritten.[10] Similarly, a court grappling with the meaning of Alex's 1992 instrument would be severely constrained by its text. It could not look beyond the face of the will to evaluate whether Alex mistakenly omitted his child or grandchild.[11] And if circumstances had changed since Alex executed the document—if he no longer owned a particular asset, or if a beneficiary had died before him—the ademption by extinction and antilapse rules would ignore extrinsic evidence about his wishes and dictate the outcome with the cold logic of a mathematical equation.[12]

But as the twentieth century progressed, formalism came under fire. Several influential scholars accused wills doctrine of being anachronistic.[13] This cohort

6. *See, e.g.*, John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 489 (1975).
7. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26 (Eng.).
8. *See, e.g.*, Smith v. Nelson, 299 S.W.2d 645, 645 (Ark. 1957) (invalidating a document that the testator "doubtless[ly] intended to be his will" because it bore the signature of only one witness); *see also infra* notes 65–73 and accompanying text.
9. *See, e.g.*, CAL. PROB. CODE § 6111(a) (West 2010) (validating wills if "the signature and the material provisions are in the handwriting of the testator"); *see also infra* text accompanying notes 74–82, 140.
10. *See, e.g.*, Estate of Johnson v. Johnson, 630 P.2d 1039, 1041, 1042 (Ariz. App. 1981) ("[A]n instrument may not be probated as a holographic will where it contains words not in the handwriting of the testator . . . .").
11. *See, e.g.*, Farmers & Merchants Bank of Keyser v. Farmers & Merchants Bank of Keyser, 216 S.E.2d 769, 772 (W. Va. 1975) ("[T]he intention of the testator must be judged exclusively by the words of the instrument.").
12. *See, e.g.*, McGee v. McGee, 413 A.2d 72, 76 (R.I. 1980) (holding that when a testator does not own a specifically bequeathed item at death, ademption by extinction occurs "regardless of the testator's intent"); *see also infra* text accompanying notes 89–102.
13. *See, e.g.*, Jane B. Baron, *Gifts, Bargains, and Form,* 64 IND. L.J. 155, 202 (1989)*;* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 9–13 (1941); Langbein, *supra* note 6, at 489–503; John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 53–54 (1987); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 543 (1990); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L. Q. 39, 49 (1985).

argued that the attestation requirement arose during an era when testators often expressed their last wishes on their deathbed—and thus needed extra protection against fraud and duress—but had become superfluous now that wills were executed in middle age under the watchful eyes of an attorney.[14] Similarly, commentators claimed that the law had not kept pace with changes in the nature of wealth transmission. In rising numbers, property owners were structuring their estate plans around devices that need not be witnessed, such as pensions, life insurance, and revocable trusts.[15] The popularity of these contractual mechanisms made the safeguards of the Wills Act seem extravagant.[16] And finally, critics trained their formidable guns on the mechanical rules that governed the interpretation and construction of wills.[17] These voices asserted that a policy of strict textualism did violence to the prime directive of honoring the testator's wishes.[18]

Two decades ago, this progressive spirit inspired two law revision projects. In 1990, the Uniform Law Commission overhauled Article II of the Uniform Probate Code (UPC).[19] Then, in 1999, the American Law Institute published the Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement).[20] Under the stewardship of esteemed professors John Langbein and Lawrence Waggoner (who I will refer to as the "Reformers"), the UPC and Restatement sought to sweep away the cobwebs of intent-defeating formalism. For starters, these sources boast "the most significant change in what constitutes a will since [the] enactment of the Statute of Frauds."[21] Under the harmless error rule, judges may ignore flaws in the execution process if there is clear and convincing

14. *See* Gulliver & Tilson, *supra* note 13, at 9–13; Langbein, *supra* note 6, at 501–03; Lindgren, *supra* note 13, at 555–56.

15. *See, e.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1139–40 (1984); Langbein, *supra* note 6, at 503–09; Lindgren, *supra* note 13, at 556–57.

16. Alex's 1991 writing illustrates this discord. Because it is typewritten and unattested, it could not be a valid will. But with a minor change to its content—if Alex had expressed the desire to give his ex-girlfriend power over his assets during life, rather than when he died—it could be an enforceable trust, at least with respect to his personal property. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 17 (1959). In fact, Alex would have created such a trust if he had simply *spoken* the same words. *See, e.g.*, Fahrney v. Wilson, 4 Cal. Rptr. 670, 673 (Cal. Dist. Ct. App. 1960).

17. *See, e.g.*, 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, 522–23 (1982).

18. *See id.* at 528, 568.

19. UNIF. PROBATE CODE (amended 1990), 8 U.L.A. 1 (2013). *See* Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2309 (1996). The original version of the Uniform Probate Code (UPC) appeared in 1969 and dealt mainly with streamlining probate procedure. *See* Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 453–54 (1970).

20. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (1999).

21. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

evidence that a decedent intended a document to be her will.[22] This novel regime might save Alex Ozeroff's "Holographic Last Will and Test[a]ment": After all, he typed it, dated it, signed it, and labeled it his "[w]ill."[23] In the same vein, the UPC and Restatement allow judges to reform even the unambiguous text of an instrument if there is strong proof that it does not faithfully reflect the testator's intent.[24] Thus, a court would have wide leeway to probe why Alex claimed to have no descendants in his 1992 will. And finally, the UPC and Restatement revamp the ademption by extinction[25] and antilapse doctrines[26] to try "to reduce the level of formality in the American law of wills."[27]

But this attempt to unify the field had the opposite effect. The Reformers' handiwork proved controversial in the legal academy. Although some scholars were enthusiastic about the proposals,[28] others argued that their extreme fact-sensitivity would sow uncertainty and breed litigation.[29] Many state lawmakers and supreme court justices were equally queasy. Although several jurisdictions

22. UNIF. PROBATE CODE § 2-503 (amended 2010), 8 U.L.A. 215 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (1999).
23. 1991 Ozeroff Will, *supra* note 1.
24. *See* UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 335 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (2003).
25. *See* UNIF. PROBATE CODE § 2-606 (amended 2010), 8 U.L.A. 262 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2 (1999).
26. *See* UNIF. PROBATE CODE § 2-603 (amended 2010); 8 U.L.A. 241 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 (1999).
27. Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1073–75 (1992).
28. A 1992 Symposium collected many of these efforts. *See, e.g.*, Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 926 (1992) ("The 1990 UPC is clearly a dynamic instrument of reform deserving wide support."); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992) (discussing the "uniformly welcome changes that the new Code makes in the law of will execution").
29. Many commentators focused on the harmless error rule. *See, e.g.*, Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 128 (1991); 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, 265 (1991); 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 Two: Uniform Probate Code Section 2-503 and a Counterproposal*, 43 FLA. L. REV. 599, 711–12 (1991) [hereinafter Miller, *Will Formality Part Two*]; Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 473–76 (2002). Others concentrated on ademption by extinction and antilapse. *See* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 641 (1993).

have borrowed particular UPC and Restatement provisions,[30] and courts have occasionally looked to these authorities for guidance,[31] only eight states have signed up for the entire package of reforms.[32] Thus, in different states—and sometimes within the same state—wills law is torn between its conventional rigidity and the Reformers' blueprint.

One reason for this impasse is the lack of information about the law's real-world impact. For instance, it is hard to assess the sagacity of the harmless error rule without data on how often strict compliance jurisdictions reject near-miss wills.[33] Likewise, will construction doctrines, which rely heavily on assumptions about testators' preferences, could benefit from a sharper sense of the decisions that testators actually make.[34] To be sure, there is a rich academic literature that analyzes probate records. Yet these studies have focused either on historical or sociological issues[35] or on the efficacy of probate proce-

30. *See, e.g.*, CAL. PROB. CODE § 6111(a) (West 2010) (adopting the UPC and the Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement) approach to holographic wills); MICH. COMP. LAWS ANN. § 700.2509 (West 2002) (same for revival of a revoked will); N.J. STAT. ANN. § 3B: 3-13 (West 2007) (same for revocation by physical act).

31. *See, e.g.*, Ruotolo v. Tietjen, 890 A.2d 166, 173, 177 (Conn. App. Ct. 2006) (relying heavily on the UPC and Restatement's approach to antilapse), *aff'd* 916 A.2d 1, 1–2 (Conn. 2007); *In re* Estate of Anton, 731 N.W.2d 19, 25–26 (Iowa 2007) (same for ademption by extinction).

32. *See* ALASKA STAT. §§ 13.12.1, 13.16.12 (2012); COLO. REV. STAT. §§ 15-10-101 to 15-17-102 (West 2013); HAW. REV. STAT. §§ 539-1 to -12 (2006); MINN. STAT. §§ 524.1 to .8 (2012 & Supp. 2013); MONT. CODE ANN. §§ 72-1-101 to 72-6-311 (2013); N.M. STAT. ANN. §§ 45-1-101 to 45-7-522 (2014); N.D. CENT. CODE §§ 30.1-01-01 to 30.1-35-0 (2010); S.D. CODIFIED LAWS §§ 29A-2 to 29A-3 (2004).

33. *See, e.g.*, Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 879 (2012) (noting that "there are dueling opinions on whether the harmless error rule . . . alter[s] the incentives of testators or their attorneys in drafting or executing a will" and that the answer "is an empirical question").

34. *See, e.g.*, Mann, *supra* note 21, at 1057 (criticizing both the traditional and the revised ademption rule for being based on "suppositious intent with no empirical foundation"); Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 629 (2009) (noting that antilapse laws have been crafted "without the guidance of empirical data"); Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher*), 77 MINN. L. REV. 659, 670 (1993) (noting that the doctrine of ademption by extinction could benefit from "an empirical study . . . that analyze[s] the will provisions for specific devises, the nature of the assets found in the probate estate, and the testator's general plan of distribution").

35. *See, e.g.*, MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 44–45 (1970) (studying probate records from Cuyahoga County, Ohio in the mid 1960s); 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 100 wills from Greene County, Alabama, from shortly before the Civil War); Lawrence M. Friedman et al., *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 1964); Jason C. Kirklin, Note, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479, 535 (2011) (examining 81 wills from Hamilton County, Indiana, in the mid 1800s).

dures.[36] Thus, we know very little about how substantive wills law plays out on the ground.

This Article begins to fill that void. It surveys every probate matter stemming from deaths that occurred in 2007 in Alameda County, California.[37] This technique offers a fresh perspective on substantive wills principles. Orthodox doctrinal analysis revolves around the slender minority of estates that both degenerate into litigation and become reported appellate decisions. Conversely, my research allows us to compare contested probate administrations with their routine counterparts. In addition, it captures variables that are central to the debate between the formalists and the functionalists, such as drafting choices, dispute rates, case length, and attorneys' fees.

Specifically, I use the Alameda County files to explore three issues. First, I argue that an ideal approach to will execution would combine strict and palliative doctrines. Contrary to the conventional wisdom, I find that the presence element of the Wills Act is not a stumbling block for testators. Instead, the most common source of litigation is ambiguity about whether a decedent wanted a casual or incomplete writing to be her will.[38] As a result, the attestation requirement is less damaging and more valuable than functionalists claim. Not only do most wills easily satisfy the mandate, but the fact that a testator took the trouble to find witnesses also resolves any doubt that she intended a document to be legally effective.[39] On the other hand, in a blow to the formalists, the surprising number of testators who make deathbed wills—and therefore do not have the opportunity to execute a conventional testamentary instrument—reveals why the benefits of holographs outweigh the costs.[40] Similarly, I contend that my research offers qualified support for the harmless error doctrine.[41]

Second, I examine the more esoteric issue of ademption by extinction. Under the longstanding identity theory of ademption, a beneficiary who was

36. *See, e.g.*, Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (surveying a handful of estates from 1953 and 1957 from Cook County, Illinois); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 393–94 (scrutinizing 415 estates from a range of years between 1929 and 1944 in Dane County, Wisconsin); Robert A. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TR. J. 596, 596 (1974) (collecting data from four Minnesota counties in 1969).

37. In a previous article, I used a slightly larger version of the same dataset to update our understanding of the probate process. *See* David Horton, *In Partial Defense of Probate: Evidence From Alameda County, California*, 103 GEO. L.J. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480719.

38. *See infra* text accompanying notes 223–228.

39. *See infra* text accompanying notes 218–220.

40. *See infra* text accompanying notes 212–215, 256–260.

41. *See infra* text accompanying notes 273–281.

supposed to receive a specific bequest takes nothing if the testator does not own that item when she dies.[42] The identity theory is legendary for allowing random events to cut loved ones out of an estate plan, such as when bonds are called or land is condemned.[43] To ameliorate these harsh results, the UPC and Restatement create an "intent" version of ademption, which allows an empty-handed beneficiary to recover the value of the missing possession if such a result would carry out the testator's wishes.[44] Critics of this approach argue that testators use specific bequests to honor a loved one's connection to a particular thing—not to confer a general pecuniary benefit.[45] Thus, they contend that specific bequests should "disappear with the asset" rather than entitle the disappointed beneficiary to recover cash at the expense of the residual beneficiaries.[46] But my data reveals greater nuance. To be sure, many testators reserve the specific bequest mechanism for sentimental objects, such as heirlooms.[47] Yet other testators use specific bequests to divide wealth among friends and relatives.[48] For these decedents, a knee-jerk rule of ademption can nullify vital estate planning choices. Given the fact that testators' motivations for making specific bequests vary, the UPC and Restatement's flexible principle is superior to the identity theory's immutable rule.

Third, I turn to the antilapse doctrine. Under common law, beneficiaries must survive the testator in order to inherit.[49] But in forty-nine states, antilapse legislation redistributes the shares of certain predeceasing beneficiaries—usually relatives of the testator—to those beneficiaries' heirs.[50] Most courts have held that testators can draft around the antilapse statute by using a survivorship condition.[51] The idea here is that when a will says, "to A, if she survives me," and A dies before the testator, the survivorship provision trumps antilapse by revealing that the testator did not want A's family to be substituted for A.[52] But the UPC

42. *See, e.g.*, Ashburger v. Macguire, (1786) 2 Bro. C.C. 108, 114.
43. *See, e.g.*, *In re* Dungan's Estate, 73 A.2d 776, 780 (Del. Super. Ct. 1950) (holding that a bequest of municipal bonds was adeemed despite overwhelming evidence that the testator acquired other bonds as a replacement).
44. *See* UNIF. PROBATE CODE § 2-606(a)(6) (amended 2010), 8 U.L.A. 263 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2(c) (1999).
45. *See, e.g.*, Ascher, *supra* note 29, at 644.
46. *See id.*
47. *See infra* text accompanying notes 331–332.
48. *See infra* text accompanying notes 335–339.
49. *See, e.g.*, JESSE DUKEMINIER ET. AL, WILLS, TRUSTS, AND ESTATES 358 (8th ed. 2009).
50. *See, e.g.*, CAL. PROB. CODE § 21110(a) (West 2011) (dictating that if a predeceasing beneficiary is related to the testator or the testator's spouse, "the issue of the deceased transferee take in the transferee's place"); *see also infra* text accompanying notes 97–98.
51. *See infra* text accompanying note 101–102.
52. *See infra* text accompanying note 102.

and Restatement view survivorship clauses as rank boilerplate, and thus require a more forceful expression of intent to override antilapse.[53] I offer evidence that decedents do not blithely use survivorship conditions, and thus probably intend their wills to be taken literally.[54] Accordingly, I propose a toned-down version of the functionalist approach that is more attuned to the words of the instrument.[55]

The Article contains two Parts. Part I provides background by describing the tug-of-war between formalism and functionalism in wills law. It reveals how dissensus over the UPC and Restatement has left the field in flux. Part II describes my research methods and discuses some overarching results. It then mines my data to analyze attestation, holographic wills, harmless error, ademption by extinction, and antilapse.

I. FORMALISM AND FUNCTIONALISM IN WILLS LAW

For the first three centuries of its existence, American wills doctrine was the height of formalism. Recently, however, the UPC and Restatement have attempted to swing the field to the opposite pole by emphasizing standards over rules and encouraging courts to admit extrinsic evidence. This Part describes these rival visions.

A. Traditional Law and Formalism

Traditional wills law consists largely of what Carol Rose famously called "crystals" (as opposed to "mud"): bright-line principles that generate clear-cut results by barring decisionmakers from weighing the equities of any particular case.[56] This leitmotif ran throughout the rules that governed the creation, interpretation, and construction of wills.

Nowhere did the formalist banner fly higher than in the arena of will execution. The act of creating a will has always been somewhat ceremonial: In medieval England, testators often expressed their wishes on the verge of death, as part of their last confession.[57] The march toward modern formality began in the

53. *See* UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010), 8 U.L.A. 243 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 (1999).
54. *See infra* text accompanying notes 359–360.
55. *See infra* text accompanying notes 369–372.
56. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577–78 (1988).
57. *See, e.g.*, SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 318–20, 340 (2d ed. 1968); MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND 31–35 (1963). Then, in 1540, the first Statute

seventeenth century, when the process for determining title to real estate had fallen into shambles.[58] Bogus sales of land—especially land that the seller claimed to have inherited—were endemic.[59] To make proof of ownership more reliable, the British Parliament passed the Statute of Frauds in 1677, thus mandating that wills conveying real property "shall be in Writeing, [sic] and signed by the [testator], . . . and shall be attested and subscribed in the presence of [the testator] by three or fower [sic] credible Witnesses."[60] This last element—attestation—distinguished wills from gifts and contracts, which never need to be witnessed. Even after a reliable recording system emerged in the eighteenth century, the Statute of Frauds remained on the books. Then, in 1837, the Wills Act extended the attestation requirement to all wills.[61] The new legislation also reduced the number of witnesses to two, but added the element that these individuals needed to be "present at the same time" when the testator signed or acknowledged her signature.[62] This stringent approach to will creation migrated across the Atlantic and became enshrined in virtually every American state.[63]

Courts interpreted the Wills Act hyperliterally. In case after case, judges seized on trivial defects in the execution process to nullify instruments that decedents "doubtless[ly] intended to be [their] last will."[64] Sometimes these mishaps related to the signature requirement, such as when a testator neglected to subscribe the will[65] or placed an authenticating mark in the wrong place.[66] The overwhelming majority of these slipups, however, involved attestation. One attempted will failed when its author exhibited his signature to his two friends seconds apart, instead of when they were "present at the same time."[67] Other efforts floundered when a witness did not realize that she was signing a will,[68] when a

of Wills made land devisable provided that the testator memorialized her wishes in writing. *See* 32 Hen. VIII, c.1 (1540).

