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WHERE STRICT MEETS SUBSTANTIAL: OKLAHOMA STANDARDS FOR THE EXECUTION OF A WILL

KATHELEEN R. GUZMAN*

I. Introduction

Oklahoma succession law dates back to the English Statute of Wills, first enacted in 1540.¹ The relevant statute, imported from the Dakotas in the 1800s, remains in essentially identical form today.² Especially where property is involved, some might say that the predictability afforded by such long-standing rules is key to an efficient, functional wealth transfer system. But any statutory scheme that exists in the twenty-first century yet originated in the sixteenth—when medieval overlords sought prayers from pious friars and “five days of fighting” from their knights³—risks asymmetry between its provisions as enacted versus applied.

When history shifts and legal theory turns from function toward form, two simple statutory responses emerge: either do nothing (and thereby force behavior to continue to conform to the law) or do something by changing the law to match extant behavior.⁴ Optimally, all interested parties—from the legislators who make the law through the judges who enforce it—would engage the issues and agree (even if metaphorically) on

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1. Statute of Wills, 1540, 32 Hen. 8, c. 1.

2. See 84 OKLA. STAT. § 55 (2011) (showing little substantive change in the years since statehood); see also L.B. Moore, *The Evolution of Editions of the Oklahoma Statutes*, 8 OKLA. ST. B.J. 131 (1937) (discussing statutory compilation pre-statehood through the late 1930s).

3. For a discussion of feudalism and the incidents of tenure, see generally SUSAN REYNOLDS, *FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED* 48-75 (1994); A. W. B. SIMPSON, *A HISTORY OF THE LAND LAW* (2d ed. 1986).

4. The first option suggests that whatever the issue, times have not changed all that much: the factors that precipitated a given rule remain constant and the rule, on balance, beneficial, irrespective of the modern realities in which it applies. The second option simply flips the first, and might glibly be called “reformation” or “progressivism” whether or not any actual substantive benefits result.

next steps.⁵ The response of a court to a legislative pronouncement, and that of a legislature to a court's, indirectly ensure that the conversations continue, limiting the instances in which old rules and new worlds collide. But things are rarely that direct, especially when distinct institutional actors are at cross purposes or when they do not always mean what they say.

At least two additional possibilities exist, both more complicated and less transparent than those direct options just described. First, a court could claim to uphold a rule as written, but actually undermine it through a light judicial touch.⁶ Second, a court could claim to apply that gentle hand to the rule in action, but continue to levy it strictly. Although reflecting subtle theoretical differences, both approaches exacerbate the problems generated by outdated rules. Both have the capacity to mislead. And yet both could be said to describe the interplay between Oklahoma's will execution statutes, its standards, and its results. The difficulty largely rests with Oklahoma courts' superficial insistence that they apply a particular approach when the holdings themselves reflect a quite different interpretive bent.⁷

Part II of this article begins by recounting the "intent plus formalities" equation that governs a will's validity, including the strict and substantial compliance theories that are used to assess whether a testamentary attempt meets the statutory mandate. Part II closes by highlighting the difficulties generated when significant discrepancy exists between a court's stated compliance theory and that which it actually applies. Drawing from those generalities, Part III clarifies and critiques the paradox of will execution in Oklahoma, assessing schizophrenic rules both too lax and too stringent, to reveal the differences between that which Oklahoma courts say versus do. After noting how Oklahoma courts assess testamentary intent in Part IV, Part V suggests how Oklahoma lawmakers, whether through substantive or interpretive legislative or judicial change, might optimize the fulfillment of testators' expectations without unduly sacrificing efficiency concerns. The boldest step—with, perhaps, the brightest future—would be for Oklahoma

5. Consider the modern debate over the Rule Against Perpetuities as marketability-enhancing versus revenue-impeding. Jurisdictions could retain the rule in its common law form, abolish it entirely (as many have done), or alter it, as Oklahoma has been seriously (and serially) considering, by redefining the period within which remote interests must actually vest. See H.B. 1553, 54th Leg., 1st Sess. (Okla. 2013), available at <http://legiscan.com/OK/research/HB1553>.

6. This tale is a common one, finding favor or critique depending on an observer's view of the precise issue at hand, broader perception of proper judicial roles, or both.

7. See *infra* Part III.

to embrace the “harmless error” doctrine under which a defectively executed will might still be accepted into probate when clear and convincing proof exists that its maker intended it to be a will. Part VI concludes.

Historical and dialogic asymmetry breeds confusion and inefficiency, and given the context of estates litigation, sometimes irremediable mistake: it is too late for a decedent to fix an invalidly executed will. That sort of mistake should be avoided whenever possible, which both the legislature and the court could accomplish were they to act in synch to refine and enforce appropriately pitched succession rules suited to our twenty-first century reality.

II. Rules & Standards: Legislative Enactment, Judicial Application

A. Balancing Formalities and Intent

Wills have existed in some form for centuries. Since their inception, a validly executed will has required the confluence of testamentary intent and statutory formalities. Particularly before the advent of intent-based compliance theory, one without the other has almost never sufficed.⁸

8. Although overwhelming evidence of that intent might soften the rigor with which a court will assess statutory compliance, standing alone it generally will not raise a noncompliant document to “legal will” status. As Prof. Johnson has noted:

[T]he layperson unencumbered by a legal education would probably think it an appalling non sequitur to say that, even though clear and convincing evidence [proves testamentary intent, establishes capacity, and negates wrongdoing], the writing will nevertheless be denied probate--solely because it was not executed in accordance with the statutory formalities intended to ensure these goals. Yet such has been the historic general rule in America.

J. Rodney Johnson, *Wills, Trusts and Estates*, 43 U. RICH. L. REV. 435, 436 (2008).

The converse is also generally true. While a document bearing all statutory formalities presumably raises a pragmatic (if not legal) presumption that testamentary intent exists, proof of its absence will destroy the validity of the will. *See, e.g.*, *Fleming v. Morrison*, 72 N.E. 499, 499-500 (Mass. 1904) (admitting extrinsic evidence to disprove testamentary intent where a will was executed solely to induce beneficiary’s acquiescence to a sexual relationship with testator); *Clark v. Hugo*, 107 S.E. 730, 733-35 (Va. 1921) (holding that perfect rule compliance still requires testamentary intent), *overruled in part by Poindexter v. Jones*, 106 S.E. 2d 144 (Va. 1958); *see also* 1 PAGE ON THE LAW OF WILLS § 5.16 (2003) (“[B]y the majority view[,] parol evidence is admissible to show jest, joke and sham.”); 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, 541-42 (1982) (“[M]ost Anglo-American courts will consider [whether testamentary intent exists] on the merits . . .”).

Apologetics found within the early case of *In re Abrams' Will* admit the tension and reveal judicial self-absolution in the result. The decedent's will was held invalid. Although the court "regretted" that the testator's intent was thwarted by "her failure" to follow statutory requirements for execution, it nevertheless admonished that "to hold otherwise would in effect be to let down the bars to evils against which the statutory provisions are aimed."⁹ Moreover, and as a careful read of the following quote reveals, the *Abrams'* court explicitly acknowledged both the triangulated relationship between courts, legislatures, and constituents as well as the role that its view of structural legitimacy played in justifying its holding:

It may happen, even frequently, that . . . wills truly expressing [their makers' intent] are made without observations of the required forms; [if so], the genuine intention is frustrated by the act of the Legislature, of which the general object is to give effect to the intention. The courts must consider that the Legislature, having regard to all probable circumstances, has thought it best . . . to run the risk of frustrating the intentions sometimes, in preference to the risk of giving effect to or facilitating the formation of spurious wills, by the absence of forms. It is supposed . . . that the evil of defeating the intention in some cases, by requiring forms, is less than the evil probably to arise by giving validity to wills without any form in all cases.¹⁰

In short, intent and formalities are distinct, and both are independently required. But the *Abrams'* court misleadingly casts the decisional option as an all-or-nothing one between some ideal set of formal rules (that virtually guarantees intent) and formless intent. True, a jurisdiction could theoretically dispense with all rules in favor of individuated desire,¹¹ just as intent could (and often has) been sacrificed for efficiency. . . But property rules are heavily localized, and apart from the broad formalities and intent

9. *In re Abrams' Will*, 1938 OK 162, ¶ 9, 77 P.2d 101, 103.

10. *Id.* ¶ 9, 77 P.2d at 103-04 (quoting *In re Tyrrell's Estate*, 153 P. 767, 768 (Ariz. 1915)).

11. Although no United States jurisdiction has taken matters this far, the *Restatement (Third) of Property* and the 2008 iteration of the *Uniform Probate Code (UPC)* have come the closest by stripping rules to a minimum and, more importantly, permitting even the few left standing to be dispensed with entirely upon clear and convincing evidence "that the decedent intended the document or writing to constitute . . . the decedent's will." UNIF. PROBATE CODE § 2-503 (amended 2008), 8 U.L.A. 146 (Supp. 2012).

baseline, there is no particular set of rules that applies across the board. Instead, through statutory enactment and judicial interpretation, jurisdictions determine for themselves what will serve as an enforceable will. The number of possible rule and standard interplays, while not endless, certainly exceeds the two shadelessly antipodal alternatives that the *Abrams*' court suggests. Moreover, in that rules draw content from the circumstances that inform their creation and hopefully evolve as those circumstances change, the evolution of neither statutory prerequisites nor the judicial standards employed in assessing them should generate surprise.

As the *Abram's* case reflects, early will-making doctrine vaunted strict quantitative and qualitative requirements, with design and application emphasis placed squarely on protecting individuals from others as well as themselves, and shielding courts against a welter of suspicious or costly claims.¹² Modern responses to potentially dated rules have varied. One response is indifference. Doing nothing on content levels suggests both the faith that the rules remain valid and the hope that sufficient shortfalls in their attainment—in other words, a holding that an attempted will is invalid—will unmistakably signal the need for compliant perfection the next time around. Presumably fearing the laxity and doctrinal disarray that might result as deviations from clear rules develop, some jurisdictions stay true to this formalistic perspective, perhaps unintentionally superordinating the rules themselves to the intent that they were bred to protect.¹³ Equally clear, however, is that their unyielding application can invalidate testamentary instruments where testamentary intent undoubtedly exists.¹⁴

12. Compliance with the Statute of Wills serves three basic functions: (1) ritualistic, (2) evidentiary, and (3) protective. The ritualistic function impresses on the testator the significance of the act, ensuring that he or she has given it adequate reflection. Requiring a will to be signed and witnessed also confirms the testator's true intent, thus satisfying the evidentiary function. Finally, two witnesses help to ensure that, at the time of execution, the testator was mentally competent and free from undue influence and fraud. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 9-10 (1941).

13. Indeed, one study concludes that most United States jurisdictions continue to adhere to strict compliance requirements. Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 580, 602 (2007).

14. See, e.g., C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error Rule" and the Movement Towards Amorphism* (pt. 2), 43 FLA. L. REV. 599, 712 (1991) [hereinafter Miller II] ("Insistence on strict compliance with the wills formalities has demonstrably produced cases that seem not only harsh and unfair, but absurd"); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate*

Perhaps because there is no “next time” for a decedent whose attempt to die testate has failed, the clear trend is toward remediation.¹⁵

This so-called (and well-documented) “fall of formalism” reflects a modern perception that intent should be central enough to the will-making enterprise to justify absorbing the decreased efficiency costs that might attend an honest and perhaps even dispositive search for its existence.¹⁶ Sometimes the response has been judicial, as where courts create ad hoc exceptions to strict requirements¹⁷ or accept as wills instruments that substantially (although not strictly) comply with the statute as enacted.¹⁸ Such a judicial role should not cause significant concern, particularly where the court candidly admits what it has done. For if legislative inertia explains the retention of a statutory straightjacket, a court’s embrace of “substantial compliance” provides an easy intermediate outlet for the pressures that its heavy-handedness might otherwise create.¹⁹ Legislatures that disapprove of this approach may answer statutorily by tightening the original rule or rededicating to its core.²⁰ Of course, should the legislature agree with the court’s move (or act on its own initiative), more direct responses include liberalizing the number or type of the statutory

Code “Harmless Error” Rule and the Movement Toward Amorphism (pt. 1), 43 FLA. L. REV. 167, 222-29 (1991) [hereinafter Miller I] (cataloguing a series of cases where heavy-handed compliance requirement perversely thwarted legitimate testamentary attempts).