58. *See, e.g.*, Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354, 355 (1983).
59. *See id.* at 366 (explaining that "the effect and even existence of wills were fruitful sources of dispute, recently inherited land often was of uncertain ownership, and its purchasers were vulnerable to fraud").
60. Statute of Frauds, 29 Car. II, c.3, § 5 (1677).
61. *See* Wills Act, 1837, 7 Will 4 & 1 Vict., c. 26 § 9 (Eng.).
62. *Id.*
63. *See, e.g.*, DUKEMINIER ET AL., *supra* note 49, at 226–27 (describing the influence of the Wills Act on American jurisdictions).
64. *In re* Sage, 107 A. 445, 445 (N.J. 1919).
65. *See, e.g.*, Succession of Hoyt, 303 So. 2d 189, 189 (La. Ct. App. 1974); *In re* Glace's Estate, 196 A.2d 297, 300 (Pa. 1964).
66. *See, e.g.*, *In re* Schiele's Estate, 51 So. 2d 287, 290 (Fla. 1951).
67. *In re* Groffman, [1969] 1 W.L.R. 733 (P.) at 739 (Eng.).
68. *See In re* Foster's Will, 90 N.Y.S.2d 892, 893 (Sur. Ct. 1949).

witness signed before the decedent did,[69] when the decedent forgot to acknowledge her previous signature to a witness,[70] when two witnesses watched the decedent write the will but only one subscribed it,[71] and when a witness could not observe the decedent's signature because the will was folded in half.[72]

Paradoxically, a handful of jurisdictions also recognized holographic wills: instruments that did not need to be witnessed, but had to consist entirely of the testator's handwriting.[73] In some ways, holographs were informal. Indeed, they could be found in letters,[74] recipes,[75] or even scratched into a tractor's fender.[76] This permissiveness seemed a far cry from the severity of the Wills Act. Yet courts were as unyielding about the requirement that the holograph be completely in the testator's handwriting as they were about the attestation requirement for traditional wills. A single non-handwritten word would doom an instrument.[77] For instance, in *In re Thorn's Estate*, a testator owned a rubber stamp that bore the name of his vacation home, Cragthorn.[78] He wrote his will by hand, but used the stamp rather than spelling out "Cragthorn."[79] The California Supreme Court denied probate.[80] It began its analysis with a telling passage:

> Of course, the intent of the deceased is obvious. He was endeavoring to make a valid [h]olographic will, and the manner in which he desired

69. *See* Chase v. Kittredge, 93 Mass. (11 Allen) 49, 63 (1865).
70. *See In re* Amsden's Will, 187 A. 148, 151 (N.J. Prerog. Ct. 1936) *aff'd*, 191 A. 801 (N.J. 1937).
71. *See In re* Watkins' Estate, 75 So. 2d 194, 195 (Fla. 1954).
72. *See In re* Mackay's Will, 18 N.E. 433, 434 (N.Y. 1888); *In re* Krause's Estate, 117 P.2d 1, 1 (Cal. 1941).
73. In the first half of the twentieth century, fewer than twenty states authorized holographs. *See* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking,* 43 REAL PROP. TR. & EST. L.J. 27, 37 n.42 (2008).
74. *See, e.g.*, *In re* Kimmel's Estate, 123 A. 405, 406–07 (Pa. 1924) (deeming a rambling letter to be a holograph).
75. *See* John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 301 (1934) (describing a holograph that was incorporated into a chili recipe).
76. In an infamous case, George Cecil Harris became trapped under a piece of heavy farm machinery and used a penknife to write and sign: "In case I die in this mess I leave all to the wife." Geoff Ellwand, *An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way Into Legal History*, 77 SASK. L. REV. 1, 1 (2014).
77. *See, e.g.*, Maris v. Adams, 166 S.W. 475, 478 (Tex. Civ. App. 1914) *modified*, 213 S.W. 622 (Tex. Comm'n App. 1919) ("[T]he authorities are numerous and seem to be without discord that a holographic will not entirely written by the testator cannot be probated."); *cf.* Matter of Estate of Dobson, 708 P.2d 422, 424 (Wyo. 1985) (denying probate to an instrument the decedent had handwritten that also bore a third party's notations because it was not "*entirely* in the handwriting of the testator") (emphasis added).
78. 192 P. 19, 19 (Cal. 1920).
79. *Id.*
80. *Id.* at 21–22.

> his property to go is clearly specified. Nor can there be a suspicion as to the genuineness of the document. *But all this is beside the question*.[81]

The Wills Act also cast its shadow across the doctrines that give meaning to wills. These rules were exceedingly hostile to the admission of extrinsic evidence. For instance, courts refused to consider communications between the testator and her attorney to clarify mistaken or unclear language. Under the no-reformation rule, even powerful proof of a scrivener's error—a transposed number or a mixed-up name—was insufficient to show that an instrument did not embody the testator's intent.[82] Likewise, the tenet of plain meaning, a more muscular version of contract law's parol evidence rule, required judges to interpret the will using nothing more than its four corners.[83] This doctrine was so robust that courts could not resort to extrinsic evidence to resolve patent ambiguities, such as glaringly vague or nonsensical passages.[84] This laser-like focus on the text was an extension of the law's blinkered approach to will execution. According to this reasoning, only the words of the document were reliable. It was the will itself—and not a testator's stray statements—that arose within the prophylactic bubble of the statutory formalities.[85]

In addition, will construction doctrines elevated form over substance. Many watershed events can occur after a testator signs a will: She can marry, have children, buy or sell property, or lose a close relative. As a result, wills law contains an array of change-of-circumstance rules that adjust the effect of a testator's dispositive scheme to accommodate these events.[86] At first blush, these

81. *Id.* at 20 (emphasis added).

82. *See, e.g.*, Sanderson v. Norcross, 136 N.E. 170, 172 (Mass. 1922) ("Courts have no power to reform wills."); Burke v. Cent. Trust Co., 242 N.W. 760, 761 (Mich. 1932) ("Testimony of the scrivener of a mistake in drafting a will or of an intention of testator different from that expressed in the will is not admissible . . . .").

83. *See, e.g.*, Dumond v. Dumond, 51 N.W.2d 374, 375 (Neb. 1952) ("The intent of the testator . . . [must] be ascertained within the four corners of the will without the assistance of extrinsic evidence.").

84. *See, e.g.*, Clark v. Trs. of Hardwick Seminary, 3 Ohio C.C. 152, 157 (1888) ("[D]eclarations of a testator to the scrivener of the will are not admissible to explain conflicting provisions of the will itself.") (quoting Lewis v. Douglass, 14 R.I. 604, 604 (1884)).

85. *See, e.g.*, Langbein & Waggoner, *supra* note 17, at 528 (noting that courts refuse "to supply an omitted term or to substitute language outside the will" because "the language to be supplied was not written, signed, and attested as required by the Wills Act").

86. For instance, many states allow a testator's spouse or children to take a share of the estate if they were inadvertently omitted from a will that predates the marriage or birth. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2302 (2012 & Supp. 2014); MD. CODE ANN., EST. & TRUSTS § 3-301 (LexisNexis 2011); MINN. STAT. § 524.2-302 (2012); MO. REV. STAT. § 474.240 (2000). Likewise, jurisdictions often provide that the testator's divorce implicitly revokes a bequest to her former spouse. *See, e.g.*, CAL. PROB. CODE § 6122 (West 2009); IOWA CODE § 633.271(1) (2013); WASH. REV. CODE § 11.12.051 (2012).

doctrines seemed contextual. After all, they effectively redrafted a testator's will as her life unfolded. But on closer inspection, these principles were quite formal. Rules of construction are supposed to mirror what most testators would want.[87] Despite this goal of effectuating intent, the tenets of will construction were calibrated to ignore a testator's actual wishes.

Consider ademption by extinction. If a testator bequeaths a specific piece of property but does not own it at death, the person who was supposed to receive the item takes nothing.[88] This so-called identity theory of ademption was "the epitome of legal formality" because it did not care *why* the asset was not in the testator's estate.[89] Perhaps the testator had earmarked a valuable watercolor for her sister but then chose to sell it after a family squabble. Or perhaps the testator had died in a house fire that also consumed the watercolor and would have preferred that her sister receive a substitute artwork, the cash value of the painting, or its insurance proceeds. Despite the night-and-day differences in these situations, the outcome was the same—the sister took nothing.[90] The identity theory thus "made the language of wills virtually sacred" by "refusing to add testamentary

87. *See, e.g.*, Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1040 (2004) (noting that if "a will neglects to anticipate a significant contingency which then occurs, a default rule reflecting the benefactor's intent as modified by unfolding events spares her the expense of executing a codicil").

88. *See, e.g.*, *In re* Wright's Will, 165 N.E.2d 561, 562 (N.Y. 1960) ("[T]he bequest fails and the legatee takes nothing if the article specifically bequeathed has been given away, lost or destroyed during the testator's lifetime.").

89. Alexander, *supra* note 27, at 1068. Before the eighteenth century, some English courts followed the intent theory of ademption, which only invoked the rule if it would dovetail with the testator's wishes. *See, e.g.*, Joseph Warren, *The History of Ademption*, 25 IOWA L. REV. 290, 298–99 (1940). But in several influential opinions, Lord Thurlow adopted the identity theory, reasoning that "the idea of discussing what were the particular motives and intention of the testator in each case . . . would be productive of endless uncertainty and confusion . . . ." Humphreys v. Humphreys, (1789) 30 Eng. Rep. 85 (Ch.) 85; *see also* Stanley v. Potter, (1979) 30 Eng. Rep. 83 (Ch.) 85.

90. For instance, in *McGee v. McGee*, the testator devised "all of my monies, standing on deposit in my name, in any bank," to her grandchildren. 413 A.2d 72, 73 (R.I. 1980). The testator's son, to whom the testator had given a power of attorney, then withdrew $50,000 from her bank account and purchased Treasury Bonds. *Id.* at 73–74. The Rhode Island Supreme Court held that the bequest to the grandchildren adeemed. *Id.* at 77–78. The court was not moved by the facts that the testator did not personally close the accounts and likely did not want to disinherit her grandchildren. *Id.* at 75–78; *see also id.* at 76 ("The extinction of the property bequeathed works an ademption regardless of the testator's intent."). Instead, the court's reasoning made clear that the identity theory served the single master of "stability, uniformity, and predictability":

> [O]nly the fact of change or extinction, not the reason for the change or extinction, is truly relevant. The vast majority of jurisdictions adhere to this rule. This [identity] theory of ademption, although it may occasionally result in a failure to effectuate the actual intent of a testator, has many advantages. Significant among these advantages is simplicity of application, as opposed to ad hoc determination of intent from extrinsic evidence in each particular case.

Id. at 77 (citations omitted).

words or to construe them in a way that undermines their surface meaning."[91] After all, "[w]hen a testator said 'I devise my grandfather's gold pocket watch to Ted,' he did not say 'or some other watch, or its value.'"[92]

The antilapse doctrine was cut from the same stiff cloth. Under common law, a bequest fails if the beneficiary dies before the testator.[93] Some wills expressly address that contingency by specifying that the asset passes to another person—for instance, "I leave my car to A, but if A is deceased, I leave my car to B." But if the will is silent about survivorship, the lapsed gift falls into the residuary clause (a catch-all provision that distributes any remaining property and therefore serves as a safety net against intestacy).[94] In this scenario, lapse can have the draconian effect of disinheriting an entire branch of the testator's family tree.[95] For instance, suppose T leaves her house to her child, A, and the residue of her estate to her children B and C. A then dies before T, leaving children A1 and A2. Under common law, the bequest to A lapses. B and C share T's entire estate, and A1 and A2 take nothing. This imbalanced result—which excludes an entire line of descendants—probably deviates from what most testators would prefer.

To combat this problem, every state with the exception of Louisiana has passed an antilapse statute.[96] Although the intricacies of antilapse legislation vary

91. Alexander, *supra* note 27, at 1088.

92. *Id.* Admittedly, ademption cases were rarely so simple. For instance, some courts strained to reach fair results, such as interpreting a bequest as general (rather than specific) or deeming property to merely have "changed in form" and thus still be in existence. *See, e.g.*, John C. Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH L. REV. 195, 197–207 (1971). In addition, the 1969 UPC recognized an exception for incapacitated testators. *See* UNIF. PROBATE CODE § 2-608 (1969) (amended 2010). If an agent for a disabled testator sold a specifically bequeathed asset, an aggrieved beneficiary was entitled to a payment equal to its value. *See id.* § 2-608(a). Likewise, the 1969 UPC identified scenarios in which a beneficiary should be able to get the vestiges of the vanished asset. For instance, if the item had been destroyed, the model statute gave the beneficiary the insurance proceeds. *See id.* § 2-608(b)(3). Similarly, if the state had exercised its eminent domain power, the 1969 UPC allowed the disappointed beneficiary to receive the condemnation award. *See id.* § 2-608(b)(2). This attempt to nudge ademption back into alignment with testators' preferences became known as the modified intention theory. *In re* Estate of Anton, 731 N.W.2d 19, 27 (Iowa 2007).

93. *See, e.g.*, LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 80 (2d ed. 1966).

94. *See, e.g.*, David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 549 (2014).

95. *See* Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 338 (1985).

96. *See* ALA. CODE § 43-8-224 (LexisNexis 1991 & Supp. 2014); ALASKA STAT. § 13.12.603 (2012); ARIZ. REV. STAT. ANN. § 14-2603 (2012); ARK. CODE ANN. § 28-25-104 (2012); CAL. PROB. CODE § 21110 (West 2011); COLO. REV. STAT. § 15-11-603 (2013); CONN. GEN. STAT. § 45a-441 (2013); DEL. CODE ANN. tit. 12, § 2313 (2007); D.C. CODE § 18-308 (LexisNexis 2001); FLA. STAT. § 732.603 (2014); GA. CODE ANN. § 53-4-64 (2011); HAW. REV. STAT. § 560:2-603 (LexisNexis 2005); IDAHO CODE ANN. § 15-2-605 (2009); 755 ILL. COMP. STAT. ANN. 5/4-11 (2012); IND. CODE § 29-1-6-1(g) (2004 & Supp. 2013); IOWA

between jurisdictions, these laws work in the same basic way: They reallocate gifts from certain predeceasing beneficiaries—generally descendants of the testator's grandparent—to the dead beneficiary's heirs.[97] For example, if an antilapse statute applied to the hypothetical above, A1 and A2 would step into A's shoes and take T's house. The premise of this sleight-of-beneficiary is that T would prefer that A's kids (who are also T's grandkids) inherit the property rather than excluding them completely.[98]

Yet courts applied these corrective statutes in a way that merely gestured toward accommodating the testator's desires. Because antilapse is a default rule, judges often needed to determine whether a testator had drafted around it. When T left property "to A, but if A dies before me, to B," the outcome was clear: T had overridden antilapse by expressly providing that B (and not A's children) would take the property.[99] But what about when the will stated "to A, if A survives me"

CODE § 633.273 (2013); KAN. STAT. ANN. § 59-615 (West 2008); KY. REV. STAT. ANN. § 394.400 (LexisNexis 2010); MASS. GEN. LAWS ch. 190B, § 2-603 (2012); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (2012); MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2011); MICH. COMP. LAWS ANN. § 700.2603 (West 2002); MINN. STAT. § 524.2-603 (2012); MISS. CODE ANN. § 91-5-7 (2013); MO. REV. STAT. § 474.460 (2000); MONT. CODE ANN. § 72-2-613 (2013); NEB. REV. STAT. § 30-2343 (2008); NEV. REV. STAT. § 133.200 (2013); N.H. REV. STAT. ANN. § 551:12 (2007); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 2012); N.J. STAT. ANN. § 3B:3-35 (West 2007); N.C. GEN. STAT. § 31-42 (2013); N.D. CENT. CODE § 30.1-09-05 (2010); OHIO REV. CODE ANN. § 2107.52 (West 2005); OKLA. STAT. tit. 84, § 142 (2011); OR. REV. STAT. § 112.395 (2013); 20 PA. CONS. STAT. § 2514(9) (2010); R.I. GEN. LAWS § 33-6-19 (2011); S.C. CODE ANN. § 62-2-603 (2009 & Supp. 2013); S.D. CODIFIED LAWS § 29A-2-603 (2014); TENN. CODE ANN. § 32-3-104 (2007 & Supp. 2014); TEX. ESTATES CODE ANN. § 255.153 (West 2014); UTAH CODE ANN. § 75-2-605 (LexisNexis 1993); VT. STAT. ANN. tit. 14, § 335 (2010); VA. CODE ANN. § 64.2-418 (2012); WASH. REV. CODE § 11.12.110 (2012); W. VA. CODE ANN. § 41-3-3 (LexisNexis 2004 & Supp. 2009); WIS. STAT. ANN. § 854.06 (West 2011 & Supp. 2013); WYO. STAT. ANN. § 2-6-106 (2013).

97. The 1969 UPC and several jurisdictions limit antilapse coverage to predeceasing beneficiaries who are descended from the testator's grandparents. *See, e.g.*, UNIF. PROBATE CODE § 2-605 (1969) (amended 2010); ALA. CODE § 43-8-224 (LexisNexis 1991 & Supp. 2014); IDAHO CODE ANN. § 15-2-605 (2009); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (2012); MINN. STAT. § 524.2-603 (2012); N.D. CENT. CODE § 30.1-09-05 (2010); WYO. STAT. ANN. § 2-6-106 (2013). Other states and the 1990 UPC have broadened this category to also include the testator's stepchildren. *See, e.g.*, UNIF. PROBATE CODE § 2-603(b) (amended 2010), 8 U.L.A. 242 (2013); ARIZ. REV. STAT. ANN. § 14-2603 (2012); ALASKA STAT. § 13.12.603 (2012); HAW. REV. STAT. § 560:2-603 (2006); MONT. CODE ANN. § 72-2-613 (2013); N.M. STAT. ANN. § 45-2-603 (2014); OHIO REV. CODE ANN. § 2107.52 (West 2005); UTAH CODE ANN. § 75-2-603 (LexisNexis 1993). A handful of states apply antilapse to any predeceasing beneficiary. *See, e.g.*, IOWA CODE § 633.273 (2013); KY. REV. STAT. ANN. § 394.400 (LexisNexis 2010); MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2011); TENN. CODE ANN. § 32-3-104 (2007 & Supp. 2014).

98. *See, e.g.*, French, *supra* note 95, at 337–38.

99. Most antilapse statutes do not apply "if the instrument expresses a contrary intention or a substitute disposition." CAL. PROB. CODE § 21110(b) (West 2011); *cf.* ARK. CODE ANN. § 28-26-104 (2013) ("[u]nless a contrary intent is indicated by the terms of the will"); FLA. STAT. § 732.603 (2014) ("[u]nless a contrary intention appears in the will"); 755 ILL. COMP. STAT. §

or "to A, if A is then living"? Did T mean to restrict this bequest to A and exclude A's heirs? Although this question might seem to hinge on the fine-grained issue of the strength of the testator's bonds with the relevant parties, the majority of courts adopted a coarse, one-size-fits-all answer. Looking exclusively at the words of the will, they found that even rote recitals that a beneficiary must survive the testator displaced antilapse.[100] Evidence that a testator was close to a distant relative or alienated from her next-of-kin was irrelevant.[101]

In sum, classic doctrine rigidly enforced the Wills Act and the text of instruments. By doing so, it prioritized the need for predictable results and manageable cases over the implementation of any particular decedent's intent. But as I discuss next, massive societal and legal changes began to make this model seem archaic.

5/4-11 (2012) ("[u]nless the testator expressly provides otherwise in his will"); IOWA CODE § 633.273(2) (2013) ("unless from the terms of the will, the intent is clear and explicit to the contrary"); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a) (McKinney 2012) ("[u]nless the will . . . provides otherwise"); OHIO REV. CODE ANN. § 2107.52(B) (West 2005) ("[u]nless a contrary intention is manifested in the will"); VA. CODE ANN. § 64.2-418 (2012) ("[u]nless a contrary intention appears in the will"); WASH. REV. CODE § 11.12.110 (2012) ("[u]nless otherwise provided"); *cf.* TEX. EST. CODE ANN. § 255.151 (West 2014) ("[A] devise in the testator's will stating 'to my surviving children' or 'to such of my children as shall survive me' prevents the application of [antilapse].").

100. *See, e.g.*, *In re* Todd's Estate, 109 P.2d 913, 914 (Cal. 1941) (holding that a bequest to testator's wife and son, "or to the survivor of them" overrides antilapse); *In re* Estate of Kerr, 433 F.2d 479, 485 (D.C. Cir. 1970) (holding that a bequest to testator's brother and friend "if they both be living at the time of my demise . . . and if one shall have predeceased me then all of my estate to the one remaining" overrides antilapse) (internal quotation marks omitted); Matter of Estate of Stroble, 636 P.2d 236, 239 (Kan. Ct. App. 1981) (holding that a bequest to testator's mother "if she shall survive me by 30 days" overrides antilapse) (internal quotation marks omitted); Slattery v. Kelsch, 734 S.W.2d 813, 814–15 (Ky. Ct. App. 1987) (holding that a bequest "to my [f]irst [c]ousins living at the time of my death" overrides antilapse); Matter of Leuer's Estate, 378 N.Y.S.2d 612, 612 (N.Y. Sur. Ct. 1976) (bequest to "my sisters and brothers living at the time of my death" overrides antilapse); *In re* Estate of Rehwinkel, 862 P.2d 639, 640 (Wash. Ct. App. 1993) (holding that a bequest to named individuals "who are living at the time of my death" overrides antilapse). Admittedly, there is contrary authority. *See, e.g.*, Schneller v. Schneller, 190 N.E. 121, 122 (Ill. 1934) (finding a bequest of residue "to my three children . . . or to the survivors or survivor of them" insufficient to override antilapse); *In re* Estate of Kehler, 411 A.2d 748, 749 (Pa. 1980) (finding a bequest to brothers and sisters "and to the survivor or survivors of them" insufficient to override antilapse) (internal quotation marks omitted). In just one state, New Jersey, courts examine extrinsic evidence to determine how to allocate lapsed gifts. *See In re* Estate of Burke, 222 A.2d 273, 279 (N.J. 1966).

101. For instance, in *Matter of Stroble's Estate*, 636 P.2d 236 (Kan. Ct. App. 1981), the testator left all of her property to her mother "if she shall survive me by 30 days." *Id.* at 238. The testator also stated that she wished to disinherit her husband, from whom she was separated but not divorced. *See id.* The testator's mother predeceased the testator. *See id.* A Kansas appellate court held that the survivorship provision overrode antilapse even though that meant that the testator's estranged husband took her entire estate in intestacy. *See id.* at 242; *see also In re* Estate of Zagar, 491 N.W.2d 915, 917 (Minn. Ct. App. 1992) (holding that the trial court erred by admitting parol evidence to interpret survivorship provision's effect on antilapse).

B. The Rise of Functionalism

The wooden heritage of wills law did not escape notice. During the middle and latter part of the twentieth century, several scholars took aim at the formalist pedigree.

In a canonical 1941 article, Ashbel Gulliver and Catherine Tilson laid the groundwork for these challenges.[102] Gulliver and Tilson argued that Wills Act requirements accomplish several goals. First, the formalities provide concrete proof of the testator's wishes (the "evidentiary function").[103] For instance, because the testator will not be available to testify, the writing requirement ensures that her "intent [will] be cast in reliable and permanent form," and the signature element distinguishes a finished will from drafts.[104] Second, the formalities reinforce the solemnity of the testation (the "ritual function").[105] To make a gift, one must experience the "wrench of delivery," and to create a contract, one must experience the metaphysical jolt of promising to surrender something of value.[106] Conversely, a will is freely revocable until death, raising the specter that testators will make improvident choices. For that reason, the Wills Act mandates of a signed and witnessed instrument add a sense of gravity that deters rash dispositions.[107] Third, attestation by two individuals shields the testator from fraud, duress, or undue influence (the "protective function").[108] And fourth, as other scholars would subsequently note, the formalities shoehorn a decedent's wishes into a template that is familiar to judges, lawyers, and other parties (the "channeling function").[109] Insisting on writing, signing, and witnessing means that "[c]ourts are seldom left to puzzle whether the document was meant to be a will."[110]

Starting with Gulliver and Tilson, a parade of critics used this framework to challenge the norm of requiring strict compliance with the Wills Act.[111] These commentators conceded that the evidence furnished by the writing and signature

102. Gulliver & Tilson, *supra* note 13.
103. *See id.* at 6.
104. *Id.*
105. *See id.* at 5.
106. *Id.* at 16.
107. *See id.* at 5.
108. *See id.* at 9.
109. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801–802 (1941) (discussing the channeling function of the contract formality of importing consideration based on a seal); Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 368 (1966) (noting that the Wills Act formalities "standardize and guide the process of transmitting billions of dollars of assets from generation to generation").
110. Langbein, *supra* note 6, at 494.
111. *See id.* at 5–13; *see also* Lindgren, *supra* note 13, at 555 (criticizing the protective function by noting that "it is fairly easy to find two agreeable witnesses"); Langbein, *supra* note 13, at 52.

prongs were indispensable: After all, by the time litigation appears on the docket, the testator will be deceased and the court must glean her desires through the haze of interested parties and documents that may be decades old.[112] They questioned whether attestation was still necessary, however. For instance, Gulliver and Tilson saw no need for witnesses in the era of professional estate planning:

> [I]n the period prior to the Statute of Frauds, wills were usually executed on the death bed. A testator in this unfortunate situation may well need special protection against imposition. His powers of normal judgment and of resistance to improper influences may be seriously affected by a decrepit physical condition, a weakened mentality, or a morbid or unbalanced state of mind . . . . Under modern conditions, however, wills are probably executed by most testators in the prime of life and in the presence of attorneys.[113]

Likewise, claiming that "deathbed wills are rare," James Lindgren argued that attestation's protective purpose had become outmoded.[114]

Meanwhile, a sea change in the mechanics of inheritance also undercut the relevance of the attestation requirement. In 1965, a mutual fund salesman named Norman Dacey self-published a book entitled *How to Avoid Probate*.[115] Dacey argued that the lawyer-driven probate process was "a form of private taxation levied by the legal profession upon the rest of the population."[116] He urged individuals to do everything in their power to bypass judicial supervision of their estates. This assault on a byzantine legal institution resonated with the antiauthoritarian zeitgeist of the era, and Dacey's tome became a bestseller.[117] In a movement known as the nonprobate revolution, owners began to rely heavily on pensions, life insurance, and revocable inter vivos trusts.[118] These contract-like instruments transmitted wealth privately, and thus were immune from court oversight. But as commentators soon observed, nonprobate devices created a paradox. In practical effect, they were indistinguishable from wills: They existed for the sole purpose of

112. *See, e.g.*, Gulliver & Tilson, *supra* note 13, at 8; Langbein, *supra* note 6, at 492.
113. Gulliver & Tilson, *supra* note 13, at 10.
114. Lindgren, *supra* note 13, at 554–55; *see also* Langbein, *supra* note 6, at 496 ("The protective policy is probably best explained as an historical anachronism.").
115. *See* Richard D. Lyons, *Norman Dacey, 85; Advised His Readers to Avoid Probate*, N.Y. TIMES (Mar. 19, 1994), http://www.nytimes.com/1994/03/19/nyregion/norman-dacey-85-advised-his-readers-to-avoid-probate.html; NORMAN F. DACEY, HOW TO AVOID PROBATE! 1 (5th ed. 1993).
116. DACEY, *supra* note 115, at 23.
117. *See* Edwin McDowell, *Book Notes*, N.Y. TIMES (Mar. 7, 1990), http://www.nytimes.com/1990/03/07/arts/book-notes-459190.html (calling HOW TO AVOID PROBATE! "one of the most successful books ever").
118. *See, e.g.*, Langbein, *supra* note 15, at 1109–15.

conveying property after death.[119] Doctrinally, however, they did not need to comply with the Wills Act.[120] Indeed, trusts of personal property can even be made orally, a fashion that satisfies *none* of the purposes of the statutory formalities.[121] As these "will substitutes" proliferated, commentators cited them as proof that lawmakers could safely abolish the attestation prong.[122]

In two well-known pieces published in 1975 and 1987, John Langbein offered a different way forward.[123] Langbein observed that other legal niches condition the validity of an instrument on the satisfaction of formalities. For example, certain contracts are not binding unless the parties jump through hoops, such as memorializing their agreement in a signed writing or promising to incur a legal detriment.[124] Yet Langbein noted that what made these rules tolerable was that they were riddled with exceptions, such as part performance and promissory estoppel.[125] In sharp contrast, wills doctrine contained no safe harbor for blundering would-be testators.[126] Langbein then looked abroad, to South Australia, which had adopted a statute permitting courts to admit a document to probate if there was strong proof that the decedent wanted it to be her will.[127] Langbein argued that this experiment had allowed courts to overlook execution gaffes without dramatically increasing litigation rates, and urged U.S. jurisdictions to pass similar laws.[128]

119. *See id.* at 1109.
120. *See id.* ("In truth, will substitutes are simply 'nonprobate wills'—'wills' that need not comply with the Wills Act.").
121. *See, e.g.*, Wehking v. Wehking, 516 P.2d 1018, 1020 (Kan. 1973) ("[T]he validity of a trust in personalty established by parol has long been recognized in this state."); *see also* Fahrney v. Wilson, 4 Cal. Rptr. 670, 673 (Cal. Dist. App. 1960).
122. *See, e.g.*, Lindgren, *supra* note 13, at 557.
123. Langbein, *supra* note 6; Langbein, *supra* note 13.
124. *See* Langbein, *supra* note 6, at 498–99.
125. *See id.*
126. *See id.*
127. *See* Langbein, *supra* note 13, at 9. The South Australian statute required proof "beyond a reasonable doubt" that a document was meant to be a will. *Id.* (quoting Wills Act Amendment Act (No. 2) of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 S. Austl. Stat. 665).
128. *See* Langbein, *supra* note 13, at 9–41, 51. Langbein's 1975 article had proposed that courts ask whether a will substantially complied with the purposes of the formalities. *See* Langbein, *supra* note 6, at 515–16. One advantage of this substantial compliance doctrine is that it can be adopted without legislative change; indeed, it was, at bottom, a call for judges to interpret the Wills Act purposively, rather than textually. *See id.* at 530. Yet as Langbein's 1987 piece observed, a different Australian state, Queensland, had adopted a substantial compliance principle by statute and it had been "a flop." Langbein, *supra* note 13, at 1–2. Indeed, courts had interpreted "substantial" as "near perfect," and thus made the principle "nearly useless." *Id.* at 1, 41. Perhaps because of Langbein's change of heart, only one reported American case has openly embraced the substantial compliance rule. *See* Matter of Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991).

Scholars pushed in the same direction on a range of related issues. The common thread in this literature was the assertion that courts should be free to read wills in light of all available evidence, not just the instrument's text. For example, Langbein and Lawrence Waggoner attacked the no-reformation rule.[129] They argued that barring courts from using extrinsic proof to correct mistakes in wills achieved the double-barreled perversity of frustrating the testator's wishes and allowing an unintended beneficiary to reap a windfall.[130] Similarly, other commentators called for lawmakers to jettison the identity theory of ademption and engage in case-by-case scrutiny of the estate's financial status and the testator's relationships when deciding whether to compensate the empty-handed beneficiary for the value of the missing asset.[131] Finally, in separate articles, Susan French and Patricia Roberts urged legislators to add shades of gray to antilapse statutes.[132] In particular, they contended that judges should focus on "the facts and circumstances surrounding [the] testator at the time the will [i]s executed" to decide whether a testator intended a survivorship condition to trump antilapse.[133]

In the late 1980s, the Uniform Law Commission named Waggoner the reporter for the UPC revisions, and the American Law Institute tapped Langbein and Waggoner to helm the new Restatement.[134] Thus, the leaders of the nascent functional school held the future of wills law in their hands.[135]

C. The UPC, the Restatement, and Their Critics

The UPC revisions appeared in 1990 and the Restatement was circulated in tentative form in 1998.[136] Unlike traditional law, which favored rules, these ambitious projects consist of holistic standards. Yet as I explain in this Subpart, their legacy remains unclear.

A primary goal of the 1990 UPC was to loosen the rules of will execution. To be sure, the original UPC, released in 1969, took bold steps in that direction.[137]

129. *See* Langbein & Waggoner, *supra* note 17.
130. *See id.* at 524.
131. Comment, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 750–51 (1961); *see also* Paulus, *supra* note 92, at 228 (outlining a range of factors for courts to consider); Comment, *Ademption in Iowa—A Closer Look at the Testator's Intent*, 57 IOWA L. REV. 1211, 1218 (1972).
132. Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 353 (1988); French, *supra* note 95, at 369–70.
133. *See* French, *supra* note 95, at 370.
134. *See* Langbein, *supra* note 13, at 2–4.
135. Miller, *Will Formality Part Two*, *supra* note 29, at 604.
136. UNIF. PROBATE CODE (amended 1990), 8 U.L.A. 1 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (1999).
137. *See supra* text accompanying note 19.

The 1990 update piggybacks on some of these measures. For instance, under both editions of the model statute, witnesses no longer need to be "present at the same time"; rather, the testator may acknowledge her will to each witness individually "within a reasonable time" after signing it.[138] Similarly, both the 1969 and 1990 UPCs endorse holographic wills and relax the requirement that the documents be entirely in the testator's handwriting.[139] The revised UPC, however, is not content with merely diluting the formalities. Instead, both it and the Restatement threaten to wash away the Wills Act by validating a writing if its proponent "establishes by clear and convincing evidence that the decedent intended [it] to constitute . . . the decedent's will."[140] The Reformers explained that this principle was designed to eliminate the inconsequential attestation defect: the decedent who "neglects to obtain one or both witnesses,"[141] or the witness who "steps out of the room to powder her nose before the other has completed signing."[142] They then defended the harmless error rule against the charge that it would increase litigation, arguing that it narrows the panorama of contestable issues from a blow-by-blow account of

138. UNIF. PROBATE CODE § 2-502(a)(3)(A) (1969); *accord* UNIF. PROBATE CODE § 2-502(a)(3)(A) (1990).

139. The original UPC, which required the signature and the will's "material provisions" to be handwritten, remains in force in many states. UNIF. PROBATE CODE § 2-502(b) (1969); ARIZ. REV. STAT. ANN. § 14-2503 (2012); CAL. PROB. CODE § 6111(a) (West 2009); IDAHO CODE ANN. § 15-2-503 (2009); ME. REV. STAT. tit. 18-A § 2-503 (2012); NEB. REV. STAT. § 30-2328 (2008); NEV. REV. STAT. § 133.090 (2013); TENN. CODE ANN. § 32-1-105 (2010). Other jurisdictions follow the 1990 UPC, which mandates that the signature and "material portions" be handwritten. UNIF. PROBATE CODE § 2-502(b) (amended 2010), 8 U.L.A. 209 (2013 & Supp. 2014); ALASKA STAT. § 13.12.502(b) (2012); COLO. REV. STAT. § 15-11-502(c)(II)(2) (2013); HAW. REV. STAT. § 560:2-502(b) (2006); MICH. COMP. LAWS ANN. § 700.2502(2) (West 2002); MISS. CODE ANN. § 91-5-1 (2013); MONT. CODE ANN. § 72-2-522(2) (2007); N.J. STAT. ANN. § 3B:3-9 (West 2012); N.D. CENT. CODE § 30.1-08-02(2) (1996); S.D. CODIFIED LAWS § 29A-2-502(a) (2004); UTAH CODE ANN. § 75-2-503(2) (West 2013); *cf.* 20 PA. CONS. STAT.§ 2502 (2010) (simply requiring a will to be a signed writing). Still other states insist that the "entire body of the will" be in the testator's hand. *See* ARK. CODE ANN. § 28-25-104 (2012); KY. REV. STAT. ANN. § 394.040 (LexisNexis 2010); LA. CIV. CODE ANN. art. 1575 (2012); N.C. GEN. STAT. § 31-3.4 (2007); OKLA. STAT. tit. 84, § 54 (2011); TEX. PROB. CODE ANN. § 60 (Vernon 2003); VA. CODE ANN. § 64.1-49(B) (2007); W. VA. CODE ANN. § 41-1-3 (LexisNexis 2004 & Supp. 2009); WYO. STAT. ANN. § 2-6-113 (2013).

140. UNIF. PROBATE CODE § 2-503(1) (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014); *see also* RESTATEMENT (THIRD) OF PROP (WILLS & OTHER DONATIVE TRANSFERS) § 3.3 (1999). The UPC also allows clear and convincing evidence to prove that a decedent intended a writing to amend, revoke, or revive her will. *See* UNIF. PROBATE CODE §§ 2-503(2)–(4) (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014).

141. UNIF. PROBATE CODE § 2-503 cmt. (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014).

142. John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 9 (2012).

the execution ceremony to the "functional question of whether the instrument correctly expresses the testator's intent."[143]

The Reformers' approach to will construction also converts crystals into mud. For starters, the drafters reject the identity theory of ademption by extinction in favor of the intent variation of the doctrine.[144] Recall that under the identity theory, if a testator bequeathed a particular item, but did not own it at death, the beneficiary took nothing.[145] This test was sharp and clean. Indeed, it "focuses on two questions only: (1) whether the gift is a specific legacy and, if it is, (2) whether it is found in the estate at the time of the testator's death."[146] Conversely, the Reformers' version of the doctrine is pure sludge. UPC section 2-606(a)(6) of the 1990 UPC allows an aggrieved beneficiary to recover the value of the missing asset if the "facts and circumstances" suggest that such a result would be consistent with the testator's intent.[147] This so-called rule is hardly a rule at all; instead, it pins each case to its own context.

Similarly, the UPC and Restatement's antilapse regime breaks from convention. As noted, most courts had refused to apply antilapse when the will expressly conditioned a bequest on the beneficiary surviving the testator.[148] For instance, if T left her diamond ring to her child A, "if she survives me" and A died before T, A's children would not receive the ring.[149] By contrast, UPC section 2-603(b)(3) provides that "words of survivorship, such as . . . 'if he survives me,' . . . are *not*, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of [antilapse]."[150] The comments to the Restatement likewise explain that antilapse statutes should yield only when the factfinder determines that the testator consciously wished to disinherit the predeceased beneficiary's heirs.[151] As Waggoner argued in a coauthored article, the will's text should not be sacrosanct:

> Words in a will requiring survivorship might very well be no more than a casual duplication of the survivorship requirement imposed by the rule of lapse, with no independent purpose. Thus, they are not necessarily included in the will with the intention of contradicting the

143. UNIF. PROBATE CODE § 2-503 cmt. (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014).
144. UNIF. PROBATE CODE § 2-606 (amended 2010), 8 U.L.A. 262 (2013).
145. *See supra* text accompanying notes 89–92.
146. *In re* Estate of Hume, 984 S.W.2d 602, 605 (Tenn. 1999) (quotation omitted).
147. UNIF. PROBATE CODE § 2-606 (amended 2010), 8 U.L.A. 262 (2013); *accord* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2(c) (1999).
148. *See supra* text accompanying notes 100–101.
149. *See supra* text accompanying notes 100–101.
150. UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010), 8 U.L.A. 243 (2013) (emphasis added).
151. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. (1999).

> objectives of the antilapse statute . . . . It is equally plausible that the words of survivorship are in the testator's will merely because, with no such intention, the testator's lawyer used a will form containing words of survivorship.[152]

Thus, under the UPC and Restatement, what had been a neutral background principle became an elephant-heavy default rule.

These profound changes did not go over smoothly in a field that was already known for its ability to "resist[] modernity . . . successfully."[153] For some scholars, even the whiff of formalism in the UPC's attestation requirement was too much.[154] Others saw the new rules as a lost opportunity to harmonize will creation with the fundamentals of executing nonprobate devices.[155] And on the opposite side of the spectrum, critics fretted about the harmless error rule's impact on conflict-averse testators and the besieged judicial system.[156] For example, Emily Sherwin took a close look at the mandate that the proponent of a flawed document establish testamentary intent by clear and convincing evidence.[157] Drawing on economic models that link the volume of lawsuits to uncertainty in the law, Sherwin argued that the higher standard of proof could actually increase the number of contested estates.[158] She thus concluded that the UPC and Restatement's signature policy initiative might lead to a spike in litigation.[159]

The more arcane aspects of the UPC and Restatement also drew fire. In a searing critique, Mark Ascher argued that the Reformers' approach to will construction was nothing short of "pretentious."[160] According to Ascher, settled law had the grace of simplicity.[161] Testators, estate planners, and beneficiaries knew exactly what they were getting.[162] If a specific bequest evaporated, the beneficiary took nothing. If a property owner wanted an asset to go to Bob but not Bob's heirs, she left it "to Bob, if he survives me."[163] Ascher argued that the revisers had become so hypnotized by the goal of carrying out the decedent's wishes that they

152. Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1109–10, 1112 (1992).
153. Mann, *supra* note 13, at 39.
154. *See, e.g.*, Lindgren, *supra* note 13, at 569 (arguing that the objectives of the harmless error rule would be better served by "eliminating the attestation requirement altogether").
155. *See, e.g.*, Miller, *Will Formality Part Two*, *supra* note 29, at 717–18.
156. *See, e.g.*, Sherwin, *supra* note 29, at 470–73.
157. *See id.* at 463–76.
158. *See id.* at 471–73.
159. *See id.* at 474–76.
160. Ascher, *supra* note 29, at 640.
161. *See id.* at 641–43.
162. *See id.* at 658.
163. *See id.*

had designed the law to detect "intention[s] the decedent has never expressed and probably never even had."[164] Even worse, some reforms, such as the UPC's anti-lapse scheme, fought the will's plain language:

> Apparently, the revisers believe their own anti-lapse provisions are likely to reflect any particular testator's intent more faithfully than the testator's own will . . . . Instead of allowing 'if he survives me' to mean what almost everyone would expect it to mean, the revisers have translated it into, 'if he survives me, and, if he does not survive me, to his issue who survive me.' For those unfamiliar with estate planning esoterica, therefore, it has become yet more difficult to figure out what the words in a will actually mean. The uninitiated apparently have three options: hire a competent estate planner, go to law school, or curl up with *Alice in Wonderland*.[165]

This tension at the heart of wills law has yet to be resolved. On the one hand, lawmakers have been gun-shy about the Reformers' agenda. Today, a quarter century after the UPC revisions emerged, only Alaska, Colorado, Hawaii, Minnesota, Montana, New Mexico, North Dakota, and South Dakota have adopted most of the model statute.[166] In fact, many of these same states have balked at some of the Reformers' most divisive provisions.[167] Just nine jurisdictions have passed harmless error legislation.[168] The drafters' first pass at ademption by extinction became such a lightning rod that they were forced to amend their amendment,[169] and their revolutionary antilapse provision has been aggressively ignored.[170] On the other hand, functionalism has enjoyed a minor resurgence recently. State supreme

164. *Id.* at 641.