15. For an excellent discussion of the history and liberalization of formal wills rules, see WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, *WILLS, TRUSTS AND ESTATES, INCLUDING TAXATION AND FUTURE INTERESTS* § 4.1 (4th ed. 2010).

16. *E.g.*, James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992).

17. *See, e.g.*, *In re Estate of Snide*, 439 N.Y.S.2d 690 (N.Y. App. Div. 1981) (legitimizing “switched signature” probate where identical and reciprocal wills executed simultaneously are accepted notwithstanding that each party signed the wrong document).

18. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

19. Indeterminacy costs might exist in the interim.

20. For example, a complicated California case wrestled with the appropriate division of a corporation’s disbursement, allegedly in partial liquidation of corporate assets, between income and principal. *In re Estate of Thomas*, 21 Cal. Rptr. 3d 741 (Ct. App. 2004). The *Thomas* court ruled as it did based upon its intent-based interpretation of a state statute, with which the California legislature disagreed and disapproved. The legislature thereafter enacted an emergency measure clarifying the legislation, permitting the court to reconsider legislative authority and its own precedent in the related case that was then pending. *Hasso v. Hasso*, 55 Cal. Rptr. 3d 667, 672-73 (Ct. App. 2007).

requirements themselves²¹ or even dispensing with the rules entirely given sufficient evidence of intent.²²

Each response generates costs. With increased flexibility comes decreased predictability;²³ a focus upon intent demands heightened attention to its definition and proof.²⁴ But that most jurisdictions have at least considered employing one of the described corrective forms suggests the relative consensus that there is a problem to be fixed. As Part III explores, Oklahoma appears to be no exception. Nevertheless, it has oddly straddled the “stay versus change” options and generated results that might be described as the worst of both worlds.

B. Defining Testamentary Intent

Testamentary intent is critical both in its own right and as the backdrop against which execution formalities appear. Yet as reiterated by Page’s noted treatise on wills, intent is notoriously difficult to define and generates less attention to its contours than warranted:

The courts have said again and again that the test whether or not an instrument is testamentary . . . is whether it was executed with . . . testamentary intent. While this is a standard form of orthodox statement, it is in itself of little help since it does not explain what . . . testamentary intent is.²⁵

21. See, e.g., Lindgren, *supra* note 16, at 1011 (noting that the approach of the UPC between 1969 to 1990 was to reduce the required formalities with which a testator must comply, but demand strict compliance with those that remained).

22. The *Restatement (Third) of Property* and the UPC tilt acutely toward intent by paring down the quantity and quality of the rules and even permitting courts to dispense with those that remain upon clear and convincing evidence “that the decedent intended the document or writing to constitute . . . the decedent’s will.” UNIF. PROBATE CODE § 2-503 (amended 2008), 8 U.L.A. 146 (Supp. 2012). This provision apparently applies in seven states: Colorado (COLO. REV. STAT. § 15-11-503 (2012)); Hawaii (HAW. REV. STAT. § 560:2-503 (2008)); Michigan (MICH. COMP. LAWS ANN. § 700.2503 (West 2013)); Montana (MONT. CODE ANN. § 72-2-523 (2011)); New Jersey (N.J. STAT. ANN. §3B:3-3 (West 2013)); South Dakota (S.D. CODIFIED LAWS § 29A-2-503 (2004)); and Utah (UTAH CODE ANN. § 75-2-503 (West 2004)).

23. See, e.g., Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 871 (2012).

24. See, e.g., Katherine R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305 (2011) (discussing the difficulty inherent in defining and locating testamentary intent in principled ways).

25. PAGE ON THE LAW OF WILLS, *supra* note 8, § 5.6 (footnote omitted).

That there is no definite fixed rule for determining testamentary intent, and that each case must stand on its own peculiar facts and circumstances,²⁶ may explain the lazy circularity of simultaneously casting testamentary intent as “the intention . . . to make a will” and a will as “an expression of testamentary intention.”²⁷ Whether taken individually or combined, these tautologies do little to clarify the intent with which a potential will must be executed, and further, impede serious efforts to reconcile older statutes with modern policies.

Beyond the consensus that a testamentary statement excludes that which its maker intends to do in the future (such as later write a will),²⁸ Oklahoma courts reflect this amorphousness and vacillate when defining relevant terms. One discredited (but not overruled) case vacuously states that a will is “a declaration of what a person desires to be done after [his] death,”²⁹ which “may be so defective . . . that it is not entitled to probate but if testamentary in character it is a will, nonetheless.”³⁰ By this logic, testamentary intent is simply any expression of intent to transfer property at death. This definition is overbroad and technically sweeps vague expressions of desire as well as all manner of clearly non-testamentary transfer forms within its bounds.³¹ Elsewhere, Oklahoma courts suggest

26. *In re Augestad's Estate*, 106 P.2d 1087, 1088 (Mont. 1940).

27. Compare, e.g., *In re Kemp's Will*, 186 A. 890, 894 (Del. Super. Ct. 1936) (“Animus testandi is the intention or serious purpose to make a will.”) with GA. CODE ANN. § 53-1-2(17) (West 2013) (“‘Will’ means the legal declaration of an individual’s testamentary intention . . .”).

28. Instead, it describes an act then being done—the current execution of a will. See *In re Paull's Estate*, 1950 OK 8, ¶ 10, 254 P.2d 357, 360; *Craig v. McVey*, 1948 OK 161, ¶ 5, 195 P.2d 753, 754.

29. *Miller v. First Nat'l Bank & Trust Co.*, 1981 OK 133, ¶ 7, 637 P.2d 75, 77 (quoting *Johnson v. Johnson*, 1954 OK 283, ¶ 7, 279 P.2d 928, 930 (per curiam)). Note that the definition does not intimate, as do some jurisdictions, that a will must affirmatively dispose of property. For example, in *Reeves v. Duke*, 1943 OK 212, ¶ 7, 137 P.2d 897, 898, the court found that a handwritten, dated, and signed document that solely nominated executors and directed the payment of certain debts nevertheless reflected testamentary intent and was admissible to probate. The court may, however, have been influenced by the existence of a codicil adding dispositive provisions to the earlier statement.

30. *Johnson*, ¶ 7, 279 P.2d at 930.

31. For example, many life insurance policies, payable on death accounts, and transfer on death deeds are each examples of “will substitutes,” i.e., death-triggered transfers that approximate the ambulatory nature of the will but which are not themselves wills, nor intended to be, and which avoid probate. Such documents are intended to substitute for, rather than be, a will. As such, their underlying intent neither could, nor should, truly be considered “testamentary” notwithstanding the ranging definition that the *Johnson* court proffered.

that testamentary intent is intent to transfer property at death through the specific document proffered, intended, and understood by its maker as a will.³² Although arguably equally flawed as underinclusive,³³ this is the definition that the Oklahoma courts adopt when it suits them, and it comports with a common understanding of the term.³⁴

III. The Disintegration of Execution Rules, Statements & Standards

Oklahoma statutes control the testate succession of all of a domiciliary decedent's personal property as well as any of her real property located within the jurisdiction, and the following review of Oklahoma law might reveal statutory perfection—if possible—in balancing testamentary intent with formalities. But while a purely content-based assessment of a particular legislative enactment is always relevant, it is usually also debatable. Moreover, wills formalities litigation is statute in action. If additional virtue (beyond pure statutory content) is to be found in confluence between statutory text, judicial statements about how a court is

32. See, e.g., *In re Young's Estate*, 1923 OK 729, ¶ 2, 219 P. 100, 100 (requiring that it satisfactorily appear that the testator intends the *particular instrument being offered into probate* as a will).

33. Requiring subjective acknowledgement that the testator's expressed testamentary intent is reflected in a document that the testator independently deems her "will" could defeat statutorily compliant documents where their makers' goals are clear but more diffuse. For example, when the proffered instrument is a letter, which is normally not intended dually to constitute communication and actual property disposition, such evidence can be elusive absent some demonstration of the writer's belief that the letter itself would have actual legal significance. Compare *Estate of Blake v. Benza*, 587 P.2d 271, 273 (Ariz. Ct. App. 1978) (finding the testator's view of the letter as an actual will was sufficient where she admonished letter recipient to "SAVE THIS") and *In re Kimmel's Estate*, 123 A. 405, 406 (Pa. 1924) (holding the testator's view of the letter as an actual will was sufficient where he suggested that the letter recipients "Kepp [sic] this letter lock it up it may help you out") with situations where nothing in the subject correspondence reflects its writer's perceived importance thereof, or where the correspondence itself reflects its writer's intent to make a future will. Outcomes often turn on the court's willingness to supplement the proffered text with extrinsic evidence relating to intent.

34. See, e.g., GERRY W. BEYER, *WILLS, TRUSTS AND ESTATES: EXAMPLES AND EXPLANATIONS* § 5.3 (5th ed. 2012) ("The testator must intend that the very instrument the testator executed [will serve as] the testator's will; that is, the document that states the testamentary desires to be effective upon death."); PAGE ON THE LAW OF WILLS, *supra* note 8, § 5.14 ("Most states have the rule that in order for an instrument to constitute a testamentary disposition, it must show the testator's intention to make a testamentary gift by 'that very [instrument or] paper itself.'"). See generally Guzman, *supra* note 24 (discussing variations on the definition of testamentary intent and the difficulties created thereby).

applying that text, and judicial conduct when actually engaging that application, Oklahoma law falls acutely short.

Oklahoma law recognizes the attested will, the holographic will, and the oral will.³⁵ The attested will must be either witnessed or notarized.³⁶ It is the most formal option and is accepted in every United States jurisdiction.³⁷ The holographic will, both more populist and less jurisdictionally embraced, dispenses with the requirement of witnesses under the theory that requiring it to be handwritten replaces the safeguards that attestation would otherwise provide.³⁸ Finally, although the relatively rare oral (or nuncupative) will suggests informality, cost-effectiveness, and ease, significant statutory requirements curtail its utility.³⁹

As presently detailed, each will form carries its own set of statutory requirements and theoretically distinct standards of attaining them. The rules are facially straightforward, particularly as statutorily expressed.

35. See 84 OKLA. STAT. §§ 46, 54, 55 (2011).

36. *Id.* § 55.

37. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 (1999) (detailing state specifics for the attested will). For detailed discussion of the attested will in Oklahoma, see *infra* Part III.A.

38. See, e.g., Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 169 (1988) (“The justification for authorizing holographic wills lies almost exclusively on the grounds that it is exceedingly difficult to counterfeit another’s handwriting and that requiring the will to be handwritten is an effective substitute for the evidentiary function of attesting witnesses.”) (citations omitted). For specifics on the holographic will in Oklahoma, see *infra* Part III.B.

39. The Oklahoma law on nuncupative wills is instructive. First, only personal property with a total value not exceeding one thousand dollars may be transferred. 84 OKLA. STAT. § 46(1) (2011). Additionally, the Statute of Frauds, 15 OKLA. STAT. § 136(5) (2011), bars oral agreements to transfer real property, and a declaration of trust must be in writing if the *res* is to include real property. 60 OKLA. STAT. § 172 (2011) (business trusts); *id.* § 175.6(F) (express trusts); see also *In re Estate of Stokes*, 1987 OK 119, ¶ 14, 747 P.2d 300, 302; *Girdner v. Girdner*, 1959 OK 50, ¶ 20, 337 P.2d 741, 745. Second, the will must be proved by two persons present at its making, one of whom must have been asked by the testator to witness it. 84 OKLA. STAT. § 46(2) (2011). Third, when the will was made, the testator must have been actually engaged in field or shipboard military service *and* suffer actual “contemplation, fear or peril of death, or [expect] immediate death from an injury received the same day.” *Id.* § 46(3); see also *Ray v. Wiley*, 1902 OK 43, ¶ 6, 69 P. 809, 810 (reversing lower court ruling admitting farmer’s alleged nuncupative will to probate by noting that “[e]ven the soldier who is not in the field, nor the person doing duty on shipboard not at sea, cannot make a nuncupative will. The right to make a nuncupative will is confined to the two classes . . . all other persons of every character and occupation are excluded from this right.”).

Because there is but one case in Oklahoma addressing the nuncupative will, it will not be discussed further in text.

Nevertheless, their careful exposition informs on practical and theoretical fronts: facility with the rules both prevents their inadvertent noncompliance and enhances meaningful assessment of their utility. What is more, their application is not always so clean, a factor that might hold more import during litigation rather than at the drafting stage.

Aligning with the populism reflected in the rule reduction that has characterized wills law over the past half-century or so,⁴⁰ Oklahoma courts sometimes glibly proclaim that substantial statutory compliance is all that is required to validate an attempted attested will.⁴¹ Ironically given national trends, closer inspection of the cases reveals that the court may protest too much.⁴² A simple read of facts against holdings suggests that Oklahoma actually often demands strict compliance, however loath a court might be to admit it.⁴³ Indeed, even documents reflecting clear testamentary intent and meeting extant legislative requirements have been rejected through the courts' imposition of "rules" that find zero basis in statutory articulation.⁴⁴

Conversely (although the standard is elusive), Oklahoma courts assert that strict rather than substantial compliance is compelled for the less common (and less uniformly favored) counterpart—the holograph.⁴⁵ It is understandable and perhaps even appropriate to require statutory perfection for a transfer form that is already so short and easily accomplished. But again, as this article will soon detail, some cases belie the claim. Case law review reveals a final roundabout twist. The rules for the holographic will are fewer and "stricter" than those mandated for the safer, more intent-reflective, more numerous, and purportedly, more forgiving attested will. Nevertheless, the court's occasional accommodation of casual holographic attempts paradoxically suggests that it is more forgiving of deviation from the former than the latter.⁴⁶

40. See, e.g., Lindgren, *supra* note 16, at 1011.

41. See *infra* note 53 and accompanying text.

42. *Id.*

43. See *infra* notes 60-64 and accompanying text.

44. See *infra* notes 88-98 and accompanying text.

45. See *infra* Part III.B.

46. See *infra* Part III.B.2. The only instance of symmetry between rules and result regards the nuncupative will. Here, the court claims to be—and in the single case assessing the nuncupative will, was—strict. *Ray v. Wiley*, 1902 OK 43, ¶ 6, 69 P. 809, 810. This should not be surprising given law's inclination to curb the moral hazard inherent in permitting an interested survivor to benefit from the claimed statements of a dead man.

A. The Attested Will

Oklahoma wills law dates back to the English Statute of Wills, first enacted in 1540.⁴⁷ The original act required a will to be in writing, but did not require the testator's signature or other formalities.⁴⁸ In fact, instructions dictated to, and committed to writing by, a third person were deemed adequate.⁴⁹ The English Statute of Frauds of 1677 added restrictions to the transfer of real estate at death, requiring the decedent's signature and attestation or subscription by three witnesses.⁵⁰ The Wills Act of 1837 unified the requirements for the transfer of personal and real property at death, requiring all testamentary instruments to comply with the following rules:

No will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned; . . . it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.⁵¹

With minor distinctions, this approach has survived through territory and statehood, and remains intact.⁵² The attested will in Oklahoma must be

47. Statute of Wills, 1540, 32 Hen. 8, c. 1.

48. *Id.*

49. *Brown v. Sackville*, (1552) 73 Eng. Rep. 152 (K.B.) (finding a will devising real estate complied with the statute where testator, alive when the will was prepared by a counselor per testator's instructions, died before the will was read).

50. Statute of Frauds, 1677, 29 Car. II, c. 3, § 5.

51. Wills Act, 1837, 1 Vict. c. 26, § 9. As compared to the Statute of Frauds, the Wills Act reduced the number of witnesses to two. However, the Wills Act required all witnesses to be present at the same time, while the Statute of Frauds permitted separate witness attestation. In addition, the Wills Act required the testator to sign at the end or foot of the will, while the Statute of Frauds only required subscription by the witnesses. Although the Oklahoma statute requires subscription by the testator, it adopts the English Statute of Frauds approach, permitting the witnesses to attest separately. See 84 OKLA. STAT. § 55 (2011).

52. See 84 OKLA. STAT. § 55 (showing little substantive change in the years since statehood); see also Moore, *supra* note 2, at 131 (discussing statutory compilation pre-statehood through the late 1930s).

written, subscribed, published, and attested in a form that substantially complies with the statute.⁵³

1. General Formalities

a) Writing

An attested will must be written, presumably in a permanent form.⁵⁴ A photocopy of the will does not suffice.⁵⁵ Although the issue has not arisen in Oklahoma case law, it appears that neither a video nor audio tape-recorded expression of testamentary intent would satisfy the writing requirement demanded by the statute. First, the Uniform Probate Code (UPC), which in theory subordinates all formalities to intent, is silent on the admissibility of such a communicative form. This suggests that a stricter jurisdiction (which would include any that, like Oklahoma, have not adopted the UPC provisions) would be averse to accepting a recording rather than merely agnostic. Second, although somewhat recent legislation permits electronic records and signatures in certain contexts, wills and similar arrangements are not among the permitted contexts.⁵⁶ Third, it would seem that such a significant inroad on the requirement of a “document” would be handled legislatively rather than through the courts. To date, Nevada is the only state to have passed an electronic wills statute.⁵⁷

53. *Hobbs v. Mahoney*, 1970 OK 209, ¶ 11, 478 P.2d 956, 958; *King v. Gibson*, 1952 OK 333, ¶ 11, 249 P.2d 84, 87; *Moore v. Glover*, 1945 OK 322, ¶ 23, 163 P.2d 1003, 1007; *In re Dunlap’s Will*, 1922 OK 282, ¶ 0, 209 P. 651, 651 (syllabus of the court) (stating that strict compliance is only required for nuncupative and holographic wills).

54. 84 OKLA. STAT. § 55. Although a conveyancing statute requires that all instruments affecting real estate title be written in English, 16 OKLA. STAT. § 28 (2011), the statute is satisfied upon translation of a will written in another language. *Heupel v. Heupel*, 1946 OK 263, ¶ 7, 174 P.2d 850, 851. The 2010 passage of State Question 751, amending Oklahoma’s Constitution to add Article XXX, § 1 (requiring “all official actions of the state [to be] conducted in the English language”) should not alter this result.

55. *In re Estate of Goodwin*, 2000 OK CIV APP 147, ¶ 16, 18 P.3d 373, 376.

56. For example, recognizing the efficiencies that electronic transactions yield, Oklahoma fairly early enacted the Electronic Records and Signature Act of 1998, 15 OKLA. STAT. §§ 960-68. Wills were not included within its parameters. Oklahoma’s enactment of the Uniform Electronic Transfers Act (UETA) in 2000 repealed the prior law; consistent with its earlier legislation, however, wills remain excluded, along with codicils and testamentary trusts. 12A OKLA. STAT. §§ 15-101 to -121 (2011). See also the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. §§ 7001-7006 (2012), which excludes wills from its coverage. *Id.* § 7003(a)(1).

57. NEV. REV. STAT. ANN. § 133.085 (West Supp. 2011). For more general discussion of the issues, see *In re Reed’s Estate*, 672 P.2d 829, 834 (Wyo. 1983) (refusing to find that audiotaped will was a “writing” for purposes of wills statute); Gerry W. Beyer & William R.

b) *Subscription*

An attested will must be subscribed (signed at its logical end) by the testator⁵⁸ or by a proxy at the testator's request and in the testator's presence.⁵⁹ The physical end of a will, partially determined by the very definition of a will, may or may not be considered its logical end.

There are several circumstances in which a court could hold that the subscription requirement failed. If a particular document reflected neither subscription nor any arguable signature at all, the will would presumably fail under both strict and substantial compliance standards.⁶⁰ This result is clearly defensible in at least some situations as failure to sign a document suggests no intent to be bound by it. By contrast, a court could find that no signature appeared at the document's close (i.e., no subscription), but that an arguable signature appeared somewhere else, such as at the document's beginning (e.g., in the exordium clause),⁶¹ within its dispositive body,⁶² or

Buckley, *Videotape and the Probate Process: The Nexus Grows*, 42 OKLA. L. REV. 43 (1989). With the advent and increasing use of electronic signatures and other technologically driven documents, it is possible that the scope of a proper writing will eventually be enlarged. See, e.g., Christopher B. Woods, Comment, *Commercial Law: Determining Repugnancy in an Electronic Age: Excluded Transactions Under Electronic Writing and Signature Legislation*, 52 OKLA. L. REV. 411 (1999); Ronald K. L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 540-42 (1992).

58. 84 OKLA. STAT. § 55(1) (2011). Any mark intended by the testator to serve as a signature will suffice. *Hicks v. Cravatt*, 1951 OK 219, ¶ 13, 235 P.2d 936, 938.

59. 84 OKLA. STAT. § 55(1); see also *Coffey v. Conney*, 1962 OK 107, ¶ 11, 372 P.2d 226, 228 (permitting a proxy signature). While the proxy should also sign her own name as required under title 84, section 56 of the Oklahoma Statutes, failure to do so will not invalidate the will. *In re Me-hun-kah's Estate*, 1920 OK 146, ¶ 6, 189 P. 867, 868; *Wattenbarger v. Wattenbarger*, 1913 OK 485, ¶ 3, 135 P. 1141, 1143.

60. Obviously, no signature at all cannot meet strict compliance requirements, and given its prominence within any set of formalities requirements, its total absence would suggest that substantial compliance was similarly missing. As Professor Langbein observes,

[t]he substantial compliance doctrine would virtually always follow present law in holding that an unsigned will is no will; a will with the testator's signature omitted does not comply substantially with the Wills Act, because it leaves in doubt all the issues on which the proponents bear the burden of proof The formality of signature is so purposive that it is rarely possible to serve the purposes of the formality without literal compliance.

Langbein, *supra* note 18, at 518; see also *Miller II*, *supra* note 14, at 635-53 (discussing signature requirements in detail).

61. The exordium clause is introductory material that generally opens the will (e.g., "I, John Jones, hereby declare this to be my last will and testament, and revoke all wills and codicils that I have heretofore made").

after its end (e.g., the beginning of an appended document, such as an attestation clause or self-proving affidavit).⁶³ Because a signature within these locations would arguably fail the “subscription” requirement, strict compliance would void the entire will, while substantial compliance would ask whether the principles underlying the will formalities were nevertheless served either to uphold the entire document or invalidate just those provisions appearing after that signature, leaving previous material intact. Although established through dicta, it appears that an Oklahoma court would void the entire will.⁶⁴

In *Coplin v. Anderson*, the Oklahoma Supreme Court seemed to take the substantial compliance route.⁶⁵ It determined that the testator’s signature, which physically followed all testamentary dispositions but was inserted in a designated blank within an attestation clause appended to the will, complied with the attested will statute.⁶⁶ In finding valid execution, the court lectured that “[t]o reach a different conclusion would in our opinion, be unnecessarily raising form above substance to destroy a document that was undoubtedly the will of the testatrix.”⁶⁷

This language initially appears significant. However, the court’s holding is limited and did not actually signal the court’s willingness to sidestep the subscription requirement any time that the proffered document credibly reflects the decedent’s testamentary desires. As such, while the holding might seem to take a substantial compliance stance (and although the dissent inaptly so characterized it⁶⁸), the court actually took pains to insist

62. For example, John Q. Doe’s attempted will, while not technically subscribed at its end, could include a handwritten provision stating that certain property was to pass pursuant to the terms of “The John Q. Doe Revocable Trust.”

63. Generally, an attestation clause is a clause that describes how the execution ceremony occurred and is signed by the witnesses, while a “self-proving affidavit” is essentially that same clause, sworn to. See *infra* Part III.A.1.d.3 for details on both and their evidentiary effect. More specifically, “most courts, like our own, recognize that the attestation clause is not a part of the will proper.” *Coplin v. Anderson*, 1955 OK 26, ¶ 5, 281 P.2d 186, 187.