165. *Id.* at 654–55; *see also* Begleiter, *supra* note 29, at 127–28 (asserting that the UPC's radical changes to antilapse would expose attorneys to malpractice liability); Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269, 308 (1994) (arguing that the drafters should have followed the majority approach by crediting survivorship conditions).

166. *See* sources cited *supra* note 32.

167. Alaska, Minnesota, New Mexico, and North Dakota have no harmless error statute. *See infra* note 168, for states that have a harmless error rule. Likewise, Minnesota, South Carolina, and Utah have preserved the majority rule regarding survivorship conditions and antilapse. *See infra* note 346. Finally, only three states have adopted the 1990 UPC's approach to ademption by extinction. *See infra* note 325.

168. *See* CAL. PROB. CODE § 6110(c)(2) (West 2010); COLO. REV. STAT. § 15-11-503 (2013); HAW. REV. STAT. § 560:2-503 (2006); MICH. COMP. LAWS ANN. § 700.2503 (West 2002); MONT. CODE ANN. § 72-2-523 (2007); N.J. REV. STAT. § 3B:3-3 (West 2012); S.D. CODIFIED LAWS § 29A-2-503 (2004); UTAH CODE ANN. § 75-2-503 (West 2013); VA. CODE ANN. § 64.2-404 (2013).

169. *See infra* text accompanying notes 325–327.

170. *See infra* text accompanying notes 346.

courts have cited the UPC and Restatement with approval,[171] and two populous jurisdictions, California and Virginia, have passed harmless error statutes within the last five years.[172] Thus, the field's fundamental principles are still up for grabs.

Part II of this Article adds a new dimension to this debate. Several scholars have noted that the issues that separate the traditionalists and the Reformers "demand empirical inquiry."[173] Yet neither side has been able to persuasively support its claims with hard evidence about testators' drafting choices and the day-to-day enterprise of probate practice.[174] To begin to remedy this deficit, this Article reports the results of a study of every estate administration stemming from deaths during 2007 in a major California county.

II. WILLS LAW ON THE GROUND

This Part reports the results of my study and discusses their normative implications. It begins by explaining how I conducted my research. It then uses my data to analyze the attestation requirement, holographic wills, the harmless error rule, ademption by extinction, and antilapse.

A. Methodology[175]

California, the home of this study, is a decent bellwether for prevailing norms because it has enacted the UPC and Restatement piecemeal. The state's Wills Act is a blend of traditional and modern. It has rejected the UPC's watered-down attestation rule and continues to demand that the witnesses be present at the same time when the testator signs the will or acknowledges her signature.[176] But it is also one of the twenty-seven jurisdictions that recognize holographs[177] and is a recent convert to the harmless error doctrine.[178] Finally, like most states, California has not embraced the full-bore intent theory of ademption[179] and continues to read survivorship conditions literally for the purposes of antilapse.[180]

171. *See* sources cited *supra* note 31.
172. *See* CAL. PROB. CODE § 6110(c)(2) (West 2010); VA. CODE ANN. § 64.2-404 (2013).
173. Hirsch, *supra* note 34, at 626; *see also supra* text accompanying notes 33–34.
174. *See, e.g.*, Kelly, *supra* note 33, at 857 (commenting that there is "a clear need for further . . . empirical scholarship").
175. For a slightly more detailed account of my research method, see Horton, *supra* note 37, at 21–25.
176. *See* CAL. PROB. CODE § 6110(c)(1) (West 2010).
177. *See id.* § 6111(a); *see also supra* text accompanying note 139.
178. *See* CAL. PROB. CODE § 6110(c)(2) (West 2010); *see also supra* text accompanying note 172.
179. *See* CAL. PROB. CODE §§ 21131–33 (West 2010).
180. *See, e.g.*, *In re* Todd's Estate, 109 P.2d 913, 914 (Cal. 1941).

The specific site of my research is Alameda County, an urban area near San Francisco with a population of 1.5 million.[181] It includes the college town of Berkeley, professional enclaves like Piedmont, blue collar suburbs such as Fremont and Hayward, and vast low-income stretches in Oakland. This economic diversity is apparent in the fact that the county's median income is over $70,000 and yet 12 percent of residents live in poverty.[182]

The county publishes court records on a website called DomainWeb.[183] Its two probate judges sit in Department 23 of the Rene C. Davidson Oakland Courthouse and Department 602 of the Fremont Hall of Justice. Starting five years ago, a team of research assistants and I examined every matter to be heard in these chambers between January 1, 2008 and March 1, 2009. When we found the administration of a will or an intestate estate, we read the file closely and recorded about fifty variables on a spreadsheet. The result was a massive dataset of about 2000 cases, including some long-running matters that had been filed in the 1970s.

I then pared this information down. First, to create a common denominator among decedents, I focused exclusively on individuals who died in 2007, giving me a sample of 668 matters. Second, I eliminated the thirty cases that appeared to be abandoned. These shipwrecks of estates were no longer progressing through the system and generally yielded little information. Third, to avoid skewing my results, I cut sixty-seven pour over wills. A pour over will leaves property to a decedent's trust.[184] The purpose of such a device is to ensure that any property that an individual acquires but neglects to title in the name of the trust will nevertheless pass under the terms of the trust.[185] Pour over wills are thus poorly suited for my purposes: I was interested in decedents who use wills as their primary estate planning device, rather than as mere adjuncts to trusts.

These adjustments left me with a universe of 571 matters. Collectively, the Alameda County decedents owned a gross value of $355,009,627 in property.[186] Three-hundred twenty-four (57 percent) had executed wills and 247 (43 percent) had died intestate. Testate decedents owned $221,837,731, with an average

181. *See State and County Quick Facts, Alameda County, California*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06/06001.html (last visited Feb. 23, 2015).

182. *See id.*

183. *DomainWeb*, SUPER. CT. OF CAL., CNTY. OF ALAMEDA, http://www.alameda.courts.ca.gov/pages.aspx/domainweb (last visited Feb. 23, 2015).

184. *See, e.g.*, MICHAEL GAU, A PRACTICAL GUIDE TO ESTATE PLANNING AND ADMINISTRATION 61 (2004).

185. *See id.*

186. The probate system uses gross value, rather than net value, and thus does not take debt into account when determining an estate's worth. This means that the individuals in my spreadsheet were less affluent than they seem. For instance, although the probate files indicate that the Alameda County decedents owned $230,816,013 in real property, it is unclear how much of that sum was equity.

estate size of just under $700,000 each. Intestate decedents were worth $132,773,807, with a mean estate size of roughly $550,000.

Before I proceed, I want to acknowledge two related phenomena that caution against drawing sweeping conclusions from my data. First, statistics from a single county are a pinprick of light in the vast darkness of probate. Other parts of the state and the country may be experiencing different trends. Second, California's status as a community property jurisdiction affects the demographics of its probate decedents. Specifically, the number of married individuals in my spreadsheet is unnaturally low—just 12 percent.[187] The reason for this predominance of single people is that lawmakers have created a shortcut, called a spousal property petition, which permits husbands and wives to transmit their assets to the survivor without marching through probate.[188] In turn, because the first spouse to die often leaves no footprint in the probate files, I cannot help but oversample decedents who have outlived their partner. I will discuss the impact of skewed demographics in the sample set in further depth below.

B. Overarching Issues

Reformers and traditionalists see wills law through different frames. Functionalists argue that policymakers should validate failed attempts to create wills in order to help decedents avoid the evils of intestacy. Formalists counter that such an approach will expose courts to an ocean of litigation. But how does intestacy compare to testacy? How many estates are contested, and how do these matters stack up against routine administrations? This Part uses my data to provide a preliminary answer to these questions.

A centerpiece of the functionalist agenda is the idea that testacy is vastly preferable to dying without a will. For instance, South Australia's pioneering harmless error rule emerged from legislation that sought to reduce the number of individuals who died intestate.[189] Similarly, in a well-regarded article, Reid Kress Weisbord proposed that states create a "testamentary schedule": an easy-to-use, fill-in-the-blank will that need not be attested, and is attached to the annual income tax return.[190] Weisbord argued that this crude estate planning device would

187. Of the 569 decedents whose conjugal status was apparent, 260 were divorced or had never married, and 239 had outlived their spouse.

188. *See* CAL. PROB. CODE § 13500 (West 1991 & Supp. 2014).

189. *See* LAW REFORM COMM. OF S. AUSTL., RELATING TO THE REFORM OF THE LAW OF INTESTACY AND WILLS 10–11 (1974).

190. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 880 (2012).

stem the tide of "[w]idespread, unintended intestacy."[191] According to Weisbord, intestacy has administrative downsides, starting with the fact that a court—not the decedent—must name a personal administrator, which can cause delays and lead to contentious battles.[192] Weisbord also noted that intestacy's one-size-fits-all distributional scheme favors spouses and children, and is not suitable for the burgeoning number of nontraditional families.[193] I will take these procedural and substantive objections to intestacy in turn.

First, I found moderate support for the proposition that testate administrations fare better in probate than intestacies. Table 1 contrasts the two kinds of cases. It reveals parity on some issues, such as cost. Both testate and intestate estates paid almost exactly 3 percent of their gross value in attorneys' and personal representatives' fees.[194] Yet in other ways, matters involving wills did experience smoother sailing than intestacies. On average, they took about three fewer months to wind through the system. In addition, they were less likely to devolve into litigation or be abandoned. Thus, although the differences between the two spheres are not stark, they do exist.

TABLE 1. Intestacy Versus Testacy

Estate Value	Number	Total Fees as a % of Estate Value	Mean Length of Probate in Days	% of Litigated Estates	% of Abandoned Estates
Intestate					
Under $250,000	53	5.4%	516	10%	12%
$250,000 to $499,000	82	3.7%	510	13%	16%
$500,000 to $749,000	61	2.7%	563	23%	8%
Above $749,000	53	2.4%	655	17%	2%
Total	248	2.9%	556	16%	10%

191. *Id.* at 878.
192. *See id.* at 896.
193. *See id.* at 892–95; Clowney, *supra* note 73, at 53 (arguing that lawmakers should abolish attestation because "intestacy statutes often fail to carry out the exact wishes of the departed").
194. Fees are not the only probate expense. Personal representatives also need to post a surety bond, unless either the testator or all the beneficiaries agree to waive it. *See* CAL. PROB. CODE § 8480 (West 1991 & Supp. 2015). Unfortunately, I was unable to gather reliable data on how much each estate spent in bonding costs. Yet I did discover that slightly more testate estates (76%) than intestate estates (67%) dispensed with bond.

Estate Value	Number	Total Fees as a % of Estate Value	Mean Length of Probate in Days	% of Litigated Estates	% of Abandoned Estates
Testate					
Under $250,000	52	4.8%	524	10%	8%
$250,000 to $499,000	103	3.4%	434	11%	5%
$500,000 to $749,000	86	3.3%	542	13%	2%
Above $749,000	81	2.6%	477	13%	2%
Total	323	3.0%	488	11%	4%
Grand Total	571	3.0%	517	13%	7%

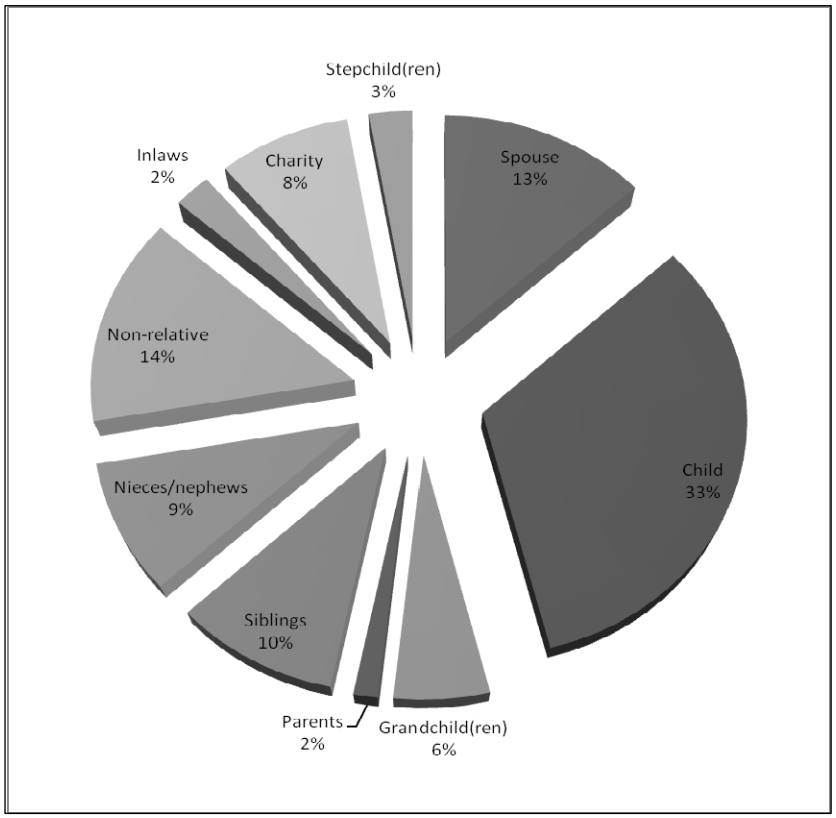
In addition, there are reasons to believe that the intestacy statute does not track most decedents' dispositive wishes. One way to attack this issue is to compare the way intestacy distributes property with the choices that testators make in their wills. California, like every state, allocates the bulk of an intestate decedent's property to their surviving spouse.[195] Unmarried decedents give their estate to their children or grandchildren, or, if they have no descendants, to their parents, siblings, or nieces or nephews.[196] The testators in my sample did not follow this hierarchy. Table 3 breaks down the percentage of noncontingent bequests by category of recipient.[197] Children led the way by being named 180 times (33 percent). Surprisingly, non-relatives (seventy-eight bequests, or 14 percent) outpaced spouses (seventy-two, or 13 percent), followed closely by siblings (fifty-four, or 10 percent), nieces and nephews (fifty, or 9 percent), and charities (forty-six, or 8 percent). Ultimately, 185 of the 324 wills (58 percent) sharply deviated from intestacy. Thus, a majority of testators opt out of the backstop rules of property distribution.

195. *See* CAL. PROB. CODE § 6401 (West 2010). The spouse takes all the community property and all the separate property if the decedent left no relatives. *See id.* The spouse's share of the separate property declines to one-half if the decedent left one child, grandchild, parent, or descendant of parent. *See id.* If the decedent left two such individuals, the spouse takes one-third of the separate property. *See id.*

196. *See id.* § 6402.

197. Unfortunately, I was unable to pinpoint how much wealth flowed to each class of beneficiary; instead, I was merely able to calculate how often a particular type of person appeared in the will. This may create the false impression that testators give more generously to nonrelatives than they actually do. For instance, it is possible that most testators make small bequests to friends and charities, while reserving the bulk of their estate for their spouses and children.

TABLE 2. Identity of Noncontingent Beneficiaries



Yet several factors undercut this finding. For one, there is no way to gauge the desires of intestate decedents, who leave no record of their intent. Thus, I cannot rule out the possibility that many individuals decided not to make a will precisely because they were satisfied with the off-the-rack intestate rules. Moreover, the popularity of nonprobate transfers likely inflates the incidence of nontraditional dispositive choices in my data. If married decedents with children are more likely to engage in estate planning—which often means executing a trust—they would not show up in the probate files. In turn, this might artificially depress the ratio of "all to spouse" or "to my children equally" estate plans. Finally, as noted above, married decedents often convey their property outside of probate through spousal property petitions.[198] As a result, my study would not capture testators who have parroted the intestacy system by transmitting their possessions largely to their

198. *See supra* notes 187–188 and accompanying text.

spouse. These factors make it hard to draw a firm conclusion about whether intestacy corresponds with most decedents' dispositive wishes.

Conversely, at first blush, the formalist preoccupation with the dangers of litigation seems well founded. Previous studies of probate court found lawsuits in about 1 to 3 percent of all estate administrations.[199] That statistic may not seem alarming, but because "there are millions of probates per year, one-in-a-hundred litigation patterns are very serious."[200] Gauged by that yardstick, my results were extraordinary: I discovered lawsuits in seventy estates (12 percent).[201] One reason for this apparent sharp increase has nothing to do with legal or societal trends. Instead, it is that prior researchers defined "litigation" as a single cause of action: disputes over the validity of a testamentary instrument.[202] I unearthed sixteen such will contests (5 percent). Yet as Table 3 elucidates, these cases were just a corner of the larger canvass. There were also twenty-two objections to the appointment or service of the personal representative, eighteen breach of fiduciary duty claims, nine contested heirship petitions, six efforts to recover property held by a third party, and three interpretation issues. Thus, conflict in probate appears to be far more frequent than we think.[203]

199. *See, e.g.*, SUSSMAN ET AL., *supra* note 35, at 184 (finding will contests in 1.3% of all cases); Ward & Beuscher, *supra* note 36, at 415–16 (putting the rate at 3.6%).

200. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994).

201. Defining "litigation" in probate is not easy. Routine administrations require the personal representative to file pleadings asking the court to open the estate, admit the will, and distribute the property. More complex matters sometimes feature ambitious requests for judicial intervention, like petitions to determine a decedent's heirs or reclaim assets held by a third party. In these cases, even if there is no formal opposition, the probate judge will often push back or even deny relief. I found about a dozen of these quasi-adversarial proceedings. Yet in the interests of clarity, I decided to limit my conception of "litigation" to full-fledged disputes between opposing parties.

202. *See* SUSSMAN ET AL., *supra* note 35, at 184; Ward & Beuscher, *supra* note 36, at 415–16.

203. Of course, even if the proportion of lawsuits to probate decedents has skyrocketed, the raw number of contested estates may be a different story. As noted above, the nonprobate revolution has created a two-tiered inheritance process. The routine administrations—the garden-variety trusts and the decedents who leave everything to their spouse—hum along privately, leaving the trickier matters for the courts. Accordingly, probate's high dispute rate may reflect its role as a repository of tough cases rather than the fact that conflict is endemic in succession.