64. See *Munson v. Snyder*, 1954 OK 257, ¶ 9, 275 P.2d 249, 252-53 (Noting that “the main purpose of [subscription] being to void a will wherein dispositive provisions follow the signature of the testator,” the court found no sustainable objection where the will was written and then signed on “two sides of one sheet of paper rather than on one side only of two sheets of paper.”).

65. *Coplin*, ¶ 8, 281 P.2d at 188.

66. *Id.*

67. *Id.* ¶ 8, 281 P.2d at 189 (quoting *In re Chase’s Estate*, 124 P.2d 895, 900 (Cal. Ct. App. 1942)).

68. *Id.* ¶ 8, 281 P.2d at 190 (Halley, J., dissenting).

that it was merely finding that the statutory requirements had indeed been met:

[O]ur Legislature . . . did not intend nor purport to specify the exact line or place at such end [of a will] where the signature had to appear to be competent and sufficient as a subscription; and when the testator's signature appears at such end, then the statutory requirement as to its location on the document is met. We refuse to extend the legislative mandate further than its plain wording implies and to add thereto a prohibition against such signature appearing in the attestation clause.⁶⁹

Read in that light, the court was merely adopting a more liberal interpretation of an existing statutory requirement rather than truly invoking the substantial compliance doctrine to save an otherwise invalid will.⁷⁰

Returning to the statutory essentials, subscription must be either simultaneously made or subsequently acknowledged by the testator in the presence of the attesting witnesses.⁷¹ This ideally occurs through an execution ceremony where the testator and all witnesses are present and watching while the testator appends a signature or acknowledges a preexisting one. Compare a testator's declaration that "this is my will" with "that was my signature." It is questionable whether an Oklahoma court would deem the explicit acknowledgement of the first to simultaneously suffice as an implicit acknowledgment of the second.⁷² On one hand, it is unlikely that an individual would adopt a signed document as her own without also adopting the signature that it bears. On the other, because title 84, section 55(3) of the Oklahoma Statutes independently requires publication, perhaps the more specific acknowledgment—of the signature itself, rather than merely the will in which it appears—must be made to

69. *Id.* ¶ 8, 281 P.2d at 188. Semantically, however, note how the court carefully used the word "document." Arguably, much turns on how that court would define a "will," as it would seem basic that a signature at the logical end of a "will" is not a signature at the start of a subsequent document.

70. *See also In re Burke's Estate*, 1979 OK CIV APP 76, ¶¶ 8-10, 613 P.2d 481, 483-84 (relying on *Coplin* to validate a testator's subscription within the attestation clause, but invoking "sufficient compliance" in finding that the remainder of the requirements had been met).

71. 84 OKLA. STAT. § 55(2) (2011).

72. *Compare Glenn v. Mann*, 214 S.E.2d 911, 914 (Ga. 1975) (permitting a testator's acknowledgment that a document was his will also to suffice as signature acknowledgment), with *In re McKellar's Estate*, 380 So. 2d 1273, 1275 (Miss. 1980) (invalidating will where the testator failed to acknowledge that she had previously signed the will).

render the requirement found in section 55(2) meaningful. As presently discussed, the paces through which publication is marched, notwithstanding the courts' repeated iteration of the substantial compliance standard, renders it likely that an Oklahoma court would take the more stringent view.

c) Publication

Oklahoma law requires that the testator "publish" the document, i.e., convey to the attesting witnesses that the instrument is intended as a will at either subscription or acknowledgment.⁷³ Publication is generally designed to prevent fraud.⁷⁴ A progressive court would thus focus on the circumstances of execution and, absent the intimation of fraud, find that publication was properly effected. That does not appear to be the case in Oklahoma.

As a relatively rare requirement, Oklahoma's continued call for publication is unusual enough.⁷⁵ More puzzling still is the disparity between the court's rhetoric and the litigation results. In the language of the case law, publication is discharged whenever the testator expressly or impliedly communicates to the witnesses, by words or by conduct,⁷⁶ the nature of the document and the witnessing function they are to perform.⁷⁷ Under that sort of flexible construct, it would be illogical to claim that publication could *never* be satisfied by contextually assessing dialogue, interaction, and conduct between execution parties without the testator independently and actively expressing the same information.⁷⁸ And yet

73. 84 OKLA. STAT. § 55(3). Publication need not (and in practice, usually does not) entail revealing the actual contents of the will.

74. *In re Stover's Will*, 1924 OK 917, ¶ 8, 231 P. 212, 214. Fraud in the execution is when a third person misrepresents to the testator the character or contents of the instrument that the testator signs. *See, e.g., In re Estate of Dabney*, 740 So. 2d 915, 923 (Miss. 1999); *see generally* PAGE ON THE LAW OF WILLS, *supra* note 8, § 14.3.

75. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. h, n.7 (1999) (revealing that only seven other jurisdictions demand publication at all, one of which limits the requirement to proxy signatures and another more indirectly providing that witnesses must understand that they are signing a will).

76. *See, e.g., In re Estate of Samochee*, 1975 OK 143, ¶ 16, 542 P.2d 498, 500 (acknowledging will by nodding in response to questions by interpreter was sufficient to constitute publication).

77. *In re Estate of Hering*, 1967 OK 82, ¶ 6, 426 P.2d 685, 686; *In re Sawyer's Estate*, 1949 OK 182, ¶ 4, 209 P.2d 864, 865; *Speaks v. Speaks*, 1923 OK 404, ¶ 18, 224 P. 533, 536.

78. *Compare Price v. Price*, 1971 OK 6, ¶ 479 P.2d 952, 954 (finding no publication where testator assented when, after will execution ceremony, son asked "is this the way you want [it] to be?"), *with In re Estate of Mowdy*, 1999 OK CIV APP 4, ¶ 15, 973 P.2d 345,

notwithstanding some early cases on point, that is exactly what a careful review of Oklahoma law reveals.⁷⁹

The long view of publication in Oklahoma reflects an early stringency followed by intermittent fits of judicial activity with substantial compliance overtones. Nearly a century ago, the Supreme Court of Oklahoma first addressed whether publication had been met where the testator and witnesses did not speak the same language. In *Hill v. Davis*, the testator shared the Creek language with a single witness, who translated for the others the testator's declaration that the document was his will and his request for them to attest.⁸⁰ In refusing to admit the will to probate, the court held that the testator and witnesses must speak the same language or no publication could occur.⁸¹

The court applied a more liberal test in 1924 when it held, in *Speaks v. Speaks*, that adequate publication existed where witnesses were present during the will's preparation even though the testator never expressly requested that they affix their signatures.⁸² But later that very year, despite the absence of any intimation of foul play, the court again reversed course by holding that publication had not been discharged. In *In re Stover's Will*, the testator and her lawyer were finalizing her will in the lawyer's office.⁸³ Witness #1 (a second attorney who shared the office with the testator's attorney) entered the room, briefly conversed with the testator, then moved to the rear of the office to speak with Witness #2.⁸⁴ Thereafter, the testator's attorney brought the will to the two of them, and within the presence and hearing of the testator, requested that they sign as witnesses to testator's signature on the document that she had requested him to prepare.⁸⁵

Although the case includes heartening language reinforcing the flexible publication approach, the court determined that "[t]he great weight of the evidence" supported the conclusion that the testator did not publish the will,

350 (upholding publication where testator's request to third party to witness his will was overheard by actual witness to whom testator turned and handed his document after third party refused to sign).

79. See *infra* notes 88-113 and accompanying text.

80. 1917 OK 340, ¶ 2, 167 P. 465, 466, *overruled by In re Nitey's Estate*, 1935 OK 1218, ¶ 27, 53 P.2d 215, 220.

81. *Id.* ¶ 7, 167 P. at 468; see also *In re Will of Tiger*, 1923 OK 1081, ¶ 4, 221 P. 441, 443; *McCarty v. Weatherly*, 1922 OK 12, ¶¶ 15-19, 204 P. 632, 636-37.

82. 1923 OK 404, ¶ 18, 224 P. 533, 536.

83. *In re Stover's Will*, 1924 OK 917, ¶ 1, 231 P. 212, 212-13.

84. *Id.* ¶ 1, 231 P. at 213.

85. *Id.*

a requirement that the court viewed as critical to impeding fraud and thwarting the untoward impulses of “designing persons” seeking to secure rights that they otherwise would lack.⁸⁶

The test for publication morphed into an often-repeated standard over the ensuing years, under which the testator was “not required to make a formal request that the witness sign or make an express declaration that the instrument was his will” as long as she “conveyed [that information to the witnesses] by words or conduct.”⁸⁷ But any relaxation of publication appears to have become more stated than real.

The rigidity of publication finds expression in *Price v. Price*, where the testator executed a will that treated his children disparately.⁸⁸ Inside the testator’s house, the primary beneficiary read the will to the testator in the presence of Witness #1, after which the testator expressed satisfaction with the will and directed the beneficiary to summon a farm hand from the field to serve as Witness #2.⁸⁹ The beneficiary did so, advising Witness #2 that the testator wanted him to enter the house to witness his will.⁹⁰ When all parties convened back inside the house, the beneficiary asked the testator, “Dad, is this the way you want this to be?”⁹¹ Although the testator “nodded or expressed assent,” the court held that publication had not occurred.⁹²

Amazingly, the court relied on the “different language” cases⁹³ to find that Witness #2 would not have known that he was executing a will but for discussion outside of the testator’s presence.⁹⁴ The court concluded that the statement made by the testator in the presence of Witness #1, coupled with the parties’ subsequent conduct and assent, did not unambiguously indicate the testator’s publication of the document or the witness’s realization of the precise role that he played.⁹⁵ The court rejected what would have been an

86. *Id.* ¶¶ 2, 8, 231 P. at 214. The court may have been swayed or at least emboldened by its belief that along with a failure of publication, the witnesses did not independently seem to know that the document they signed was a will, nor had it been signed or acknowledged in their presence. These distinctions could be salient were a better test case to arise.

87. *Howard v. Estate of Smith*, 1959 OK 150, ¶ 4, 344 P.2d 260, 262.

88. 1971 OK 6, ¶ 3, 479 P.2d 952, 953.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* ¶¶ 3, 8, 479 P.2d at 954.

93. *Price* was decided in 1971, long after the Court had discredited the holding in *Hill v. Davis* and its progeny. See *supra* notes 80-81 and accompanying text.

94. *Price*, ¶ 8, 479 P.2d at 954.

95. *Id.*

intelligent and warranted test even though it suspected no fraud, ironically observing that execution effectiveness should be judged by a uniform standard.⁹⁶ Capping matters, the court ignored the presumption of proper execution normally created when a will contains an attestation clause,⁹⁷ citing the farm hand's failure to read that clause which had appeared directly above his signature.⁹⁸

The cramped approach to publication that *Price* displayed was recently replicated in *In re Estate of Hanson*.⁹⁹ Although the record is not clear, it appears that the testator executed a will favoring her daughter over her sons.¹⁰⁰ The daughter testified that at her mother's request, she drove her mother into town to accomplish its attestation.¹⁰¹ The two stopped at an establishment owned by the daughter's friend, where the testator purportedly "had [the daughter] ask [the friend and proprietor] if he would help witness her will, [as] she'd like to get it finalized."¹⁰² The proprietor and his employee apparently agreed, "if [the testator] would come in."¹⁰³ Allegedly, the daughter returned to the car and so informed the testator, who then entered the establishment and directly told the putative witnesses that "she was glad they would do this for her."¹⁰⁴ The proprietor and his employee then signed.¹⁰⁵

The will was offered for probate.¹⁰⁶ When asked whether he remembered speaking to the testator in conjunction with his attestation, the proprietor responded "I don't remember. Hell, that was too many years ago."¹⁰⁷ He did recall, however, that the testator signed the document within his presence.¹⁰⁸ The employee recalled little more, other than hearing the daughter say (in the mother's presence) that it was the mother's

96. *Id.*; see also *In re Stover's Will*, 1924 OK 917, ¶ 8, 231 P. 212, 214.

97. See *infra* note 160 and accompanying text.

98. *Price*, ¶ 8, 479 P.2d at 954. Before this case, the court had never pointed out the significance of witnesses actually reading the attestation clause, an additional requirement that appears nowhere in the statute and that is probably seldom satisfied.

99. *In re Estate of Hanson*, No. 109,527 (Okla. Civ. App. Dec. 28, 2012) (unpublished opinion), available at <http://oklegal.onenet.net/oklegal-cgi/ifetch?okca+24051232387958+F>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

will and that they needed a witness, and seeing the testator sign after the daughter pointed to the appropriate place.¹⁰⁹ The trial court denied probate, holding that there was “*absolutely no indication* that [the testator], by conduct or by words, conveyed to the witnesses . . . that the [W]ill was hers.”¹¹⁰

After defensively reiterating (1) that the substantial compliance doctrine applied, (2) that the trial court’s finding should not be disturbed unless clearly against the weight of the evidence, and (3) that the testimony of the daughter conflicted with the two witnesses, the Oklahoma Court of Appeals agreed.¹¹¹ But it appears that the court’s ruling was heavily influenced by its view of the will’s vulnerability on non-formalities grounds.

For example, recall that the will’s proponent was likely also its primary beneficiary. Although technically limiting its review to the question of compliance, the court tellingly felt compelled to frame the entire discussion within “the possibility . . . that [capacity and freedom from coercion] were unsatisfied at the time of the execution of the Will.”¹¹² Moreover, the court deployed confusing language which, oddly, cast the substantial compliance standard as something more akin to strict: “Because . . . these formalities ‘are safeguards against imposition and fraud,’ the Oklahoma Supreme Court has concluded that they ‘therefore require substantial compliance.’”¹¹³ The statement suggests that while ordinarily, any compliance (even slight or partial) would suffice, here, the need for “substantial” compliance actually triggered heightened rather than lessened responsibility from the norm.

Irrespective of their preventive efficacy, it is true that execution formalities are at least *designed* as safeguards against imposition or fraud.¹¹⁴ But that has neither stopped the court from claiming to be a more forgiving substantial compliance jurisdiction when it suits, nor has it

109. *Id.*

110. *Id.* (emphasis added).

111. *Id.*

112. *Id.*

113. *Id.* (quoting *In re Estate of Speers*, 2008 OK 16, ¶ 16, 179 P.3d 1265, 1271).

114. See, e.g., 95 C.J.S. *Wills* § 220; 79 AM. JUR. 2D *Wills* § 163. But see Langbein, *supra* note 18, at 496 (“The attestation formalities are pitifully inadequate to protect the testator from determined crooks, and have not in fact succeeded in preventing the many cases of fraud and undue influence which are proved each year. . . . Protective formalities do more harm than good, voiding homemade wills for harmless violations. . . . [They] are not needed. Since fraud or undue influence may always be proved notwithstanding due execution, the ordinary remedies for imposition are quite adequate.”) (citing Gulliver & Tilson, *supra* note 12, at 9-13).

motivated the legislature to ban holographic wills, for which subscription, publication, and the core of the witnessed will—attestation—are not required at all.¹¹⁵

d) Attestation

Attestation closes out the communicative act of publication: the testator must publish to at least two target witnesses, who then must sign at the end of the will—i.e., attest—at the testator’s request *and* in the testator’s presence.¹¹⁶ In nominal keeping with the acknowledgment and publication requirements, the communication need not be formal.¹¹⁷

In some regards, the Oklahoma attestation scheme is comparatively liberal when viewed against some other state’s rules. First, a witness may request a third party to sign the witness’s name as long as the witness adopts that signature.¹¹⁸ Second, the witnesses need only sign in the presence of the testator and not each other.¹¹⁹ Nevertheless, and notwithstanding its reiteration that even an informal and implicit request would suffice, the court has been reluctant to find that request whenever

115. *See infra* Part III.B.

116. 84 OKLA. STAT. § 55(4) (2011); *In re Estate of Samochee*, 1975 OK 143, ¶¶ 20-28, 542 P.2d 498, 501; *Moore v. Glover*, 1945 OK 322, ¶¶ 21-26, 163 P.2d 1003, 1007. Although the witnesses’ attestation should include their name and addresses, failure to do so will not invalidate the will. 84 OKLA. STAT. § 56 (2011); *Wattenbarger v. Wattenbarger*, 1913 OK 485, ¶¶ 2-3, 135 P. 1141, 1142.

117. *In re Hess’ Estate*, 1962 OK 74, ¶ 19, 379 P.2d 851, 857; *Howard v. Smith’s Estate*, 1959 OK 150, ¶¶ 1-7, 344 P.2d 260, 262; *Speaks v. Speaks*, 1923 OK 404, ¶¶ 17-20, 224 P. 533, 536. In *In re Atohka’s Estate*, 1955 OK 107, 282 P.2d 737, the court held that mere physical presence does not satisfy the requirements. Rather, there must be some facts indicating that the testator knowingly or intelligently acquiesced in the witnessing of the will. *Id.* ¶¶ 5-8, 282 P.2d at 739-40. Although the decision might at first seem limiting, the court probably reached the correct decision based on other facts that existed at the will’s execution (the testator’s alleged “blindness, deafness, addiction to alcoholic beverages, incompetency (at least for some purposes), his illness, his ignorance of the English language, and the fact that he was without the services of an interpreter, which he generally used in matters of similar importance”). *Id.* ¶ 8, 282 P.2d at 739-40.

118. *Wolber v. Rose*, 1923 OK 570, ¶ 5, 218 P. 323, 324.

119. This result can be reached by a strict reading of title 84, section 55(4) of the Oklahoma Statutes. *See also In re Estate of Speers*, 2008 OK 16, ¶ 16, 179 P.3d 1265, 1271; *Hess*, ¶ 19, 379 P.2d at 857; *Moore*, ¶ 37, 163 P.2d at 1008.

Of course, it is advisable to hold a contemporaneous execution ceremony at which the testator and all subscribing witnesses are present and perform the requisite acts. For a solid practice-oriented approach to drafting and executing wills, see Roger W. Andersen, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57 (1994).

someone other than the testator does the asking.¹²⁰ This is so even where the aggregation of the testator's physical proximity, attention, and silence indicate assent, ratification, or agency.¹²¹

Reconsider the facts of *In re Estate of Hanson*, where the testator's daughter escorted her mother to a friend's business establishment to effectuate attestation of the will.¹²² Although uncontroverted testimony established that the testator had signed the will in front of both witnesses, and at least some evidence that the testator had thanked them for their assistance appeared, the trial court made this arguably incorrect point quite clear:

[The witnesses] did not indicate that they signed the Will at the request of [the testator], “[a]nd instead, quite frankly, it seems that it was at the request of [her daughter]. . . . *There's absolutely no indication that [the testator], by conduct or by words, conveyed to the witnesses . . . that the [W]ill was hers*” . . . she “never asked these witnesses to sign the [W]ill at her request and in her presence. *There's an absolute total lack of evidence that suggests the same.*”¹²³

Notwithstanding the tilted recapitulation of events that the preceding quote reflects, it should be obvious that one who signs a will labeled “Last Will and Testament,” stands by while two others append their names thereto, and then thanks them for their service, has by conduct and ratification requested those signatories to so act. If not, it would seem that the only “conduct-based” request that would suffice would be physically handing pen or paper to the witness, sign language, or pantomime.

Although it is usually not discussed in such terms, Oklahoma might be said to follow substantial compliance principles in connection with interested witness analysis. Consistent with basic evidentiary rules,¹²⁴ anyone with the ability at execution to observe, recollect, and truthfully communicate relevant facts, is competent to witness a will.¹²⁵ Even a

120. See *supra* notes 88-113 and accompanying text.

121. *Id.*

122. *In re Estate of Hanson*, No. 109,527 (Okla. Civ. App. Dec. 28, 2012) (unpublished opinion), available at <http://oklegal.onenet.net/oklegal/cgi/iffetch?okca+24051232387958+F>.

123. *Id.* (emphasis added).

124. See 12 OKLA. STAT. §§ 2, 2601, 2602 (2011).

125. Post-execution incompetency is irrelevant to the validity of the attestation as long as the will is otherwise satisfactorily proved. 84 OKLA. STAT. § 145 (2011). For example, in *Howard v. Fields*, 1945 OK 62, ¶ 6, 156 P.2d 139, 142, a contestant asserted that one witness was rendered incompetent when a spouse purchased an interest in property devised

witness who is also a beneficiary (i.e., an “interested witness”) may so serve; without proof of fraud, undue influence, or other substantive challenge to the will, attestation by one or even all interested witnesses does not cause a will to fail on grounds that “two *disinterested* witnesses” were missing.¹²⁶ But lest this doctrine seem too generous, note that Oklahoma does not stand alone in upholding an interested-witnessed will. Every other American jurisdiction does so as well, whether they are strict in their approach to compliance with statutory formalities or not.¹²⁷

That the will remains valid in Oklahoma does not, however, mean that interested witnesses proceed unscathed. Instead, they forfeit their bequest or devise through what operates as a *sub rosa* presumption that they hold inclination, or at least incentive, to mask ceremonial execution flaws.¹²⁸ In theory, removing the testamentary “take” also removes the incentive to lie, and thus cures any suspected defect in the witness’s candor. Moreover, beyond the neutrality of mere rehabilitation, purging witnesses of their testamentary shares arguably even *strengthens* the likelihood that they are telling the truth, forcing them into the flummoxing position of upholding the testator’s general testamentary intent except as it applies to them.

There are two exceptions to the purging statute. Under the supernumerary rule, an interested witness’s beneficial interest is saved if at least two disinterested witnesses to the will remain.¹²⁹ Further, an

under a will from the beneficiary. The court reaffirmed that the critical question was whether the witness was interested at the time of execution, not whether the witness subsequently acquired an interest in the property. *Id.*

126. All beneficiaries under the terms of a will are interested witnesses. Contrary to earlier case law, a beneficiary’s spouse or other family member, or a creditor, executor attorney, or trustee of the testator, is not. *In re Estate of Harrison*, 1987 OK CIV APP 31, ¶ 15, 738 P.2d 964, 966. For earlier cases upholding the principle that a beneficiary’s spouse is interested, see *Caesar v. Burgess*, 103 F.2d 503 (10th Cir. 1939) (invoking common law principles in an Oklahoma probate to disqualify a spouse as a disinterested witness); *In re Purcell’s Estate*, 1947 OK 25, ¶ 9, 176 P.2d 986, 987; *Howard*, ¶¶ 4-5, 156 P.2d at 141-42 (invoking 12 OKLA. STAT. § 385 (1941), subsequently repealed and replaced with 12 OKLA. STAT. § 2601 (1981)).

127. PAGE ON THE LAW OF WILLS, *supra* note 8, § 19.76.

128. 84 OKLA. STAT. § 143 (2011).

129. *Id.* Oklahoma courts have been reluctant to apply the supernumerary rule where the will is also signed by a “non-witness” performing an evidentiary duty. *See, e.g., Caesar*, 103 F.2d at 509 (holding acknowledgement by a county judge as required by act relating to Five Tribes did not constitute witness signature for supernumerary purposes); *In re Estate of Overt*, 1989 OK CIV APP 1, ¶¶ 12-13, 768 P.2d 378, 380 (finding the supernumerary rule is not triggered by a notary who was neither requested nor intended to serve as an attesting witness). Note that these signatures have occasionally been invoked successfully to validate

interested witness who “would have been entitled to any share of the estate of the testator” were the will not to exist “succeeds to so much of the share as would be distributed to him,” up to his share under the will.¹³⁰ In other words, that witness will take whichever is less: the share under either the inappropriately witnessed will or intestacy.¹³¹

As applied to interested witness theory rather than the will itself, Oklahoma’s rules are overly strict. Logically, no witness who takes *less* under the subject will than she would have taken in its absence—and thus could hold incentive to promote its *invalidity* rather than *validity*—should be treated as interested and subject to purging. What is more, such a witness should be capable of acting as a supernumerary through which other truly interested witnesses’ shares might be resurrected.¹³² Relatedly, the Tenth Circuit has applied Oklahoma law to determine that, for purposes of interested witness analysis, disclaimers of a share under a will relate back to the date of the testator’s death rather than its earlier execution.¹³³ Thus, an interested witness who disclaims does not “cure” that interest and remains subject to purging. The purging is irrelevant, as relinquishing a share through disclaimer obviates the need to purge anyone of anything.

the will itself when there is only one other witness. See *infra* notes 177-179 and accompanying text.