TABLE 3. Litigation[204]

Claim	Number	Mean Days to Close Estate	Mean # of Attorney Appearances	Total Fees as % of Estate Value	Settled	Resolved on Pleadings	Trial
Validity of Instrument	16	841	8.3	3.7%	8	6	2
Appointment of Fiduciary	22	825	8.0	2.7%	9	5	8
Exercise of Fiduciary Duties	18	1086	10.0	4.1%	1	6	11
Petition to Recover Property	6	812	6.0	3.2%	2	1	3
Heirship Petition	9	701	7.4	5.0%	3	4	2
Meaning of Instrument	3	634	4.3	5.0%	2	0	1
Other	10	875	7.1	4.2%	5	3	2
Totals	84	851	7.3	3.6%	30	25	29

In addition, one of the most damaging consequences of probate litigation is that it derails the administrative process. The mean case length in Table 3 (851 days) is over a year more than the average span for cases without disputes (475 days). Because a decedent's property is suspended in limbo during this period, even functionalists would concede that this is a serious problem.

Yet this discussion is subject to an asterisk and two facts that point in the opposite direction. First, the caveat: My data probably exaggerates the frequency of disputes within the total universe of transfers by will. As noted above, the probate files (and hence my research) undersamples married people. Because those

204. Thirteen estates involved multiple kinds of claims. Because there is no way to separate out the time and expense associated with each cause of action, I was forced to double-count these matters. For instance, if an estate featured both a will contest and an objection to an accounting, I had no choice but to plug its full statistics into both the "validity of instrument" and "exercise of fiduciary duties" categories.

individuals—the first spouse to die—often leave everything to their husband or wife, their estates are unlikely to be contentious. Conversely, when a decedent is divorced, or when the surviving member of a couple passes away, things are more likely to get ugly. Indeed, only ten of the sixty-nine contested estates in which conjugal information was available (14 percent) featured married decedents. Thus, the actual litigation rate among all testators and intestate decedents is lower than it first seems.

Moreover, breaking the litigated cases down by type of claim fortifies the functionalist argument that testacy is superior to intestacy. A healthy plurality of all petitions—forty out of eighty-four (48 percent)—either challenged the appointment of an administrator or executor, requested the removal of such an individual, or sought damages for breach of fiduciary duty. These cases reveal one of the widest gulfs between testacy and intestacy in my data. Sixteen of the twenty-two (73 percent) objections to the personal representative and twelve of the eighteen (67 percent) allegations of mismanagement occurred in intestacy. These statistics elucidate one salutary byproduct of encouraging testacy: It permits a decedent to handpick a trusted, capable executor in her will.[205]

In addition, lawsuits seem to cost much less than expected. Scholars have been understandably concerned that greedy lawyers and personal representatives use disputes as an excuse to drain the estate.[206] Actually, the amount of compensation paid in litigated matters (3.6 percent of the value of the estate) was similar to the baseline in other cases (2.9 percent). This unexpected equivalence is a result of probate fees that are set at a fixed percentage of the value of the decedent's property. For instance, in California, attorneys and personal representatives earn a minimum of 4 percent of the first $100,000 in the estate, 3 percent of the next $100,000, 2 percent of the next $800,000, and 1 percent of the next $9,000,000.[207] To be sure, judges can augment these so-called ordinary fees with compensation for "extraordinary services."[208] Nevertheless, the probate courts in my sample were reluctant to do so. Indeed, of the $1,775,286 paid to attorneys and personal representatives in contested estates, only $301,275 (17 percent) was

205. *See* Weisbord, *supra* note 190, at 896.

206. *See, e.g.*, Langbein, *supra* note 200, at 2041. The purported expense of litigation has also driven the current interest in alternative dispute resolution in probate. *See, e.g.*, David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1029 (2012).

207. *See, e.g.*, CAL. PROB. CODE § 10810 (West 1991 & Supp. 2014); NEV. REV. STAT. §§ 150.060–.067 (2013).

208. *See* CAL. PROB. CODE § 10811 (West 1991 & Supp. 2014).

"extraordinary fees."[209] Thus, in this one important way, probate litigation may be less harmful than assumed.

To summarize, functionalists appear to be correct that lawmakers have a stake in encouraging testacy. Formalists are likewise on solid footing when they argue that probate litigation brings the administrative process to a screeching halt. Then again, contrary to conventional wisdom, lawsuits do not seem to consume large proportions of a decedent's property. In the next Subparts, I move beyond these overarching matters to examine the specific issues that divide the traditionalists and the Reformers.

C. Will Execution

This Subpart explores ground zero in the debate over wills doctrine: the requirements for executing a valid instrument. It argues that lawmakers should retain the attestation element but soften its hard edges by allowing holographic wills. It then considers—and rejects—a narrow reading of harmless error statutes that would insist, at minimum, that a purported will be signed.

1. Attestation

Scholars who seek to abolish the attestation requirement contend that it is all cost and no benefit: a relic that routinely thwarts decedents' will-making efforts.[210] In this Subpart, I challenge both claims.

The case against attestation begins by contending that its protective function is no longer necessary. Most prominently, Gulliver and Tilson argued that the safeguard of witnesses was important in the era of deathbed wills, but has faded now that testators are usually healthy.[211] Table 4 holds that claim to the fire by identifying when the 2007 Alameda County decedents executed their wills. It indicates that Gulliver and Tilson are correct that most testators engage in estate planning long before they pass away. Two-thirds of the individuals in my study died more than a thousand days after signing their wills. In fact, the average gap between will execution and death was a decade, and the median was seven years.[212] Yet Table 4 also shows that a plurality of testators waited until the very

209. In nonlitigated cases, extraordinary fees amounted to 4% of the total amount paid to attorneys and personal representatives.

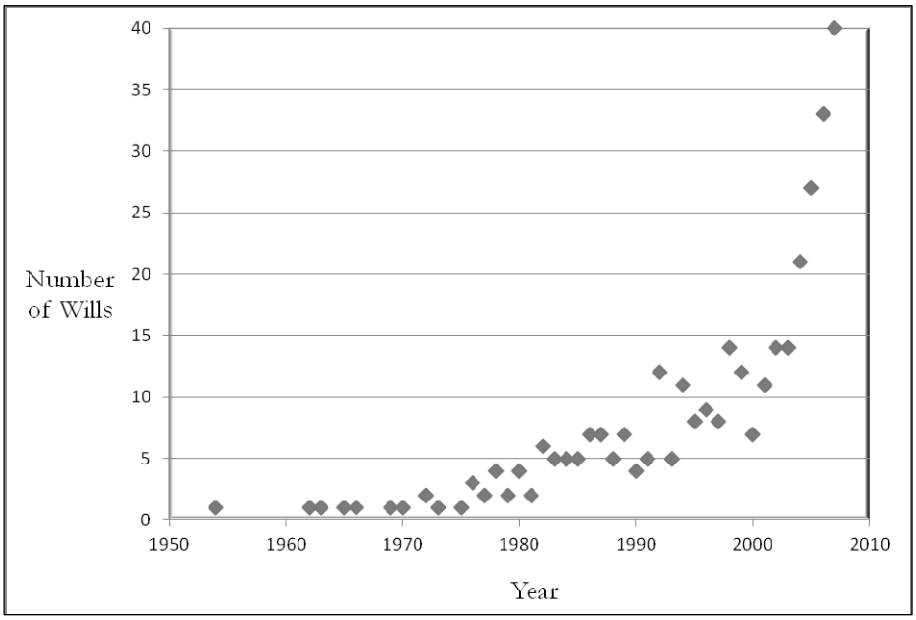
210. *See supra* text accompanying notes 111–114.

211. *See, e.g.*, Gulliver & Tilson, *supra* note 13, at 10; *see also supra* text accompanying note 113.

212. For some, the gap was significantly longer, such as Teena Kools, whose brisk 1954 will preceded her demise by more than a half-century. *See* Will Dated Nov. 24, 1954 at 1, Estate of Kools, No. RP07344482 (Cal. Super. Ct. Sept. 5, 2007).

last minute. Indeed, the most common years for will execution were the final three in my study: 2007 (forty wills, or 12 percent), 2006 (thirty-three wills, or 10 percent), and 2005 (twenty-seven wills, or 8 percent). In fact, twenty-three testators (7 percent of the entire sample) died within a month of signing their wills, including nine (3 percent) who perished the same week and three (1 percent) who passed on the same day. Thus, claims that testators are "in the prime of life"[213] and "are not particularly susceptible to pressure from those around them"[214] paint with too broad a brush.

TABLE 4. Will Execution Dates



Similarly, I uncovered no evidence that the presence prong regularly impedes decedents' intent. Unlike the UPC, California continues to require the witnesses to be together when the testator signs or acknowledges the will.[215] Judging from the attention lavished on this detail in casebooks and law journal

213. Gulliver & Tilson, *supra* note 13, at 10.
214. Lindgren, *supra* note 13, at 555. Of course, a functionalist might still argue that the ease with which a wrongdoer could obtain two coconspirators means that "very little fraud, duress, or undue influence is prevented." *Id.* at 556.
215. *See* CAL. PROB. CODE § 6110(c)(1) (West 2010).

articles, one would expect it to be a wellspring of litigation.[216] But as Table 5 shows, few cases in my spreadsheet even feature allegations that a document fails to satisfy the Wills Act. Indeed, in the sixteen will contests, only four of the twenty discrete legal theories centered on faulty execution. And critically, none of these cases hinged on the meaning of presence.

TABLE 5. Will Contests

Claim	Number
Incapacity	6
Undue Influence	5
Improper Execution	4
Forgery	3
Fraud	2
Total	20

Instead, I found that the attestation element weeds out documents that are not witnessed *at all*. As I discuss in more depth below, a fair number of probate files contain instruments that are typewritten, signed, and yet not attested.[217] As an initial matter—subject to the harmless error rule—these purported wills are invalid. This finding points in a surprising direction. Although there is widespread consensus that attestation "protect[s] . . . the testator from fraud, duress, and undue influence,"[218] its primary benefit may be as a *channeling* device. Attestation signals that a testator wants a document to be legally effective.[219] By jumping through the additional hoop of procuring witnesses, an owner dispels any doubt that she wants to create a will.

One might wonder why we require testators to take this extra step. Indeed, functionalists have argued for decades that a decedent's bare signature is enough

216. *See, e.g.*, *supra* text accompanying note 109.
217. *See infra* text accompanying notes 223–228.
218. Lindgren, *supra* note 13, at 554.
219. In addition, attestation likely plays an evidentiary role that is closely tied to its protective value. As Table 5 illuminates, two-thirds of the allegations in will contests were forgery, incapacity, or undue influence. Witnesses are often pivotal in these matters, which hinge on corroboration that the testator actually signed the will or description of her demeanor on that day. *See, e.g.*, James v. Knotts, 705 S.E.2d 572, 578 (W.Va. 2010) ("Evidence of witnesses present at the execution of a will is entitled to peculiar weight . . . ." (quoting Stewart v. Lyons, 47 S.E. 442, 442 (W. Va. 1903)) (internal quotation marks omitted)). Attestation makes it more likely that the court will be privy to a firsthand account of those issues.

to trigger will-like transfers under trusts, pensions, and life insurance policies.[220] On close inspection, though, this claim ignores the fact that nonprobate mechanisms have their own channeling proclivities. For instance, it often takes more than executing a writing to create a trust. A settlor must also transfer title to property to the trustee, which reinforces her commitment.[221] Similarly, pensions and life insurance policies are embodied in standardized contracts promulgated under the letterhead of large financial institutions. Thus, their channeling function is baked into their format: When a decedent signs on the dotted line, we know precisely what she means to do. Conversely, wills come in all shapes and sizes. In this age of downloadable templates and do-it-yourself estate planning guides, there is ample room for ambiguity about whether a decedent meant a writing—even a signed writing—to be the final expression of her testamentary wishes.

Several examples from Alameda County illustrate the counterintuitive fact that a decedent's signature is sometimes not enough to prove testamentary intent. For instance, Alice Sahlin wrote three documents over the course of two years with different dispositive schemes.[222] One was entirely handwritten and signed, but bore the words "cancelled" in the right margin and "reissued" at the top.[223] The other two were typewritten and signed, but not attested.[224] In a declaration filed with the probate court, Alice's financial planner and confidant admitted that even she was unsure about Alice's testamentary wishes.[225] Similarly, Carlos Varela put two inconsistent handwritten wills signed and dated July 12, 2007 in the same envelope.[226] And Hannah Wit, whose estate was worth over $5,000,000, signed and dated a passage in her diary:

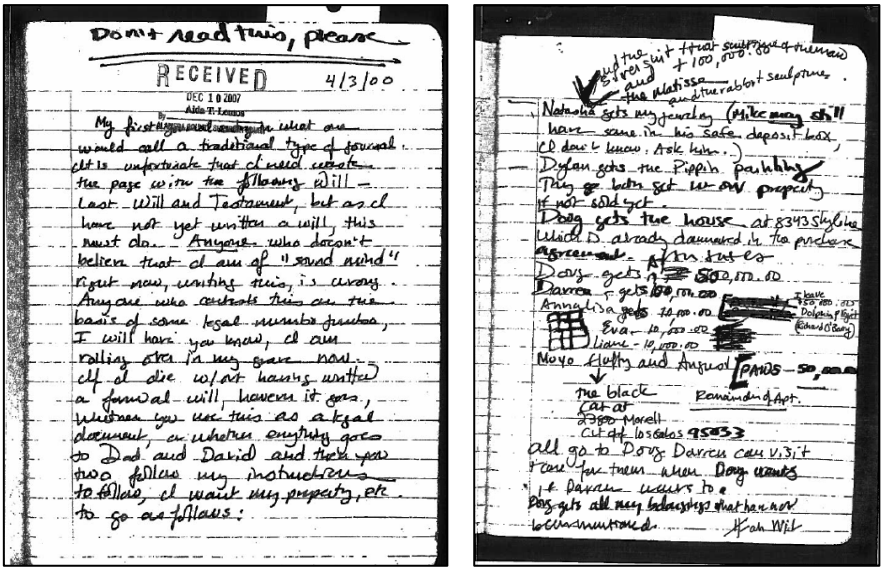
> My first journal entry is what one would call a traditional type of journal. It is unfortunate that I need to waste the page with the following will—Last Will and Testament, but as I have not yet written a will, this must do. *Anyone* who doesn't believe that I am of 'sound mind' right now, writing this, is wrong. Anyone who contests this on

220. *See supra* text accompanying notes 118–122. Moreover, in this age of rampant adhesion contracting, in which we consummate agreements by clicking "I agree" or failing to return a package within thirty days, signing a document seems more official than ever.
221. *See, e.g.*, CAL. PROB. CODE § 15206 (West 1991 & Supp. 2014).
222. *See* Petition for Probate of Will and for Letters Testamentary at 11–19, Estate of Sahlin, No. HP08367279 (Cal. Super. Ct. Jan. 23, 2008).
223. *See id.* at 11–12.
224. *See id.* at 13–19.
225. *See id.* at 10.
226. *See* Petition for Decree Determining Interest in Estate at 6–11, Estate of Varela, No. RP07345102 (Cal. Super. Ct. Mar. 14, 2008).

> the basis of some legal mumbo jumbo, I will have you know, I am rolling over in my grave now.

Yet she then undercut this proclamation by adding a bolded, underlined heading that implored: "Don't read this, please."[227]

Hannah Wit's Purported Will



The problem in these scenarios is not formality, but its absence. We can only guess whether the decedents wanted these documents to be drafts, notes for future estate plans, or full-fledged testamentary instruments. But if any of these writings had also been subscribed by two witnesses, the calculus would have changed. This additional step—the hallmark of a will—would have allowed their wishes to shine through.

Accordingly, attestation is not simply a hangover from previous centuries. Witnesses protect the sizeable minority of gravely ill testators and furnish additional proof of testamentary intent. Of course, some decedents may not know that they must have their wills witnessed, and others may run out of time. Should lawmakers accommodate that cohort by authorizing holographs and excusing harmless errors? I confront those questions next.

227. Petition for Probate of Will at 7–8, Estate of Wit, No. RP07362504 (Cal. Super. Ct. Jan. 3 2008).

2. Holographs

As noted, about half the states validate unattested handwritten wills.[228] Under the UPC and in many jurisdictions, only the key provisions must be in the testator's handwriting;[229] a stricter minority view requires the entire document to be devoid of printed text.[230] Formalists object to holographs on two grounds. First, they claim that these rough-and-tumble instruments create chronic problems for the courts. Second, they assert that holographs cannot be squared with the purposes of the Wills Act and thus are unreliable. In this Subpart, I offer a slightly different perspective.

Holographs do seem to spawn more than their fair share of litigation. Of the 332 wills under my microscope, 32 (10 percent) were handwritten. Yet of the thirty-five disputed testate matters, eight (23 percent) involved holographs.[231] A common knock on the practice of permitting holographs is that it encourages survivors to dredge up a decedent's letters and diary entries, forcing courts to grapple with whether these documents were meant to be wills.[232] As noted above, this was a recurring problem in the Alameda County files.[233] Indeed, five of the six contested holographs turned on that issue. Also, because holographs are drafted by lay people without legal advice, they can be marred by omissions

228. *See supra* sources cited and text accompanying note 139.
229. *See supra* sources cited and text accompanying note 139.
230. *See supra* sources cited and text accompanying note 139.
231. *Compare* Clowney, *supra* note 73, at 59 (analyzing 145 holographic wills from Allegheny County, Pennsylvania and determining that only six (4%) led to litigation).
232. *See, e.g.,* Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 110 (2006) ("Perhaps the most common holographic will problem is the testamentary intent requirement."). An infamous example involves former CBS correspondent Charles Kuralt, who, while hospitalized, penned a letter to his mistress about a cabin:

> June 18, 1997
> Dear Pat—
> Something is terribly wrong with me and they can't figure out what. After cat-scans and a variety of cardiograms, they agree it's not lung cancer or heart trouble or blood clot . . . . I'll keep you informed. *I'll have the lawyer visit the hospital to be sure you inherit the rest of the place in MT if it comes to that.*
> I send love to you & [your youngest daughter,] Shannon. Hope things are better there!
> Love,
> C.

In re Estate of Kuralt, 15 P.3d 931, 933 (Mont. 2000) (emphasis added). Playing fast and loose with the fact that Kuralt seems to be telegraphing his desire to make a subsequent will, the Montana Supreme Court determined that the letter was a valid holograph. *Id.* at 934.
233. *See supra* text accompanying notes 222–227.

and ambiguities.[234] Specifically, twenty of the thirty-two holographs (63 percent) failed either to name an executor or include a residuary clause.[235] And although no handwritten will gave rise to all-out interpretation litigation, several contained vague passages that the probate court clarified in nonadversarial proceedings.

But in another way, holographs did not live up to their dark reputation. Holographs have their own execution tripwire: Many decedents reportedly fail to satisfy the principle that the instrument be entirely or largely handwritten.[236] Supposedly, there is "a large and ugly case law voiding wills which contained some innocuous printed matter."[237] I unearthed no such estate. In addition, this lone nod to formality in the realm of holographs has a clear upside. Whether the benchmark is that the entire will,[238] the "material portions,"[239] or "material provisions"[240] be in the testator's hand, it distinguishes holographs from the great mass of typewritten, unattested, will-like writings. Abandoning this convention would make it even harder to determine whether a decedent set out to make a will.

Formalists also argue that holographs are inherently suspect because they defy the protective and ritual purposes of the Wills Act.[241] To be sure, experts can verify the decedent's penmanship, fulfilling the evidentiary function. But there matters end. Even Gulliver and Tilson, who were hardly formalists, saw self-made wills as aberrant:

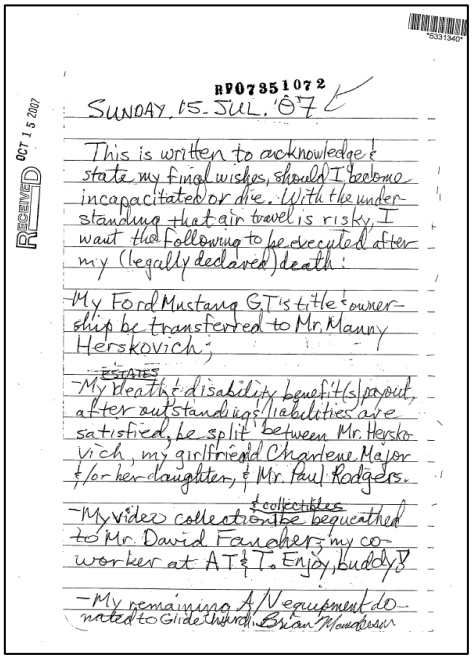
> [T]here seems no substantial guarantee of the performance of the protective function, since no effort is made to prevent other forms of imposition such as undue influence. A holographic will is obtainable by compulsion as easily as a ransom note. While there is a certain ritual value in writing out the document, casual offhand statements are frequently made in letters.[242]

234. *See, e.g.*, Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 632 (1981) (arguing that the apparent simplicity of holographs "mask[s] the very real problems involved in making a coherent and orderly estate disposition").
235. *Compare* Clowney, *supra* note 73, at 47–50 (determining that 24% of holographs in Allegheny County, Pennsylvania, failed to include a residuary clause and 43% did not name an executor).
236. *See, e.g.*, Brown, *supra* note 232, at 109–10.
237. Langbein, *supra* note 6, at 519.
238. *See, e.g.*, Berry v. Trible, 626 S.E.2d 440, 444 (Va. 2006); TEX. EST. CODE ANN. § 251.052 (West 2014); *see also supra* sources cited and text accompanying note 139.
239. *See, e.g.*, UNIF. PROBATE CODE § 2-502(b) (amended 2010), 8 U.L.A. 209 (2013 & Supp. 2014); *see also supra* sources cited and text accompanying note 139.
240. *See, e.g.*, UNIF. PROBATE CODE § 2-502(b), 2-503 (1969); *see also supra* sources cited and text accompanying note 139.
241. *See, e.g.*, Bird, *supra* note 234, at 631–32.
242. Gulliver & Tilson, *supra* note 13, at 13–14.

Citing similar reasons, other scholars have also asserted that "handwritten will"—an informal formal instrument—should be an oxymoron.[243]

In sharp contrast, I found that the informality of handwritten wills often establishes their *authenticity*. Sometimes the physical appearance of a holograph leaves little doubt about its genuineness. For instance, it would be hard to imagine anyone disputing the authorship of Brian Manderson's will, which he jotted in a notebook next to a grocery list and a food diary.[244]

Brian Manderson's Will


RP07351072

SUNDAY, 15 JUL. '07

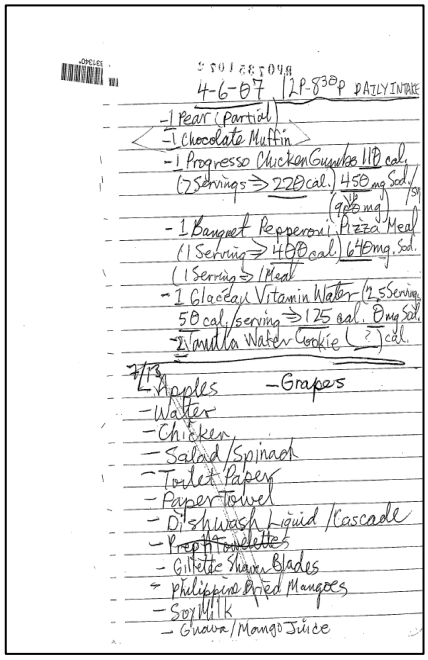
This is written to acknowledge & state my final wishes, should I become incapacitated or die. With the understanding that air travel is risky, I want the following to be executed after my (legally declared) death:

My Ford Mustang GT's title & ownership be transferred to Mr. Manny Herskovich;

~~ESTATES~~
-My death & disability benefit(s) payout, after outstandings/liabilities are satisfied, be split between Mr. Herskovich, my girlfriend Charlene Major &/or her daughter, & Mr. Paul Rodgers.

-My video ~~collection~~ collectibles be bequeathed to Mr. David Faraher, my co-worker at AT&T. Enjoy, buddy!

-My remaining A/V equipment donated to Glide thereof. Brian Manderson


4-6-07 12P-830P DAILY INTAKE

-1 Pear (partial)
-1 Chocolate Muffin
-1 Progresso Chicken Cumbre 110 cal.
(2 Servings ⇒ 220 cal.) 450 mg Sod.
(905 mg)
-1 Banquet Pepperoni Pizza Meal
(1 Serving ⇒ 400 cal.) 640 mg. Sod.
(1 Serving ⇒ 1 Meal)
-1 Glaceau Vitamin Water (2.5 Serving
50 cal./serving ⇒ 125 cal. 0 mg Sod.
-1 Tomalla Water Cookie ( ) cal.

-Apples -Grapes
-Water
-Chicken
-Salad/Spinach
-Toilet Paper
-Paper Towel
-Dishwash Liquid/Cascade
-Propitomelettes
-Gillette Sharp Blades
-Philippine Dried Mangoes
-Soy Milk
-Guava/Mango Juice

Moreover, the contents of holographs frequently reveal that a decedent is acting freely and thoughtfully. Without the anesthetizing drone of legalese, testators digress, add personal flourishes, and comment on their lives.[245] They write

243. *See, e.g.*, Bird, *supra* note 234, at 631–32; Brown, *supra* note 232, at 124–25; *cf.* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1073 (1996) ("[T]he holographic will cannot be justified within the framework of traditional will execution theory.").

244. *See* Will Dated July 15, 2007 at 1–2, Estate of Manderson, No. RP07351072 (Cal. Super. Ct. Oct. 15, 2007).

245. For a general discussion of the speaking will phenomenon, see David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 81–89 (2012).

love letters[246] and crack inside jokes.[247] They explain why they have disinherited a particular individual[248] or left assets unequally among similarly situated relatives.[249] They implore survivors to "pull [the] plug" if necessary,[250] to take care of their pets,[251] or to allow their spouse to remain in the family home.[252] Phillip Torres's funeral instructions were haunting and direct: "I want a closed [b]ox, not a[n] open one. *Don't look at me*."[253] Evelyn Vierra's no contest clause could not have been more forceful: "Anyone tries to break this will, give them $1."[254] The singularity of the testator's voice runs throughout, providing reassurance that no one else has hijacked the document. Similarly, the many decedents who took pains to justify their dispositive choices revealed that they had deliberated and were not acting impetuously. These common drafting idiosyncrasies serve as a kind of second signature, at least partially fulfilling the protective and ritual functions.

The formalist campaign against handwritten wills also ignores their many advantages. Holographs allow low-income testators to create estate plans. Similarly, they facilitate so-called emergency room wills: spontaneous dispositions by those in dire straits.[255] In one tragic example from Alameda County, Rebecca Bray recorded her wishes in graceful cursive mere hours before she committed suicide.[256] Similarly, Yi-Chun Hope Wu's handwritten will begins by declaring that "[s]ince it is too hard finding willing witnesses to sign my will, I am rewriting the

246. *See* Estate of Vales, Petition for Probate of Will and for Letters of Administration With Will Annexed at 7, No. RP07322292 (Cal. Super. Ct. Apr. 24, 2007) (containing a long passage about the testator's love for his wife).

247. *See* Petition for Probate of Will and for Letters of Administration With Will Annexed at 9, Estate of Gonzalez, No. RP07347314 (Cal Super. Ct. Sept. 20, 2007) (making jokes about the testator's lack of fishing skill).

248. *See* Petition for Probate of Will and for Letters Testamentary at 5, Estate of Holdener, No. HP08372654 (Cal. Super. Ct. Feb. 22, 2008) (explaining that the testator had given her daughter $1 because of a specific argument).

249. *See* Petition for Probate of Will and for Letters Testamentary at 5, Estate of Mills, No. RP08365476 (Cal. Super. Ct. Jan. 11, 2008) (noting that one of the testator's three brothers "has been like a son to me").

250. *See* Will Dated Jan. 24, 2007 at 1, Estate of Rodgers, No. RP07351944 (Cal. Super. Ct. Oct. 18, 2007).

251. *See* Will Dated Sept. 24, 2002 at 1, Estate of Pastermack, No. RP07327199 (Cal. Super. Ct. May 22, 2007).

252. *See* Will Dated Apr. 16, 2007 at 2, Estate of Korich, No. RP07347795 (Cal. Super. Ct. Sept. 24, 2007).

253. *See* Will Dated Aug. 20, 1983 at 1, Estate of Torres, No. RP07323475 (Cal. Super. Ct. Apr. 30, 2007) (emphasis added).

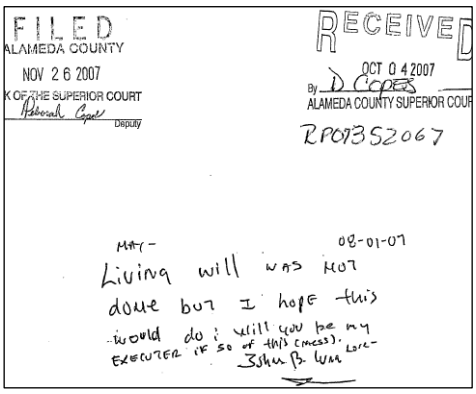
254. *See* Will Dated Dec. 10, 2000 at 1, Estate of Vierra, No. HP08387031 (Cal. Super. Ct. June 16, 2008).

255. Clowney, *supra* note 73, at 58–59.

256. *See* Declaration of Larry Bray at 1–2, Estate of Bray, No. FP07343548 (Cal. Super. Ct. Oct. 17, 2007).

entire will by hand . . . ."[257] Thirteen days later, she passed away. Likewise, less than a week before he died, John Lum wrote to his sister, explained that his "living will was not done," and asked her to divide his property among three nieces and nephews.[258] The probate court admitted Lum's apology for not having made a formal will as a valid holograph.[259]

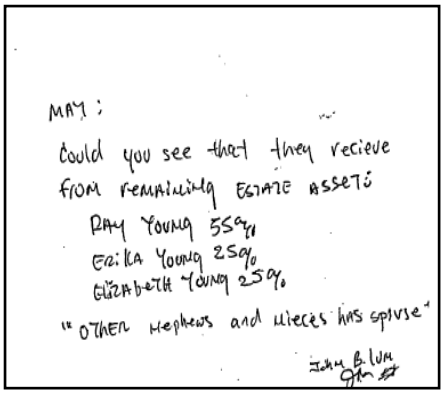
John Lum's Will[260]


FILED
ALAMEDA COUNTY
NOV 26 2007
K OF THE SUPERIOR COURT
Deputy

RECEIVED
OCT 04 2007
By D Cipres
ALAMEDA COUNTY SUPERIOR COUR

RP07352067

MAY -
08-01-07
Living will was not
done but I hope this
would do ; will you be my
EXECUTER IF SO of this cmcss).
John B. Lum Love-


MAY :
could you see that they recieve
from remaining ESTATE ASSETS
RAY YOUNG 55%
Erika Young 25%
ELIZABETH YOUNG 25%
"OTHER Nephews and nieces has spivse"
John B. Lum

On balance then, the virtues of holographs seem to outweigh the vices. Handwritten wills are an indispensable estate planning shortcut. In addition, they often have unique ways of satisfying the purposes of the Wills Act formalities. Yet as I discuss next, the harmless error rule—a further step down the informality ladder—is more fraught.

3. Harmless Error

The harmless error rule is the UPC and Restatement's most dramatic departure from traditional law. Yet its benefits and risks remain speculative. Moreover,

257. *See* Will Dated Aug. 13, 2007 at 1, Estate of Wu, No. FP07354780 (Cal. Super. Ct. Dec. 21, 2007).

258. *See* Will Dated Aug. 1, 2007 at 1, Estate of Lum, No. RP07352067 (Cal. Super. Ct. Nov. 26, 2007) [hereinafter Estate of Lum Will]. In addition, holographs permit testators to make last-minute changes to existing wills. For example, two days before he died, John Romero made numerous handwritten and initialed adjustments to the face of his attested will. *See* Will Dated Oct. 22, 2007 at 1–2, Estate of Romero, No. HP08383117 (Cal. Super. Ct. Apr. 22, 2008) [hereinafter Estate of Romero Will].

259. *See* Order Appointing Executor at 1, Estate of Lum, No. RP07352067 (Cal. Super. Ct. Nov. 27, 2007).

260. Estate of Lum Will, *supra* note 258, at 1–2. An eagle-eyed reader may notice that Lum gives away 105% of his estate: 55% to Ray Young, 25% to Erika Young, and 25% to Elizabeth Young. *Id.* at 2.

in the few jurisdictions that have embraced the doctrine, its scope is unclear. This Subpart examines these issues and tentatively endorses an unrestricted harmless error rule.

In most states, the ancient rigors of the Wills Act are alive and well. For instance, in *In re Estate of Chastain*, a 2012 opinion, the Tennessee Supreme Court denied probate to a two-page document that had been authenticated multiple times.[261] The decedent and three witnesses had initialed the first page.[262] In addition, the witnesses had signed both the second page and a separate affidavit that declared that they had seen the testator execute the will.[263] The decedent had mistakenly signed the affidavit, however, rather than the second page of the will.[264] The state high court explained that because "the [a]ffidavit is not part of the [w]ill," the decedent had "fail[ed] to sign the [w]ill."[265] Then, in a remarkable passage, the court reasoned that the decedent's "signature on the separate [a]ffidavit provides little, if any, insight about [his] beliefs and intentions concerning the unsigned two-page [w]ill."[266]

Is harmless error preferable to this beady-eyed approach? Unfortunately, this is a particularly soft spot in my data. California lawmakers approved the bill that authorized harmless error on July 1, 2008.[267] At that time, 138 (24 percent) of the estates in my spreadsheet had closed. By January 1, 2009, when the statute became effective, that number had grown to 293 (51 percent). Thus, my data only provide a partial glimpse of the relevant period.

It is worth noting, however, that I did not uncover a single litigant who attempted to invoke the rule—a finding that might belie doomsday claims about harmless error overburdening courts. Of course, there are other plausible explanations for this whistling silence. Perhaps some members of the probate bar were unaware of the new statute or assumed that it did not apply to pending cases. Yet I am skeptical of those narratives for three reasons. First, in a different context, the attorneys in my sample were attuned to developments in the law. California once imposed a graduated filing fee that rose with the value of the decedents' assets.[268] In March 2008, a state appellate court held that this rubric violated the state

261. 401 S.W.3d 612 (Tenn. 2012).
262. *See id.* at 614.
263. *See id.* at 614–15.
264. *See id.* at 621.
265. *Id.* at 620–21.
266. *Id.* at 621; *see also* Allen v. Dalk, 826 So. 2d 245, 248 (Fla. 2002) (refusing to validate an unsigned will despite acknowledging that "it is probable that the decedent read the will and intended to sign her name").
267. Act of July 1, 2008, ch.53, 2008 Cal. Stat. 180 (codified at CAL. PROB. CODE § 6110(c)(2) (West 2009)).
268. *See In re* Estate of Claeyssens, 74 Cal. Rptr. 3d 304, 307 (Cal. Ct. App. 2008).

constitution, thus entitling some estates to small reimbursements.[269] Within weeks, personal representatives began requesting these funds.[270] It seems unlikely that the same lawyers who capitalized on this relatively minor shift would be ignorant of a massive change like harmless error. Second, harmless error is retroactive and governs attempted wills regardless of their date.[271] Thus, even though the doctrine came online after the vast majority of cases were up and running, it was still available to any interested party. And third, the absence of harmless error claims—and the sunny proposition that the rule will not overtax the judiciary—is consistent with my conclusions about the nature of will contests. Recall that the critical issue in most execution-based challenges was that an instrument lacked testamentary intent. Harmless error is irrelevant to that determination. Indeed, the tenet only works its magic *if* there is clear and convincing evidence that a decedent *wanted* a document to be her will. Accordingly, it is useless in disputes over testamentary intent because it merely echoes the question already posed: Did a decedent mean to create a will? For these reasons, it is possible that harmless error will not trigger the litigation landslide some have feared.

In addition, a handful of estates demonstrated how the principle could be useful. The marquee case is *Estate of Schwind*,[272] which predated the California legislature's adoption of harmless error by about six months.[273] The decedent obtained a fill-in-the-blank will and handwrote his sister's name as the executor and sole beneficiary.[274] He then signed the document in front of a notary public and also had it notarized.[275] Yet because he never obtained another witness' signature, his estate was forced to trudge through intestacy.[276] Given the abundant proof that he wanted the instrument to be his will, refusing to admit it to probate is not just formalism—it is empty formalism. Similarly, Rose Vaughan typed a document in 1993 expressing her desire to leave her entire estate to her

269. *See id.* at 310–11 (reversing the lower court's denial of a fee reimbursement to the Claeyssens's estate after holding such a graduated fee violated the California Constitution).

270. *See, e.g.*, Petition for Final Distribution at 25, Estate of Adams, No. RP07319025 (Cal. Super. Ct. June 24, 2008).

271. *See, e.g.*, *In re* Estate of Stoker, 122 Cal. Rptr. 3d 529, 535 (Cal. Ct. App. 2011) ("The 2009 legislation gave the court the authority to consider the 2005 written revocation to also be a will that could be probated if clear and convincing evidence established that it was consistent with the decedent's intent.").

272. *See* Will at 1, Estate of Schwind, No. RP07362658 (Cal. Super. Ct. Dec. 21, 2007) [hereinafter Estate of Schwind Will].

273. *See supra* text accompanying note 267.

274. *See* Estate of Schwind Will, *supra* note 272, at 1.

275. *See* Declaration of Notary Public Regarding Testator's Signature at 1–2, Estate of Schwind, No. RP07362658 (Cal. Super. Ct. Dec. 21, 2007).

276. Ironically, the UPC now recognizes notarization as a substitute for attestation. *See* UNIF. PROBATE CODE § 2-502(a)(3)(B) (amended 2010), 8 U.L.A. 209 (2013).

daughter.[277] Thirteen years later, she reiterated this wish in a nearly identical instrument.[278] Both pieces of paper were signed, but neither was attested.[279] In light of the testator's dogged insistence, other facts might corroborate her intent to leave her property to her daughter. Harmless error would at least permit the court to inquire into that issue.[280]

Yet even if harmless error is superior to traditional law, that only gets us so far. There is festering uncertainty as to what the principle's contours are and should be. For example, it is unclear whether it governs unsigned instruments. Some harmless error statutes only cover specific kinds of signature defects. Colorado's rule applies "only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse."[281] Likewise, legislation in Virginia cannot "excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself . . . ."[282] And California appears to forgive attestation errors, but not any kind of mistake relating to the decedent's signature.[283]

277. *See* Will Dated Aug. 26, 1993 at 1, Estate of Vaughan, No. RP07309178 (Cal. Super. Ct. Feb. 1, 2007).

278. *See* Will Dated Aug. 27, 2006 at 1, Estate of Vaughan, No. RP07309178 (Cal. Super. Ct. Feb. 1, 2007).

279. *See id.*

280. Even during the period before California adopted harmless error, I found several unfinished will-like documents in the record, although many of these were then superseded by another instrument. *See, e.g.*, Will of Albert Albach at 1, Estate of Albach, No. HP07332024 (Cal. Super. Ct. Aug. 28, 2007) (handwritten document that may be notes for later attested will); Will Dated June 19, 1991 at 1, Estate of Ozeroff, No. RP07311595 (Cal. Super. Ct. Apr. 19, 2007) (typed document purporting to be holographic will, followed by formal witnessed will); Petition for Probate of Will and for Letters Testamentary at 11–29, Estate of Sahlin, No. HP08367279 (Cal. Super. Ct. Jan. 23, 2008) (multiple will-like documents). As a result, it is unlikely that they would have generated harmless error claims.