130. 84 OKLA. STAT. § 144 (2011).

131. If the decedent would have died intestate, and were the “interested witnessed will” invalid, it is clear that the choice is between the present devise and the intestate share. However, if the “interested witness will” revoked a prior will, it is unclear whether the limiting consideration is the beneficiary’s earlier devise or the intestate share. As the words used in title 84, section 144 of the Oklahoma Statutes (“succeeds,” “share,” “distributed”) are all words commonly used in an intestate setting, a court could determine that the present devise is limited by the interested witness’s intestate share irrespective of the presence of a devise under a prior will. So, a beneficiary who takes one-half of the decedent’s estate under the present will, who had been bequeathed one-fourth of the decedent’s estate under a prior will, but who would take one-eighth of the decedent’s estate as an intestate heir would presumably receive that one-eighth share.

132. This assumes that if there was an earlier attested will, the present interested witness did not also witness it. One might counter that the interested witness presumably knows neither the distributive contents of the present nor prior will, much less his putative intestate share, and thus cannot perform the cost/benefit analysis that would lead him to conclude that witnessing the present will is against self-interest. Nevertheless, the same could be said of “partial purging” in general: a witness who holds the *presumptive* motivation to lie either will or will not have *actually* held that motivation, and irrespective of knowing whether he would lose all or only part of a particular bequest. That has not stopped partial purging from occurring.

133. See *Caesar*, 103 F.2d at 507-08. Although the issue has not arisen in Oklahoma courts, find detailed analysis in *Estate of Parsons*, 163 Cal. Rptr. 70, 72 (Ct. App. 1980).

But disclaimer should render the witness disinterested for supernumerary purposes by which other interested witnesses, if any, might find their testate share saved.¹³⁴

The most forgiving approach to the interested witness issue would extend its irrelevance beyond the will to its witnesses by abolishing interested witness proscriptions at the outset. Most beneficiaries who also witness the wills under which they take are probably innocents, both close to and trusted by the testator and unaware of their bequests in any event. Credibility choices would remain on the table, with a decision maker who fears either overreaching or fraud able to discount a witness's veracity in the same way that any witness can be impeached. And an undue influence challenge—which erects such low barriers to establishing its presumption that the mere presence of an interested witness could create it—is operational to divest true wrongdoers of their interests when proven facts warrant.¹³⁵

2. Presence

As earlier described, Oklahoma law requires “presence” at three points in the execution ceremony: (1) proxies must sign in the testator's presence;¹³⁶ (2) testators must subscribe or acknowledge in the witnesses' presence;¹³⁷ and (3) witness attestation and signature must be made in the testator's presence.¹³⁸ Determining what suffices as presence for these purposes proves troublesome given competing definitional views. The strict “line of vision” test demands that each person be within sight of the other, and see

134. This should result even if the disclaimed share ends up passing through the disclaimant's estate to her descendants. *See supra* note 126 (noting the reversal of Oklahoma's earlier strict rules imputing interest to relatives of a beneficiary).

135. *See, e.g., In re Estate of Holcomb*, 2002 OK 90, ¶ 18, 63 P.3d 9, 14-16 (reiterating that undue influence in the making of a will is presumed by the coalescence of a confidential relationship and assistance by the stronger party in the preparation or procurement of the will).

136. 84 OKLA. STAT. § 55(1) (2011).

137. *Id.* § 55(2).

138. *Id.* § 55(4). Additionally, subscription and acknowledgment must be made in the presence of a district court judge where the testator is subject to a guardianship or conservatorship, 84 OKLA. STAT. § 41(B) (2011), and a nuncupative will, discussed *supra* note 39, must be made in the presence of two witnesses, 84 OKLA. STAT. § 46(2). The exigent circumstances attending nuncupative wills, and the fact that they are executed by verbalization rather than attestation, presumably mean that the presence requirement is satisfied whenever the witnesses are within hearing range of the testator irrespective of whether they see the testator utter the relevant words.

or have been able to see the relevant act upon looking.¹³⁹ The more liberal “conscious presence” test is satisfied whenever the relevant actor is within the range of senses of the other party and knows what is occurring.¹⁴⁰

While the Oklahoma courts have yet to explicitly adopt either test, a “line of vision” approach has generally been applied in past cases. The most comprehensive discussion of the issue appears in *Moore v. Glover*, where the court found the presence element satisfied under relatively liberal facts.¹⁴¹ Testator prepared her will and was driven to a filling station for witnessing by its proprietor.¹⁴² Physically unable to leave the car, she handed her will to the proprietor who then entered the station (approximately four feet away), placed the will on a desk, signed it, and then returned it to testator.¹⁴³ The court noted that the open station door and

139. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. p (noting exceptions for blind testators and disapproving the line of vision test); see also *Newton v. Palmour*, 266 S.E.2d 208, 209-10 (Ga. 1980); *In re Lynch's Estate*, 431 N.E.2d 734, 738 (Ill. App. Ct. 1982).

140. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. p (adopting the conscious presence test); see also UNIF. PROBATE CODE § 2-502 (amended 2010), 8 U.L.A. 144 (Supp. 2012) (removing all presence requirements except for signature by proxy, for which it codifies the “conscious presence” test). For interpretation and application of this standard, see, for example, *In re Estate of Politowicz*, 304 A.2d 569, 571-72 (N.J. Super. Ct. App. Div. 1973) (admitting will to probate when one witness signed in a room adjacent to the testator); *In re Demaris' Estate*, 110 P.2d 571, 585 (Or. 1941) (accepting presence where the witnesses “are so near at hand that they are within the range of any of [the testator's] senses, so that he knows what is going on”). For a more general discussion of “presence,” see Verner F. Chaffin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297, 318-22 (1977); Gulliver & Tilson, *supra* note 12, at 10-11; Langbein, *supra* note 18, at 517; W. W. Allen, Annotation, *What Constitutes the Presence of the Testator in the Witnessing of His Will*, 75 A.L.R. 2d 318 (1961).

Technological trends foreshadow that distant “presence” will present difficulty for the courts in determining compliance with formalities. To illustrate: An execution ceremony where all parties are seated within the same room and at the same conference table would satisfy both tests. An execution ceremony where the testator publishes and subscribes his will at the table but the witnesses sign in an anteroom would probably fail the line of sight test but survive the conscious presence test. An execution ceremony where the testator and witnesses are connected via videophone might well survive the line of sight test but fail the conscious presence test. An execution ceremony where the relevant acts occur while the parties are connected by telephone would probably fail both tests. See, e.g., *In re Estate of McGurrin*, 743 P.2d 994 (Idaho Ct. App. 1987); *In re Jefferson's Will*, 349 So. 2d 1032 (Miss. 1977).

141. 1945 OK 322, ¶ 37, 163 P.2d 1003, 1008-09.

142. *Id.* ¶¶ 17-21, 163 P.2d at 1006.

143. *Id.* ¶ 19, 163 P.2d at 1006.

a large glass window permitted the testator's interior view of the station, including the desk where the proprietor signed.¹⁴⁴ Even though the testator could not observe the precise act of his signing, the court held that the witness signed in the testator's presence.¹⁴⁵

Although the facts of the case suggest adherence to the conscious presence test, the *Moore* court neither adopted nor even alluded to that rule. Instead, the court characterized the jurisdictional split more narrowly—as one between literal and liberal construction of the “line of vision” test.¹⁴⁶ To the court, the literal approach finds presence only where the testator was “able to see the instrument on the desk or table, to see the pen in the hand of witness, and to see and observe the movement of his hand and arm while in the act of signing his name.”¹⁴⁷ Although the court acceded that the testator could not have seen any of these things by looking from her car through the filling station window,¹⁴⁸ it employed substantial compliance to adopt the “liberal approach.”¹⁴⁹ Thereunder, presence is met where the witnesses are “in range of view of the testator and can or could have been plainly seen while in the act of signing their names and the body and person of witnesses could have been plainly seen while so doing.”¹⁵⁰ Although the court claimed to have applied the substantial compliance doctrine,¹⁵¹ in reality it did little more than endorse a more liberal definition of the “presence” that its statute required (but did not define), and which other courts had already accepted.

A court considering the issue today might follow the more modern “conscious presence” test, especially in light of its at least theoretical

144. *Id.*

145. *Id.* ¶ 23, 163 P.2d at 1007. For a different result on strikingly similar facts, see *In re Weber's Estate*, 387 P.2d 165 (Kan. 1963). The testator, on the way to the hospital, signed his will while sitting in a car in front of a bank window, observed by three witnesses inside. *Id.* at 167-68. The will was then brought into the bank where the witnesses signed, observed by the testator who remained in the car. *Id.* at 168. In refusing to admit the will to probate, the court observed that to do otherwise “would permit substantial compliance and conscious presence to run wild.” *Id.* at 170; see also *McCormick v. Jeffers*, 637 S.E.2d 666, 669-70 (Ga. 2006).

146. *Moore*, ¶¶ 21-22, 163 P.2d at 1006-07.

147. *Id.* ¶ 21, 163 P.2d at 1006.

148. *Id.*

149. *Id.* ¶ 23, 163 P.2d at 1007.

150. *Id.* ¶ 21, 163 P.2d at 1006; see also *In re Burke's Estate*, 1979 OK CIV APP 76, ¶ 12, 613 P.2d 481, 484 (finding statutory compliance with title 84 after observing that the witnesses “affixed their signature [to the will] while the will lay on the hood of the pickup within the vision of [testator]”).

151. *Moore*, ¶ 23, 163 P.2d at 1007.

willingness to employ substantial compliance for execution formalities and the exceptions already accorded to blind or vision-impaired testators. Nevertheless, practitioners should ensure that the stricter approach is followed to avoid a post-death challenge on the basis of noncompliance with title 84, section 55 of the Oklahoma Statutes.

3. Attestation Clauses and the Self-Proved Will

The proponent of the will bears the burden of establishing by a preponderance of the evidence that the will was executed in compliance with the statutorily demanded formalities.¹⁵² For attested wills, one way to make that prima facie showing is through the testimony or affidavit of a subscribing witness that the execution comported with the statute.¹⁵³ If there is a will contest, however, generally all subscribing witnesses present in the county must testify, and affidavits are insufficient.¹⁵⁴ Either method—affidavit or live testimony—can prove costly or troublesome, particularly where witnesses have died, become incapacitated, moved, or lost their ability to recollect execution events. For example, in *In re Estate of Nelson*, an attested but non-self-proved will that the decedent executed in Indiana was offered for probate in Oklahoma County.¹⁵⁵ When the probate was contested, the subscribing witnesses still resided in Indiana.¹⁵⁶ Although the proponent offered the witnesses' affidavits, the court rejected that method of proof as providing "[in]sufficient evidence of due execution."¹⁵⁷

Such difficulties of proof can be avoided if, in addition to ensuring that all basic attestation requirements are met, the testator either appends an attestation clause to the will or renders the will "self-proved." An attestation clause is merely a written recitation or certificate setting forth the procedures followed during the will's execution.¹⁵⁸ It may be signed by

152. For statement of the general proposition, see *In re Estate of Bogan*, 1975 OK 134, ¶¶ 16, 541 P.2d 854, 857; *In re Weber's Estate*, 1970 OK 131, ¶ 9, 471 P.2d 919, 922; *In re Stover's Will*, 1924 OK 917, ¶ 8, 231 P. 212, 214; *McCarty v. Weatherly*, 1922 OK 12, ¶ 19, 204 P. 632, 637.

153. 58 OKLA. STAT. § 30 (2011).

154. *Id.* § 43; see also *In re Estate of Hardesty*, 1975 OK CIV APP 72, ¶¶ 5-6, 545 P.2d 823, 824.

155. 1994 OK CIV APP 126, ¶ 10, 882 P.2d 1103, 1104.

156. *Id.* ¶ 9, 882 P.2d at 1104.

157. *Id.* The case was remanded, and the proponents were, however, afforded the opportunity to present the deposition of the witnesses. *Id.* ¶ 11, 882 P.2d at 1104.