281. COLO. REV. STAT. § 15-11-503(2) (2013).

282. VA. CODE ANN. § 64.2-404(B) (2012).

283. The state probate code has separate provisions for attested wills and holographs. *See* CAL. PROB. CODE § 6110 (West 2009) (validating attested wills) and *id.* § 6111 (governing holographs). The California harmless error rule appears in section 6110, the attested will section:

> (1) Except as provided in paragraph (2), the will shall be witnessed by being signed, during the testator's lifetime, by at least two persons each of whom (A) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (B) understand that the instrument they sign is the testator's will.
>
> (2) *If a will was not executed in compliance with paragraph (1)*, the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will

Even the breadth of the UPC's harmless error doctrine is contested. At first blush, the statute seems to mandate nothing more than that a decedent create a "document":

> Although a document . . . was not executed in compliance with [the elements for an attested or holographic will], the document . . . is treated as if it had been executed in compliance . . . if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent's will . . . .[284]

But recent appellate cases from New Jersey, a UPC jurisdiction, cloud the waters. First, in *In re Probate of Will & Codicil of Macool*, the court wrestled with facts that were "so uniquely challenging that they feel like an academic exercise, designed by a law professor to test the limits of a student's understanding of probate law."[285] After her husband died, Louise Macool drafted a sheet of paper that described how she wanted to amend her estate plan.[286] She took it to her attorney, who dictated the terms of a new will. The lawyer's secretary then typed

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> establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.

Id. §§ 6110(c)(1)–(2) (emphasis added).

On its face, this language implies that harmless error is only available for instruments that are not "in compliance with paragraph [6110(c)](1)"—in other words, wills with attestation defects. *Id.* § 6110(c)(1). In addition, because holographic wills need not be witnessed, the doctrine would not be able to salvage a failed holograph. *But see* Peter T. Wendel, *California Probate Code Section 6110(c)(2): How Big Is the Hole in the Dike?*, 41 SW. L. REV. 387, 404–05 (2012) (noting that some passages in the statute's legislative history imply that it was not intended to exclude holographs). Funnily enough, the one reported appellate case on the issue involved a hybrid document that was neither a holograph nor a witnessed will. In *Estate of Stoker*, 122 Cal. Rptr. 3d 529 (Cal. Ct. App. 2011), Wayne Stoker had executed a will and a trust in 1997. *See id.* at 532. In 2005, Stoker changed his mind about his 1997 estate plan and asked a third party to handwrite a brief paragraph that gave his property to different beneficiaries. *See id.* In front of two friends, Stoker signed the new instrument and destroyed his 1997 will by urinating on it and then burning it. *See id.* The court wryly "hesitate[d] to speculate how he accomplished the second act after the first." *Id.* at 536. Although the 2005 document was neither in Stoker's handwriting nor attested, the court cited the fact that he had referred to it as his "will" and his emphatic destruction of his 1997 instrument as clear and convincing evidence that he intended the 2005 writing to govern. *See id.* In addition, the court rejected the contestants' argument that the legislature did not intend harmless error "to apply to cases involving handwritten documents." *Id.* at 534. As the court explained, the statute governs "wills that are 'in writing' and signed by the testator" and that Stoker's "2005 document is a written will signed by decedent." *Id.* at 534 (citation omitted). The court stopped short, however, of holding that the harmless error rule applies to holographs, noting only that "*handwritten non-holographic wills* are not excluded from the scope of this statute." *Id.* (emphasis added).

284. UNIF. PROBATE CODE § 2-503 (amended 2010), 8 U.L.A. 215 (2013); *see also supra* note 168 and accompanying statutes.

285. 3 A.3d 1258, 1261 (N.J. Super. Ct. App. Div. 2010).

286. *See id.* at 1262.

up an instrument that differed in several minor ways from Louise's notes and was marked "rough."[287] Sadly, before Louise could schedule a meeting to review and sign the draft will, she died.[288] The trial court refused to apply harmless error, reasoning that the doctrine requires a writing to be "executed or signed in some fashion by the testator."[289] In a unanimous opinion, the appellate court affirmed on the different ground that there was insufficient evidence that Louise assented to the typewritten draft.[290] But, to provide guidance for future courts, the reviewing justices rejected the trial court's interpretation of the harmless error statute, explaining that "the term 'executed' is not synonymous with 'signed.'"[291]

Then, in *Estate of Ehrlich*, Richard Ehrlich, a trusts and estates attorney, repeatedly declared that he wanted to leave the bulk of his property to his nephew, Jonathan.[292] In 2000, shortly before undergoing major surgery, Ehrlich typed a detailed, fourteen-page document that left three-quarters of the residue to Jonathan.[293] Ehrlich later told several people that he had created a will.[294] But when he died, only an unsigned and unattested version of the 2000 writing was found.[295] On the cover page of this copy, he had indicated that he had mailed the original to the executor.[296] A divided Appellate Division admitted the 2000 document to probate, reasoning that Ehrlich's desire to benefit Jonathan, statements about having made an estate plan, and notation on the cover page showcased his desire to have the instrument serve as his will.[297]

Justice Skillman, however, dissented.[298] Justice Skillman had previously served on the *Macool* panel and joined the majority opinion.[299] Nevertheless, he announced that he no longer believed that the harmless error rule allowed the probate of an unsigned instrument.[300] He noted that the statute kicks in only if "a document . . . was not *executed* in compliance" with the elements for creating a

287. *See id.*
288. *See id.*
289. *Id.* (quotation omitted).
290. *See id.* at 1264 (explaining that Macool "never had the opportunity to confer with counsel after reviewing the document to clear up any ambiguity, modify any provision, or express her final assent to this 'rough' draft").
291. *Id.* at 1266.
292. 47 A.3d 12, 14 (N.J. Super. Ct. App. Div. 2012).
293. *See id.*
294. *See id.*
295. *See id.*
296. *See id.*
297. *See id.* at 18.
298. *See id.* at 20 (Skillman, J., dissenting).
299. *See id.* at 23.
300. *See id.*

valid attested or holographic will.[301] He reasoned that because this language presumes that a "document" has been "executed," harmless error "does not apply if the document was not executed at all."[302] Accordingly, he interpreted the UPC to demand that an instrument at least bear the decedent's signature.

Justice Skillman's reading is unpersuasive. First, let us follow his lead and zoom in until the word "executed" fills the entire screen. The definition of "executed" includes not only "signed," but also the much broader concepts of "done" and "performed."[303] Thus, even if the sentence imposes an obligation on testators, it would not necessarily be to *sign* a purported will. Instead, merely *creating* a purported will would suffice. But more importantly, pulling back to consider the passage as a whole reveals that the pivotal word is not "executed." Instead, it is "not." There are dozens of ways a document can be *not* executed in compliance with the law. A typewritten, signed, and unattested instrument fits that description. But so does a typewritten, *unsigned*, and unattested instrument. Even a sheet of paper with a diagram of a possible future estate plan has been "*not* executed in compliance" with the Wills Act. These words are not a backdoor attempt to impose duties on testators. Rather, they establish the simple point that harmless error governs failed, would-be wills.

The comments to the UPC and Restatement support extending harmless error to unsigned documents.[304] Admittedly, as mentioned above, those sources indicate that the thrust of the new rule is to forgive attestation mistakes.[305] But neither views signature defects as categorically irredeemable. For instance, the Restatement provides: "*Among the defects in execution that can be excused*, the lack of a signature is the hardest to excuse. An unsigned will raises a serious *but not insuperable* doubt about whether the testator adopted the document as his or her will."[306] Likewise, the UPC sees signature flaws as severe, but not fatal:

> The larger the departure from . . . formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent. Whereas

301. *See id.* at 20 (emphasis added).
302. *See id.*
303. *See, e.g.*, BLACK'S LAW DICTIONARY 689 (10th ed.2009); *see also* Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc., 323 S.W.3d 151, 157 (Tex. 2010) (rejecting the "argument that 'to execute' . . . only mean[s] 'to sign'").
304. Although these sources are not part of the statutory text, they will likely influence the contours of the harmless error rule. *See, e.g.*, *Ehrlich*, 47 A.3d at 21 (Skillman, J., dissenting) (relying heavily on the UPC and Restatement's comments); *see also* MONT. CODE ANN. § 72-2-523 (2013) (parroting the UPC's comments); UTAH CODE ANN. § 75-2-503 cmt. (LexisNexis 1993 & Supp. 2014) (parroting the UPC's comments).
305. *See supra* text accompanying notes 141–143.
306. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (1999) (emphasis added).

> the South Australia . . . courts lightly excuse breaches of the attestation requirements, . . . they have been extremely reluctant to excuse non-compliance with the signature requirement.[307]

The import of this passage is that courts in the jurisdiction that inspired harmless error *have* overlooked a testator's failure to satisfy the signature element. Thus, there is no reason to predicate the UPC's harmless error rule on a signed document.

Finally, although my research is hardly conclusive, it supports extending harmless error to all signature defects. First, although a surprising number of unfinished testamentary instruments popped up in the files, missing or misplaced signatures were extremely rare.[308] Thus, construing harmless error broadly may not dramatically increase the volume of cases. Second, it is theoretically possible that a decedent intended an unsigned writing to be her will. To be sure, we think of a signature as the sine qua non of an effective document. In almost every case, the fact that a decedent did not place her imprimatur on an instrument means that she is irresolute about it. But every once in a while, there may be exceptions.[309] I found one such black swan. Somebody handwrote a joint "last will and testament" for Alameda County decedents Eli and Juanita Ramirez on four sheets of ragged gray paper.[310] On the one hand, the last page ends abruptly, and there is a gaping space where the signature and date should be. On the other hand, the document is

307. UNIF. PROBATE CODE § 2-503 cmt. (amended 2010), 8 U.L.A. 215 (2013) (stating also that "[t]he main circumstance in which the South Australian courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other").

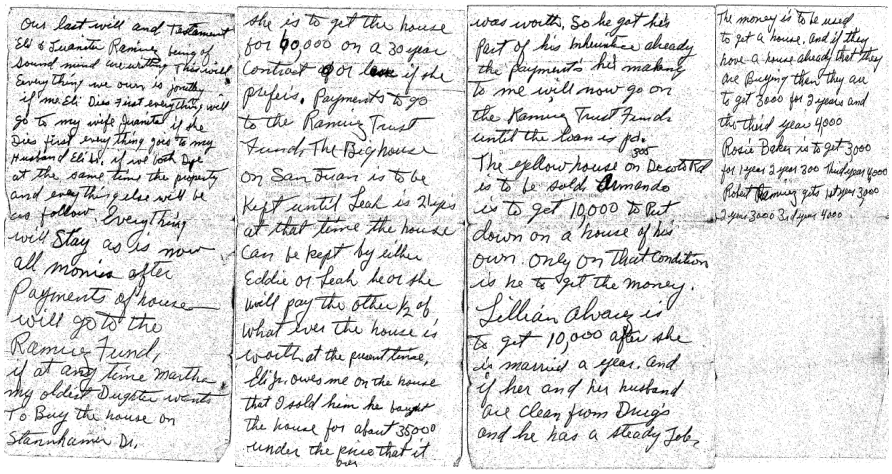
308. *See supra* text accompanying note 272–279.

309. Arguably, *Estate of Chastain*, 401 S.W.3d 612 (Tenn. 2012), discussed in the text *supra* notes 261–266, is such a case. The decedent subscribed a separate affidavit attached to the will rather than the actual testamentary instrument. *See id.* at 615. Notably, under California's harmless error rule and the crabbed interpretation of the UPC, the court would be powerless to admit the document to probate. *See supra* text accompanying notes 284, 298–302. The outcome might even be the same under Colorado's statute, which applies "only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse." COLO. REV. STAT. § 15-11-503(2) (2013). (I say "might" because it is possible that the document had been "acknowledged by the decedent" within the meaning of the statute). In addition, there are other, more-outlandish scenarios in which a document that the decedent intended to be effective goes unsigned. Supposedly, Theodore Dwight, the founder of Columbia Law School, died after he had written "Theodore W. Dwi" on his will. *See* SAMUEL F. HOWARD & JULIUS GEOBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 132 (1955).

310. Purported Will of Eli A. Ramirez at 2–5, Estate of Ramirez, No. FP08368656 (Cal. Super. Ct. Apr. 14, 2008).

detailed and discursive, even stating that one beneficiary should inherit if she "and her husband are clean from [d]rug[s] and he has a steady job."[311]

Eli and Juanita Ramirez's Purported Will


Our last will and Testament
Eli & Juanita Ramirez being of
sound mind and writing this will
Every thing we own is jointly
if Mr. Eli Dies first everything will
go to my wife Juanita if she
Dies first every thing goes to my
Husband Eli Sr. if not both Dye
at the same time the property
and every thing else will be
as follows. Everything
will Stay as is now
all monies after
Payments of house
will go to the
Ramirez Fund,
if at any time martha
my oldest Daughter wants
To Buy the house on
Stanislaus St.
she is to get the house
for $0,000 on a 30 year
Contract or loan if she
prefers. Payments to go
to the Ramirez Trust
Fund. The Big house
on San Juan is to be
kept until Leah is 21yrs
at that time the house
can be kept by either
Eddie or Leah her she
will pay the other ½ of
what ever the house is
worth at the present time,
Eli Jr. owes me on the house
that I sold him he bought
the house for about 35000
under the price that it
was worth, So he got his
part of his inheritance already
the payments he's making
to me will now go on
the Ramirez Trust Fund
until the loan is pd.
The yellow house on Decatur
is to be sold. Armando
is to get 10,000 to Put
down on a house of his
own. Only on that condition
is he to get the money.
Lillian always is
to get 10,000 after she
is married a year. and
if her and her husband
are clean from Drugs
and he has a steady Job.
The money is to be used
to get a house. And if they
have a house already that they
are Buying then they are
to get 3000 for 3 years and
the third year 4000
Rosie Baker is to get 3000
for 1 year 2 year 300 third year 4000
Robert the money gets 1st year 3000
2 year 3000 3rd year 4000

We can only speculate why neither Eli nor Juanita signed the document. Did they only intend it to be a sketch of their estate plan? Did they initially want it to be effective but then change their minds about its contents? Or were they confused about how one executes a *joint* holographic will—a seemingly impossible task given the requirement that a holograph be largely in a *single* testator's handwriting?[312] An unbounded harmless error rule would allow a court to ask those questions, rather than simply closing its doors.

* * *

To summarize, the UPC and Restatement make a series of wise moves related to will execution. They maintain the attestation requirement, which helps testators flag that a document is their will. And yet they shave the rough edges off this rule by validating holographs and excusing harmless errors. As I discuss next, however, my data render a mixed verdict on their approach to ademption by extinction and antilapse.

311. *Id.* at 4.

312. A handful of cases involve joint holographic wills. *See, e.g.*, Puckett v. Hatcher, 209 S.W.2d 742, 743 (Ky. 1948) (noting that it was undisputed that a purported joint holographic will written by both a husband and wife "was not written 'wholly' by either of them [and therefore] could not be regarded as a holographic will"); *cf.* Graser v. Graser, 215 S.W.2d 867, 870 (Tex. 1948) (holding that when a husband handwrote entirety of joint holographic will, the document could be admitted to probate for the purposes of his estate, but not for his wife's).

D. Will Construction

The UPC and Restatement's will construction doctrines have faced stiff resistance. This Subpart defends the Reformers' take on ademption by extinction, but contends that their approach to antilapse goes too far.

1. Ademption by Extinction

Ademption by extinction has long been a thorn in the sides of courts and legislators. As noted, the identity theory of ademption endured decades of criticism.[313] Yet the intent theory embodied in the 1990 amendments to the UPC (and another round of revisions in 1997) has been shunned by states. This section argues that the 1997 UPC deserves a second look.

Recall that section 2-606(a)(6) of the 1990 UPC stated that the empty-handed beneficiary was entitled to recover the value of the vanished specific gift "unless the facts and circumstances indicate that ademption of the devise was intended . . . ."[314] As such, it transformed what had been a crystalline rule (missing assets adeem) into a fuzzy standard (missing assets adeem, but the intended recipient might be able to extract cash from the residuary beneficiaries). This shift prompted concern that a formerly straightforward issue had metastasized into an "invitation to litigation that resembles legalized gambling."[315]

In addition, by presuming that the shortchanged beneficiary was entitled to compensation, the 1990 UPC stood traditional law on its head. This did not sit well with Mark Ascher, who charged the drafters with misunderstanding the nature of specific bequests.[316] Ascher asserted that most testators do not dole out certain things to certain people as part of their overall wealth-distribution scheme.[317] Instead, he claimed that testators generally make specific bequests because they believe "a particular beneficiary has a particular desire for or familiarity with a particular asset."[318] Thus, because the purpose of the gift disappears along with the property, he concluded that most testators would prefer that the empty-handed beneficiary take nothing.[319] Yet Gregory Alexander contended

313. *See supra* text accompanying note 131.
314. UNIF. PROBATE. CODE § 2-606(a)(6) amend. (amended 2010), 8 U.L.A. 265 (2013); *see also supra* text accompanying note 147.
315. Ascher, *supra* note 29, at 646; *see also* Kelley, *supra* note 33, at 887–88 (noting that under section 2-606(a)(6), "each claim might entail expensive and time-consuming litigation").
316. *See* Ascher, *supra* note 29, at 646–49.
317. *Id.* at 644.
318. *Id.*
319. *Id.*

that it is hard to generalize about testators' motivations for using specific bequests.[320] Alexander noted that an owner with few liquid assets might try to allocate her property by making numerous specific gifts (rather than by dividing her estate into fractions).[321] According to Alexander, this testator is not spurred by her loved one's sentimental tie to an object; instead, she is simply attempting to bestow a pecuniary benefit.[322] Thus, he asserted, this testator would want to siphon funds from the residue to the aggrieved beneficiary in order to equalize the overall allocation of her property.[323]

Lawmakers reacted to section 2-606(a)(6) as though it were an electric third rail. A grand total of three states adopted the controversial provision.[324] Thus, in 1997, the Reformers retreated. In a technical amendment, they reversed section 2-606(a)(6)'s burden of proof.[325] The 1997 UPC restores ademption's status as the default rule by declaring that specific bequests vaporize if the testator does not own the asset at death.[326] Nevertheless, the 1997 UPC still allows the disappointed beneficiary to recover the value of the vanished property by introducing extrinsic evidence that such a result would further the testator's intent.[327] Because the 1997 revision did little to assuage fears about lawsuits, only Colorado and New Mexico have implemented it.[328] The overwhelming majority of states, including California, have rejected both iterations of section 2-606(a)(6).[329]

My data suggest that ademption is unlikely to be a fount of litigation, however. For one, I found that ademption is extremely rare. Indeed, in the 332 testate administrations, only twenty (6 percent) featured specific bequests of possessions that the decedent no longer owned. None resulted in a lawsuit or

320. *See* Alexander, *supra* note 27, at 1080.
321. *See id.* at 1080–81.
322. *See id.* at 1081.
323. *See id.*
324. *See* MICH. COMP. LAWS ANN. § 700.2606(1)(f) (West 2007); MONT. CODE ANN. § 72-2-616(1)(f) (2013); UTAH CODE ANN. § 75-2-606(1)(f) (LexisNexis 1993 & Supp. 2014).
325. UNIF. PROBATE CODE § 2-606(a)(6) amend. (amended 2010), 8 U.L.A. 264–65 (2013).
326. *See id.*
327. *See id.*
328. *See* H.B. 14-1322, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014), 2014 Colo. Sess. Laws 1233–34; N.M. STAT. ANN. § 45-2-606(a)(6) (2014).
329. *See, e.g.*, CAL. PROB. CODE § 21133 (West 2011); *see also* ALA. CODE §§ 43-8-227(a)(1)–(4) (Lexis Nexis 1991 & Supp. 2014); ALASKA STAT. §§ 13.12.606(a)(1)–(3) (2012); ARIZ. REV. STAT. ANN. §§ 14-2606(a)(1)–(4) (2012); HAW. REV. STAT. ANN. §§ 560:2-606(a)(1)–(4) (2006); IDAHO CODE ANN. § 15-2-608(a)(1)–(4) (2009); MINN. STAT. §§ 524.2-606(a)(1)–(4) (2012); S.D. CODIFIED LAWS §§ 29A-2-606(a)(1)–(4) (2004); MASS. GEN. LAWS ch. 190B, §§ 2-606(a)(1)–(4) (2012); ME. REV. STAT. tit. 18-A, §§ 2-608(a)(1)–(4) (2012); NEB. REV. STAT. §§ 30-2346(b)(1)–(4) (2008); N.J. STAT. ANN. §§ 3B:3-44(a)–(d) (West 2012); N.D. CENT. CODE §§ 30.1-09-08(1)(a)–(d) (2010); TENN. CODE ANN. §§ 32-3-111(a)(1)–(4) (2007); WYO. STAT. ANN. §§ 2-6-109(b)(i)–(iv) (2013).

even necessitated court involvement. Moreover, few valuable assets are adeemed. As Table 6 reveals, more than half of all the vanished items or objects were personal property. These belongings were just as likely to be curios and bric-a-brac as they were to be jewelry or heirlooms.