158. See generally Roger L. Severns, *The True Function of the Attestation Clause in a Will*, 11 CHI.-KENT L. REV. 11 (1932).

both the testator (i.e., acknowledged) and all subscribing witnesses, or (and more commonly) by the witnesses alone following the testator's subscription of the will itself.¹⁵⁹ The inclusion of an attestation clause creates a presumption of due execution,¹⁶⁰ rebuttable only by clear and convincing evidence that the acts that it describes did not actually take place.¹⁶¹

For example, in *Hobbs v. Mahoney*, the court upheld a non-self-proved will bearing an attestation clause even though the remaining witnesses testified that they could not recall specifics of the execution ceremony and even admitted that they may not have met certain presence specifics as recited in that clause.¹⁶² Holding that the will was nevertheless properly executed, the court assured that

[t]here is no affirmative evidence that the will was not properly executed. In such circumstances, and where the record as it now stands verifies the authenticity of the signatures of testatrix and the surviving witnesses, it is our opinion the formal attestation clause is presumptive evidence of the facts which it states. Any other conclusion would defeat the purpose of the attestation clause.¹⁶³

159. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. q (1999).

160. See *Hobbs v. Mahoney*, 1970 OK 209, ¶ 14, 478 P.2d 956, 959 (upholding non-self-proved will bearing attestation clause even though the remaining witnesses could not recall whether execution details matched the attestation clause narrative); *In re Estate of Lambe*, 1985 OK CIV APP 38, ¶ 10, 710 P.2d 772, 775 (upholding self-proved will, even though last surviving witness and notary could not recall every detail of execution, by observing that "a valid attestation clause . . . serves as prima facie evidence of a valid execution"); see also *In re Estate of Johnson*, 1989 OK 98, ¶ 11, 780 P.2d 692, 695 (will held invalid where testimony of witnesses persuasively contradicted attestation clause).

161. MCGOVERN, KURTZ, & ENGLISH, *supra* note 15, § 4.3. Normally, mere inability to remember execution events is insufficient to overcome the presumption, and instead, the evidence must clearly establish that proper procedures were not followed. See, e.g., *In re Weber's Estate*, 1970 OK 131, ¶ 17, 471 P.2d 919, 924 (holding that the evidence offered by contestant regarding execution procedures was not clear and convincing enough to bar probate of will); *Goff v. Knight*, 1949 OK 118, ¶ 15, 206 P.2d 992, 995 (the presumption created by an attestation clause can be overcome only by clear and convincing evidence).

162. *Hobbs*, ¶ 14, 478 P.2d at 959.

163. *Id.* ¶ 13, 478 P.2d at 958-959.

The attested will can be further insulated from attack by making it self-proved.¹⁶⁴ Two statutory methods exist, employable either when the will is initially executed or at any later date before the testator or any of the witnesses die.¹⁶⁵

First, an acknowledgment by the testator and an affidavit of the attesting witnesses may be signed by the testator and all attesting witnesses *and notarized*.¹⁶⁶ If this option is selected, there should be three individuals besides the testator present at the will's execution: two witnesses and a notary.

Requiring notarization proved to be administratively inconvenient in small law offices and rural practices, and the Oklahoma legislature amended the statute in 1996 to add the second and less formal self-proving method: a non-notarized acknowledgment signed by the testator and the witnesses under penalty of perjury.¹⁶⁷ The statute explicitly authorizes a prior executed will to be made self-proving using this simplified method, but it is unclear whether the statutory language should replace an existing attestation clause. The wiser course would add the acknowledgement in addition to the provisions of the properly executed and witnessed will.¹⁶⁸

Like the attestation clause, a self-proved will creates a *prima facie* presumption that the acts as described actually occurred and dispenses with the requirement for live or deposition testimony of subscribing witnesses.¹⁶⁹ Again, as the presumption appears rebuttable only by clear and convincing evidence,¹⁷⁰ a witness's failure to independently recall execution events will not overcome it.¹⁷¹ Nevertheless, any witness to execution, including one who has also attested or notarized the will, may controvert the statements

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

165. 84 OKLA. STAT. § 55(5) (2011).

166. *Id.* § 55(5)(a). The statute sets out a suggested form, reproduced in Appendix A.

167. Act of Apr. 18, 1996, ch. 107, ¶ 1, 1996 Okla. Sess. Laws 424, 424-26 (codified as amended at 84 OKLA. STAT. § 55(5)(b)). The statute sets out a suggested form, reproduced in Appendix B.

168. The ceremony described in the attestation clause and any newly added self-proving acknowledgement should match.

169. 84 OKLA. STAT. § 55(7); *In re Estate of Lambe*, 1985 OK CIV APP 38, ¶ 10, 710 P.2d 772, 775.

170. *In re Estate of Johnson*, 1989 OK 98, ¶ 11, 780 P.2d 692, 695 (affirming trial court's determination as sufficiently "clear and convincing" testimony controverting declarations contained in self-proved will, particularly given corroboration between witnesses, notary to will, and will's drafting attorney).

171. *Hobbs v. Mahoney*, 1970 OK 209, ¶¶ 13-14, 478 P.2d 956, 958-59 (involving lesser-strength attestation clause rather than self-proving will).

appearing in the attestation clause with the resulting evidentiary determination left to the finder of fact.¹⁷² Moreover, if the will is contested, these presumptions do not apply and the proponent must prove each element of execution before the will can be admitted to probate.¹⁷³ This includes live or deposition testimony regarding the proper execution of the will under title 58, section 43 of the Oklahoma Statutes.¹⁷⁴

An attorney who prepares and includes an attestation clause or self-proving affidavit must therefore maneuver three hazards. First, to trigger validity presumptions, the attestation clause must demonstrate full compliance with the statutory requirements of title 84, section 55 of the Oklahoma Statutes.¹⁷⁵ For example, a clause that states that the witnesses signed beyond the presence of the testator or at their own volition with no request to do so would actually create a presumption *against* due execution, as well as reflect malpractice. Second, the execution ceremony should mirror the recitation in the attestation clause. Their discordance (such as where boilerplate language is used in the self-proving affidavit) could invite question over either or possibly nullify both.¹⁷⁶ For example, although Oklahoma law does not compel the decedent to sign or acknowledge her signature before both witnesses *present at the same time*, that is presumably how attorney-overseen ceremonies usually take place. If, however, the witnesses attest separately, the attestation clause should so state, as should the self-proving affidavit that reinforces it.

Finally, neither the attestation clause itself nor the self-proving statement should be the sole source for any required signature. Neither of these

172. See *Johnson*, ¶¶ 2, 10, 780 P.2d at 693-94, 695 (subscribing witness and notary disavowed statements contained in valid self-proving affidavit by asserting that witness was not in decedent's presence either "when he executed the will or when she signed as witness").

173. 84 OKLA. STAT. § 55(7); *In re Estate of Allen*, 1998 OK CIV APP 64, ¶ 4, 964 P.2d 922, 923.

174. See *In re Estate of Romeiser*, 1973 OK CIV APP 1, ¶ 17, 513 P.2d 1334, 1336 (requiring testimony of both subscribing witnesses to self-proving affidavit where codicil was contested).

175. Indeed, notwithstanding most states' attempts to accept into probate not only wills valid under internal rules, but also those validly executed under the law of execution situs, the best practice would be for attorneys to conduct execution ceremonies that meet the requirements of all jurisdictions rather than simply those of Oklahoma. This can be accomplished by ensuring that, in addition to compliance with Oklahoma law, the testator sign the will first in the presence of the witnesses present at the same time, who then sign the will in the presence of the testator and each other, all without leaving the table at which the execution ceremony takes place.

176. See *supra* note 168 and accompanying text.

documents are literally part of “the will,” but rather freestanding documents that support it.¹⁷⁷ Although it is neither surprising nor uncommon for these sorts of errors to occur, they have occasionally resulted in intestacy where strict courts determine that a will must be valid before an attestation clause can “prove” it.¹⁷⁸ By contrast—and this time true to the thrust of its “substantial compliance” pronouncements—Oklahoma case law has upheld many wills where witnesses’ and even testators’ signatures appear but once, in the attestation clause alone.¹⁷⁹ Nevertheless, deeming a will properly executed does not necessarily and simultaneously mean that it will achieve self-proved status.¹⁸⁰ A far safer practice would require the testator to sign at the close of the will, the witnesses (and perhaps the testator again) to sign after the attestation clause, and all parties to sign the self-proving affidavit.

Were these relatively early cases involving presence or signature location the only ones reviewed, one might argue that Oklahoma indeed aligns with the broader decline of formalism in favor of intent. But the increasing amount of evidence required to prove that substantial compliance seems to have returned the case law full circle. In essence, Oklahoma has become strict. The stark contrast between cases like *Hobbs* and a pair of more recent rulings, discussed below, highlights the point.

In *Pool v. Estate of Shelby*, a fragmented court invalidated a purported will revocation to uphold the formerly executed will.¹⁸¹ The affidavit of revocation in question, which alternately denied the existence of and revoked the former will, was notarized and subscribed by the testator and two witnesses.¹⁸² Stunningly, the court held that the affidavit facially failed

177. See *supra* note 63 and accompanying text. See also *Coplin v. Anderson*, 1955 OK 26, ¶ 5, 281 P.2d 186, 187 (“[Oklahoma courts] recognize that the attestation clause is not a part of the will proper.”).

178. See, e.g., *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985) (will invalid where testator signed only in affidavit); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966) (will invalid where witnesses signed only in the affidavit). For an excellent critique of these sorts of cases and the role of the self-proving affidavit, see *Mann, supra* note 164, at 49.

179. The testator’s handwritten name in attestation clause was sufficient subscription in the following cases: *In re Burke’s Estate*, 1979 OK CIV APP 76, ¶ 7, 613 P.2d 481, 482; *Coplin*, ¶ 8, 281 P.2d at 188. The witnesses’ signature in the self-proving affidavit was sufficient in these cases: *Dillow v. Campbell*, 1969 OK 63, ¶ 3, 453 P.2d 710, 712; *In re Estate of Cutsinger*, 1968 OK 130, ¶ 8, 445 P.2d 778, 781.

180. See *In re Estate of Romeiser*, 1973 OK CIV APP 1, ¶¶ 7-11, 513 P.2d 1334, 1335 (questioning whether witnesses’ signatures only in self-proved affidavit can doubly perform both basic attestation and self-proving requirements, noting that no earlier case had specifically addressed the issue given the live testimony offered by witnesses in each).

181. 1991 OK 124, ¶ 13, 821 P.2d 361, 364.

182. *Id.* ¶ 6, 521 P.2d at 362.

to comply with the statutory requirements for a valid will or revocation thereof because it did not “*contain any language* indicating [compliance with assorted statutory requirements].”¹⁸³ The opinion rapidly veers between the requirements themselves and evidence that they were met, even though the court had long before stated that the absence of an attestation clause “*simply change[s]* the mode of proof that the will was witnessed as required by law.”¹⁸⁴ The Restatement admonishes that “[a] court should *never* impose formal requirements beyond those in the statute.”¹⁸⁵ Yet as Justice Wilson’s pointed dissent in *Pool* acknowledges, the majority appears to have grafted a requirement of a written attestation clause onto the statutory requirements of title 84, section 55 of the Oklahoma Statutes.¹⁸⁶

Three points are very clear: The options of attestation clauses and their self-proved versions are well-advised.¹⁸⁷ Neither option, however, is ever prerequisite to a valid will.¹⁸⁸ And no jurisdiction that deploys alleged non-compliance with the option to invalidate a will meeting all statutory mandates actually deserves the “substantial compliance” mantle that it claims.

The Oklahoma Supreme Court recently issued an even more restrictive ruling involving the interplay between formalities and self-proving clauses. In *In re Estate of Speers, Wife #1* predeceased her husband.¹⁸⁹ Husband

183. *Id.* ¶ 12, 521 P.2d at 363 (emphasis added).

184. *Wolber v. Rose*, 1923 OK 570, ¶ 3, 218 P. 323, 324.

185. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. f (1999) (emphasis added).

186. *Pool*, ¶ 4, 821 P.2d at 364-66 (Wilson, J., dissenting).

187. Indeed, an attorney’s failure to include one or both is probably malpractice. *See, e.g.*, Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1045 (1994).