TABLE 6. Type of Asset Adeemed by Extinction

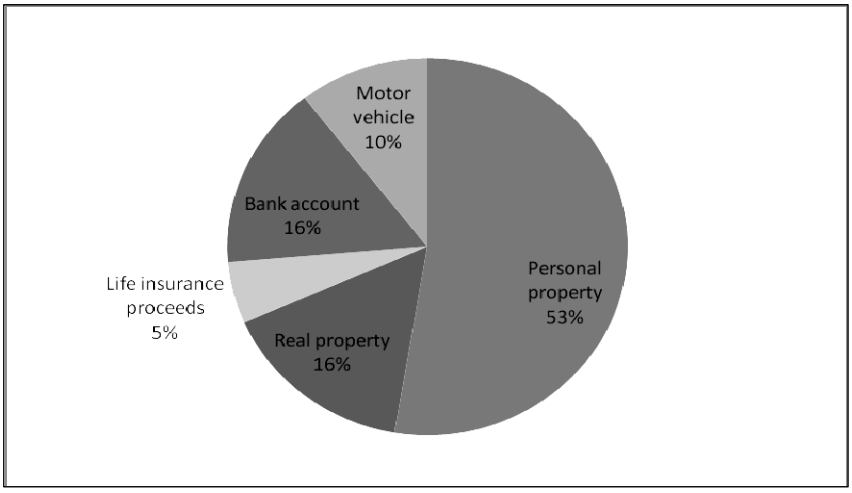


Table 6 also speaks to the debate between Ascher and Alexander about whether to reimburse the disappointed beneficiary for the missing asset. The high percentage of adeemed collectibles and chattels supports Ascher's argument that most testators make specific bequests as a tribute to a particular person, rather than as part of their property-distribution scheme. After all, one would not parcel out "A/V equipment"[330] or an "Elvis Presley plate"[331] as part of one's efforts to divide wealth among competing beneficiaries. In fact, even some of the high-value specific gifts seemed to be rooted in nostalgia rather than pecuniary concerns. For instance, Joyce McMillan executed a will that left real property in Illinois to the widow of her uncle, Bernadette, who lived nearby, and the residue to other friends, relatives, and charities.[332] Joyce then sold the land before she died. It seems unlikely that Joyce would have wanted Bernadette—her far-flung relative—to recover the substantial value of the land at the expense of her residuary beneficiaries. These

330. Will Dated July 15, 2007 at 1, Estate of Manderson, No. RP07351072 (Cal. Super. Ct. Oct. 15, 2007).
331. Estate of Romero Will, *supra* note 258, at 1.
332. Will Dated Nov. 29, 1988 at 1–2, Estate of McMillan, No. RP07326113 (Cal. Super. Ct. May 16, 2007).

scenarios, in which a testator would prefer that a "specific bequest disappear[s] with the asset,"[333] are sufficiently common that the 1990 UPC misses the mark by presumptively compensating the disappointed beneficiary.

Yet not every estate fits this mold. For instance, over 20 percent of the adeemed belongings were financial accounts or life insurance. 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. This is particularly true for individuals who draft their own wills and thus may not be aware that specific bequests are not an efficient way to slice the pie among their friends and family members.[334] Consider Ora Smart, who handwrote her wishes on a fill-in-the-blank form and gave each of her three children their own piece of real property.[335] Because she did not own one of these parcels when she died, California's old school ademption doctrine would have disinherited an entire line of her descendants.[336] Luckily, Ora had purchased another property in Texas, and her beneficiaries agreed to distribute it as a substitute gift to this branch of the family tree.[337] Likewise, Sharafat Siddiqi's holographic will left his savings account to his brother.[338] By the time he died, one of the banks no longer existed, throwing his estate plan into disarray.[339] Cases like these illustrate why a reflexive rule of noncompensated ademption foils some testators' wishes.[340]

The 1997 UPC harmonizes these concerns. Like the common law, it assumes that testators intend to delete specific bequests when they part with the

333. Ascher, *supra* note 29, at 644.

334. Of course, this finding is not necessarily inconsistent with Ascher's view that "the 'average' well-counseled testator almost certainly prefers that each specific bequest disappear with the asset bequeathed." *Id.* Ascher's disagreement with the 1990 UPC may boil down to whether it goes too far to protect the wishes of *do-it-yourself* will-makers.

335. *See* Will Dated Dec. 3, 1999 at 1–2, Estate of Smart, No. RP08380683 (Cal. Super. Ct. Apr. 8, 2008).

336. *See* Consent of Specific Devisee to Ademption by Extinction of Specifically Devised Asset, at 1, Estate of Smart, No. RP08380683 (Cal. Super. Ct. Nov. 12 2008).

337. *See id.* at 1–2.

338. *See* Will Dated Apr. 11, 1985 at 1–2, Estate of Siddiqi, No. RP08385646 (Cal. Super. Ct. May 5, 2008).

339. *See id.*

340. In addition, according to my data, the intended recipients of the adeemed gifts varied. Often they were close relatives. Indeed, 23% of them were the testator's children, 6% were the testator's grandchildren, and 6% were the testator's spouse. Yet a healthy proportion were also nonrelatives (23%) and charities (12%). Testators are probably more likely to want individuals in the former group to be able to obtain compensation for adeemed property than the people and entities in the latter camp. The diversity in beneficiary identity reinforces the fact that testators' motivations vary, and that a bright-line rule is too blunt.

underlying asset.[341] Yet it also allows beneficiaries to obtain remuneration by proving that the testator did not intend to cut them out.[342] It thus finds middle ground between the quicksand of the 1990 UPC's intent theory and the ruthless identity theory.

2. Antilapse

As noted, in most jurisdictions, testators can draft around the antilapse statute by using survivorship conditions such as "to A, if she survives me."[343] Conversely, UPC section 2-603(b)(3) states that "words of survivorship . . . are not, in the absence of additional evidence" sufficient to displace antilapse.[344] This view, which the Restatement echoes[345] but only six states have adopted through legislation,[346] assumes that a will's clear language is meaningless.[347] As I explain below, a better rule would presumptively enforce survivorship provisions.

To illustrate this fork in the doctrinal road, consider *Estate of Snapp*, a recent Tennessee appellate court opinion.[348] Cleo Snapp left the residue of her estate to her three sisters with the caveat that "if any sister should predecease me, then, in that event, the surviving sister(s) shall take the deceased sister's share."[349] All three sisters predeceased Snapp, and two of them left children.[350] Because of its impression that Snapp was close to her sisters, the trial court applied antilapse

341. UNIF. PROBATE CODE, § 2-606(a)(6) (amended 2010), 8 U.L.A. 263 (2013).
342. *See id.*
343. *See supra* notes 99–101 and accompanying text.
344. UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010), 8 U.L. A. 243 (2013).
345. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. h (1990).
346. *See* ALASKA STAT. § 13.12.603(a)(3) (2012); COLO. REV. STAT. § 15-11-603(2)(c) (2013); HAW. REV. STAT. § 560:2-603(b)(3) (2006); MICH. COMP. LAWS § 700.2603(1)(c) (2002); MONT. CODE ANN. § 72-2-613(2)(c) (2013); N.M. STAT. ANN. § 45-2-603(b)(3) (2014); *see also* Ruotolo v. Tietjen, 890 A.2d 166, 173, 177 (Conn. App. Ct. 2006) (adopting the UPC and Restatement's approach to antilapse) *aff'd.* 916 A.2d 1, 1–2 (Conn. 2007). *But see* MINN. STAT. § 524.2-603 (2012) ("words of survivorship . . . *are* a sufficient indication of an intent contrary to the application of [the antilapse statute]") (emphasis added); S.C. CODE ANN. § 62-2-603(C) (2009 & Supp. 2013); TEX. ESTATES CODE ANN. § 255.151 (West 2014); UTAH CODE ANN. § 75-2-603 (LexisNexis 1993 & Supp. 2014); McGowan v. Bogle, 331 S.W.3d 642, 646 (Ky. Ct. App. 2011) (rejecting the argument that the 1990 UPC revision "warrant[s] a deviation from . . . [settled] law").
347. Or, as Mark Ascher more colorfully puts it, the Reformers "apparently believe they can capture the testator's intention as to whether the antilapse statute should apply to a given lapsed bequest more accurately than the testator's own estate planner." Ascher, *supra* note 29, at 655.
348. 233 S.W.3d 288 (Tenn. Ct. App. 2007).
349. *Id.* at 291.
350. *See id.* at 290–91.

and distributed the residue to Snapp's nieces and nephews.[351] Applying classic wills law, the appellate panel reversed, holding that the survivorship clause ousted antilapse and thus the residue passed through intestacy to be shared by Snapp's many relatives.[352] The appellate court explained that because the will was unambiguous, the analysis did not proceed beyond the word "surviving."[353]

The UPC and the Restatement would change this result in two ways. For starters, they would indulge in the opposite assumption: that the survivorship clause does *not* affect antilapse.[354] Thus, the court would presume that Snapp's nieces and nephews inherited the residue. But then the UPC and Restatement would permit Snapp's other intestate heirs to swing the pendulum back by proving that Snapp intended the survivorship condition to be taken literally.[355] This two-tiered approach is driven by the Reformers' suspicion that survivorship clauses are empty word balloons.[356] For instance, the UPC asserts that such provisions raise nothing more than "an inference" that "the testator thought about the matter and intentionally did not provide a substitute gift to the [predeceased] devisee's descendants."[357] The Restatement elaborates, noting that even if a testator is aware that the clause exists, she may not appreciate its severe consequences:

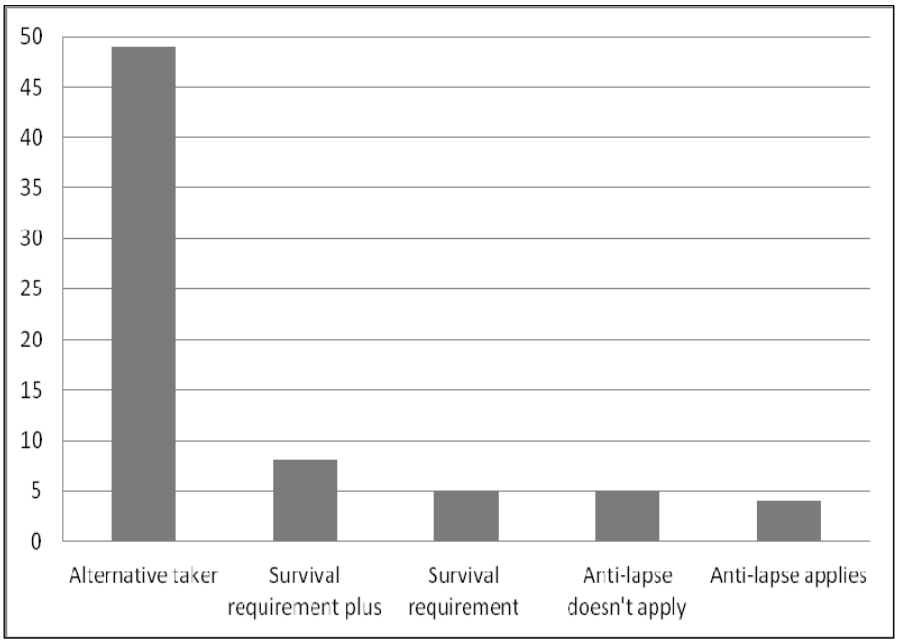
> [T]he testator may not understand that such language could disinherit the line of descent headed by the deceased devisee. When the testator is older than the devisee and hence does not expect the devisee to die first, or if the devisee was childless when the will was executed, it seems especially unlikely that a provision requiring the devisee to survive the testator was intended to disinherit the devisee's descendants.[358]

The Alameda County wills suggest, however, that survivorship clauses are salient to most testators. As Table 7 demonstrates, I found seventy-one lapsed

351. *See id.*
352. *See id.* at 293–94.
353. *See id.* at 293 ("[C]ourts may not make a new will or bequest for a [t]estator but must construe what the [t]estator has written and published.").
354. *See* UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010), 8 U.L.A. 243 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. h (1999).
355. *See* UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010), 8 U.L.A. 243 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 (1999).
356. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. h (1999).
357. UNIF. PROBATE CODE § 2-603 cmt. (amended 2010), 8 U.L.A. 244–49 (2013) (Contrary Intention-the Rationale of Subsection (b)(3)).
358. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. h (1999).

bequests.[359] Forty-nine of these gifts (69 percent) raised no antilapse issue because the testator had named an alternative taker in case a beneficiary died first. These wills went beyond bare survivorship provisions ("to A, if she survives me") and made substitute gifts ("to A, if she survives me, *but if not*, *to X*").[360] Likewise, eight testators (11 percent) achieved the same result with what I call survival requirements plus: language that emphasized that a failed bequest falls into the residue. These testators sent lapsed gifts to a new destination and thus had contemplated outliving their loved ones.

TABLE 7. Applicability of Antilapse



The survival requirements plus clauses highlight another flaw with the UPC and Restatement. I found little standardization among these provisions. They included phrases such as "to A or B, or to the survivor of them,"[361] "to A, if she survives me, but if not, this gift shall lapse,"[362] and "to A, if she survives me, but if not,

359. Two wills contained multiple lapsed gifts, which means that lapse occurred in 69 of 332 testate estates (21%).

360. These express replacement gifts would override antilapse even under the UPC. *See* UNIF. PROBATE CODE § 2-603 cmt. (amended 2010), 8 U.L.A. 249–50 (2013) (Subsection (b)(4)).

361. Will of Edward T. Wong at 1, Estate of Wong, No. RP07350264 (Cal. Super. Ct. Oct. 10, 2007).

362. Will Dated Dec. 15, 1994 at 1, Estate of Saunders, No. RP07312533 (Cal. Super. Ct. Aug. 16, 2007).

this bequest becomes part of the residue."[363] This diversity of language is rarely a problem under conventional law. Because courts take survivorship conditions at face value, these different ways of expressing the same idea displace antilapse.[364] But under the Reformers' approach, the results are often anyone's guess. To be sure, the UPC comments list several supposedly foolproof ways to draft around antilapse, including making a gift "to my two children, A and B, or to the survivor of them"[365] or placing a clause in the residue that says "including all lapsed gifts or failed devises."[366] Yet nothing in the model statute speaks to provisions that state that a failed gift "will lapse" or "shall be added to the residue." Moreover, some of the Reformers' distinctions seem haphazard. The UPC draws a line between a bequest to two named individuals "or to the survivor of them" (which presumptively dislodges antilapse) and to a single named individual "if he survives me" (which does not).[367] Given the similarity between these sentences, it is unclear why they lead down different paths. In fact, this magic-words regime smacks of formalism. To be sure, it is intertwined with a healthy dose of functionalism, since the second step of the Reformers' analysis allows judges to consult all the facts and circumstances when making the final determination about the testator's wishes. But because there may often be little such evidence, the initial setting of the scales is all the more important. On this crucial issue, the UPC and Restatement are as nearly as stilted as the principles they seek to overturn.

This is not to say that the Reformers' concerns are baseless. Several wills seem to justify the UPC and Restatement's jaundiced view of survivorship clauses. Only five testators (7 percent) employed bare survivorship provisions ("to A, if she survives me"). Three of these conditions were appended to bequests to spouses or nonrelatives, however. These individuals do not fall within the relationship required to activate the antilapse statute.[368] Thus, in these instruments,

363. Will Dated Nov. 10, 1997 at 1, Estate of Hanley, No. RP07322236 (Cal. Super. Ct. Apr. 24, 2007).

364. *See supra* text accompanying note 100–101. Of course, even under traditional law, courts sometimes struggle with language that is less clear. *Compare* Allen v. Talley, 949 S.W.2d 59, 60 (Tex. App. 1997) (noting that "unto my living brothers and sisters . . . to share and share alike" displaces antilapse), *with In re* Estate of Kuruzovich, 78 S.W.3d 226, 228–29 (Mo. Ct. App. 2002) (finding that a bequest to three individuals to "share and share alike" does not trump antilapse).

365. UNIF. PROBATE CODE § 2-603 ex. 4 (amended 2010), 8 U.L.A. 250 (2013) (Contrary Intention-the Rationale of Subsection (b)(3)).

366. *Id.* This is consistent with the weight of authority. *See, e.g.*, Estate of Salisbury, 143 Cal. Rptr. 81, 82–84 (Cal. Ct. App. 1978); Colombo v. Stevenson, 563 S.E.2d 591, 592–94 (N.C. Ct. App. 2002); Lacis v. Lacis, 355 S.W.3d 727, 735–36 (Tex. App. 2011). *But see* Blevins v. Moran, 12 S.W.3d 698, 700, 704 (Ky. Ct. App. 2000).

367. UNIF. PROBATE CODE § 2-603 cmt. (amended 2010), 8 U.L.A. 250 (2013) (Contrary Intention-the Rationale of Subsection (b)(3)).

368. *See supra* text accompanying note 97.

the survivorship language was superfluous: Whether or not it existed, antilapse could never apply. Apparently, at least some testators and lawyers do insert survivorship conditions without serious consideration of what they are doing.

The best solution to this dilemma would be to flip the UPC and Restatement's presumption. Because most testators seem aware of the possibility that bequests may lapse, survivorship conditions should be prima facie enforceable. But to minimize the risk of accidental disinheritance, judges should give beneficiaries the opportunity to prove that a testator did not intend to supplant antilapse.[369] This evidence could include the discussions that the testator had with her estate planner or the fact that a testator was particularly fond of one group of beneficiaries or estranged from another. To make this test concrete, recall *Estate of Snapp*.[370] Under my proposal, the court would follow traditional law by assuming that "surviving sisters" means "surviving sisters," and not the testator's nieces and nephews.[371] Yet like the UPC and Restatement, I would liberate this inquiry from the shackles of textualism. The testator's nieces and nephews should be given a chance to prove, as the trial court found, that the testator would have wanted them to fill the void in the will left by their parents' demise.[372] This fusion of the formal and functional would recognize that sometimes words on a page are meaningful, and sometimes they are just words on a page.

CONCLUSION

The debate over the future of wills law has taken place in an empirical vacuum. This Article has attempted to add color and detail to this debate by analyzing a year's worth of probate court records. It has emphasized that wills doctrine should frequently combine formalist and functionalist elements. Courts and legislators can preserve the attestation requirement but validate holographic wills and forgive harmless errors. They can assume that specific bequests dissolve with the property but not be dogmatic about this conclusion. And when it comes to antilapse, they can assume that the language of a will faithfully reflects a testator's intent unless there is strong countervailing evidence. In these ways, they can balance stasis and change, the venerable and the experimental, the lucidity of crystals and the malleability of mud.

369. Arizona and Utah follow such an approach, although they insist on clear and convincing evidence before applying antilapse in the teeth of a survivorship condition. *See* ARIZ. REV. STAT. ANN. § 14-2603(C) (2012); UTAH CODE ANN. § 75-2-603 (LexisNexis 1993 & Supp. 2014).

370. 233 S.W.3d 288 (Tenn. Ct. App. 2007); *see also supra* text accompanying notes 348–353.

371. Estate of Snapp, 233 S.W.3d at 290.

372. *See id.*