188. Nuncupative and holographic wills need not be attested at all, and while attested ones obviously are, the inclusion of either a specific attestation clause or a self-proving affidavit remains entirely optional. Execution requirements for an attested will are set forth in title 84, section 55 of the Oklahoma Statutes. 84 OKLA. STAT. § 55 (2011). The acts described in subsections 1 through 4 are imposed mandatorily through use of the word “must.” *Id.* § 55(1)-(4). The statute continues in subsection 5 by stating that “[e]very will . . . may . . . be made self-proved,” underscoring the non-compulsory nature of the act. *Id.* § 55(5) (emphasis added). Numerous cases so hold. *See, e.g.*, *In re Estate of Cutsinger*, 1968 OK 130, ¶ 9, 445 P.2d 778, 782 (“We are committed to the rule that the attestation ‘clause’ of a will need not be in any particular form, and the entire absence, from it, of such clause, does not invalidate the will.”); *Ward v. Bd. of Comm’rs*, 1902 OK 83, ¶ 27, 70 P. 378, 382.

189. 2008 OK 16, ¶ 3, 179 P.3d 1265, 1266.

then married Wife #2 and died some years later.¹⁹⁰ After Wife #2 later discovered Wife #1's will, she offered it for probate.¹⁹¹

The will was standard on its face in every regard and included an attestation clause.¹⁹² Two witnesses attested to the testator's signature, and a notary acknowledged all signatures in an attempt to make the will self-proving.¹⁹³ Although the will reflected markings not present when it was initially executed, no one claimed that the will was procured through fraud or undue influence.¹⁹⁴

Only one witness testified at trial, and given the passage of time, with an understandably limited recollection of the original execution events.¹⁹⁵ The court recounted his testimony, interspersing relevant and irrelevant statements to the precise point of whether the testamentary attempt had achieved statutory demands. The witness testified that he had seen the decedent sign the instrument and that he had signed in her presence (relevant).¹⁹⁶ Although he thought that the will was executed at their church, he was not certain of that fact (irrelevant).¹⁹⁷ He could not recall whether the second witness and notary were present when he signed (irrelevant) or whether they had added their signatures in his presence (irrelevant).¹⁹⁸ Finally, he stated that he had been told that the second witness was deceased.¹⁹⁹ Remarkably, on both substantive and procedural fronts, the Supreme Court reversed both the trial court and the Oklahoma Court of Civil Appeals and denied probate of the will.²⁰⁰ To the court, the

190. *Id.*

191. *Id.* Although these facts may initially seem odd, Wife #2 stood to benefit from the probate of that will. The first wife's property primarily passed to her surviving husband. *Id.* ¶ 2, 179 P.3d at 1268. The facts are incomplete, but presumably all or some of this property would pass through the decedent husband's estate to the second wife, rather than to the first wife's heirs under intestate succession.

192. *Id.* ¶¶ 17-18, 179 P.3d 1272.

193. *Id.* at 1276 (displaying, on its own page in the reporter, the testator's entire will).

194. *Id.* ¶ 11, 179 P.3d at 1269. Because the will passed the decedent's property to her surviving spouse, it is unlikely that contestants would have prevailed on such a claim in any event.

195. Over twenty-three years passed between the will's execution and trial. *Id.* ¶¶ 2-3, 179 P.3d at 1267.

196. *Id.* ¶ 4, 179 P.3d at 1268.

197. *Id.*

198. *Id.* ¶ 4, 179 P.3d at 1267-68. Importantly, the witness did not testify that they were *not* present, but merely that he could not recall.

199. *Id.* ¶ 13, 179 P.3d at 1270.

200. *Id.* ¶ 20, 179 P.3d at 1273.

proponent failed to establish that the will was executed in accordance with statutory formalities.²⁰¹

First, the court concluded that the will was not self-proving because the notary failed to apply her seal as required by title 84, section 55(5) of the Oklahoma Statutes.²⁰² In 1985, three years after the will's execution but before the instant litigation, the Oklahoma legislature enacted the Uniform Laws on Notarial Acts,²⁰³ which defines a Notarial Act as "any act that a notary public of this state is authorized to perform,"²⁰⁴ including the execution of a self-proving affidavit. The Uniform Act obviates the requirement of a seal.²⁰⁵ Even though the Uniform Act was only applied prospectively,²⁰⁶ a progressive court would have employed substantial compliance principles to find the will self-proving and admit it to probate.²⁰⁷ Any argument over the validity of the self-proving affidavit is largely irrelevant as it is entirely unnecessary to begin with.

Second, the Supreme Court found that notwithstanding the available witness's testimony that he had been told of his cohort witness's death, the proponent failed to "satisfactorily" establish that the unavailable witness was dead, absent, or insane.²⁰⁸ To the court, "satisfaction" requires the presentation of evidence sufficient to release it from doubt, suspense, or uncertainty.²⁰⁹ In this regard, said the court, the proponent must present proof which will "ordinarily satisfy an unprejudiced mind beyond a reasonable doubt."²¹⁰ As the dissent observed, the legislature could not have possibly intended, for this civil matter, the heightened level of proof suggested by the majority, particularly where it was only required to be "satisfactory" rather

201. *Id.*

202. *Id.* ¶ 10, 179 P.3d at 1269.

203. Ch. 131, 1985 Okla. Sess. Laws 361.

204. 49 OKLA. STAT. § 112 (2011).

205. The certification of the notarial act "may include the official stamp or seal of office." *Id.* § 118(A) (emphasis added).

206. *Id.* § 120.

207. The self-proving affidavit may be appended to the will at any time after the will's execution if the relevant parties are still alive. 84 OKLA. STAT. § 55(5) (2011). The notary's seal does not have to be affixed at the same time that the notary signs the affidavit. Since the will was probably executed at church, it may have been the notary's intent to add her seal at a later time.

208. 58 OKLA. STAT. § 43 (2011). This witness was, in fact, dead. The court noted that "a quick search" of the Social Security Death Index confirms that the witness died on August 15, 2000. *In re Estate of Speers*, 2008 OK 16 n.18, 179 P.3d 1265, 1270 n.18.

209. *Id.* ¶ 14, 179 P.3d at 1271.

210. *Id.*

than compelling, convincing, clear, or incontrovertible.²¹¹ Moreover, because the will's challengers failed to object to the surviving witness's testimony, the actuality of the second witness's death was not contested.²¹²

Finally, although the language of the attestation clause told a story of statutory compliance, the majority determined that there was insufficient evidence over the attestation of the deceased witness to establish proper execution.²¹³ In corroboration, the testifying witness remembered having been in the testator's presence when they both signed, and added that he presumed that the second witness and notary were also there because their signatures appeared on the will.²¹⁴ With a peculiar aside requiring proof that the deceased witness's signature was in fact hers, the court brushed off the precedential presumption that an attestation clause is *prima facie* evidence of the facts stated therein and found that there was insufficient evidence that the will was attested by the second witness in accordance with the statute.²¹⁵

The court's decision to reject the proffered will could be viewed as a failure of proof rather than one of execution. That said, a court seriously committed to substantial compliance and the effectuation of the testator's unambiguously expressed intent would have decided the case differently. As the dissent observes, a progressive court would have admitted the will to probate.²¹⁶

The clarity of the attestation requirements as statutorily addressed and the alacrity with which Oklahoma courts recite their substantial compliance commitment could lull practitioners into false security at the drafting, execution, or probate stages. This is especially so when the current national

211. *Id.* ¶ 2, 179 P.3d at 1277 (Reif, J., dissenting).

212. The dissent, authored by Justice Reif, observed:

In the case at hand, the unobjected hearsay statement of subscribing witness Walter Durbin (that he was told Sadie Walton had died), was adequate and sufficient to convince a reasonable person that there was good reason for her "absence" as a witness at trial. It was also sufficient to quiet the mind of the trial judge on this issue and give him freedom to act according to his judgment in allowing only one subscribing witness to prove the will. Accordingly, I strongly disagree with the majority holding that "the trial court could not, as a matter of law, have made the requisite statutory finding that Walton's absence or death was 'satisfactorily shown.'"

Id. ¶ 3, 179 P.3d at 1277 (Reif, J., dissenting).

213. *Id.* ¶¶ 19-20, 179 P.3d at 1272-73.

214. *Id.* ¶¶ 5-6, 179 P.3d at 1277 (Reif, J., dissenting).

215. *Id.* ¶¶ 18-19, 179 P.3d at 1272.

216. *Id.* ¶ 2, 179 P.3d at 1277 (Reif, J., dissenting).

conversation is replete with examples of intent-based forgiveness. Indeed, one might say that Oklahoma courts have often approached the attested will much like a wolf in sheep's clothing—claiming solicitude until the fatal bite.

B. The Holographic Will

Oklahoma joins twenty-six jurisdictions²¹⁷ and the UPC²¹⁸ in recognizing the informal holographic (handwritten) will. While it need not appear in English²¹⁹ nor be witnessed, Oklahoma's relatively stringent statute requires that the holographic will be "entirely written, dated and signed" in the testator's handwriting and "subject to no other form."²²⁰

In many ways, the holographic will is the antithesis of the attested one. The holographic will is informal, unwitnessed and quick, while the attested one is formal, witnessed, and usually somewhat involved. The holographic

217. The following states recognize holographic wills: Alaska (ALASKA STAT. § 13.12.502 (2012)); Arizona (ARIZ. REV. STAT. ANN. § 14-2503 (2012)); Arkansas (ARK. CODE ANN. § 28-25-104 (2012)); California (CAL. PROB. CODE § 6111 (Deering 2004)); Colorado (COLO. REV. STAT. § 15-11-502 (2012)); Idaho (IDAHO CODE § 15-2-503 (2009)); Kentucky (KY. REV. STAT. ANN. § 394.040 (LexisNexis 2007)); Louisiana (LA. REV. STAT. ANN. § 1575 (2013)); Maine (ME. REV. STAT. tit. 18-A, § 2-503 (2012)); Michigan (MICH. COMP. LAWS § 700.2502(2) (2013)); Mississippi (MISS. CODE ANN. § 91-5-1 (1999)); Montana (MONT. CODE ANN. § 72-2-522 (2011)); Nebraska (NEB. REV. STAT. § 30-2328 (2008)); Nevada (NEV. REV. STAT. § 133.090 (2013)); New Jersey (N.J. STAT. ANN. § 3B:3-2(2) (West 2013)); North Carolina (N.C. GEN. STAT. § 31-3.4 (2007)); North Dakota (N.D. CENT. CODE § 30.1-08-02 (2010)); South Dakota (S.D. CODIFIED LAWS § 29A-2-502 (2004)); Tennessee (TENN. CODE ANN. § 32-1-105 (2007)); Texas (TEX. ESTATES CODE ANN. § 251.052 (West 2012)); Utah (UTAH CODE ANN. § 75-2-502 (West 2004)); Virginia (VA. CODE ANN. § 64.2-403(B) (2012)); West Virginia (W. VA. CODE § 41-1-3 (2010)); Wyoming (WYO. STAT. ANN. § 2-6-113 (2013)). Maryland (MD. CODE ANN., EST. & TRUSTS § 4-103 (LexisNexis 2011)) and New York (N.Y. EST. POWERS & TRUST LAW § 3-2.2 (Consol. 2006)) permit holographic wills for sailors and soldiers. For specific state statutory distinctions, see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 Statutory Note (1999). For a general discussion of the holographic will, see MCGOVERN, KURTZ, & ENGLISH, *supra* note 15, § 4.4.

Interestingly, of those twenty-six states, only five also accept nuncupative wills. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 (1999).

218. UNIF. PROBATE CODE § 2-502(b) (amended 2010), 8 U.L.A. 144 (Supp. 2012).

219. Heupel v. Heupel, 1946 OK 263, ¶ 7, 174 P.2d 850, 850-51.

220. 84 OKLA. STAT. § 54 (2011). Such a statute is described by the *Restatement* as "first generation," highlighting its strictness by comparison to the relaxed provisions of subsequent legislation that may require only that the material "provisions" or "portions" of the will be in the decedent's handwriting. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 cmt. a, Statutory Note; UNIF. PROBATE CODE § 2-502 cmt. on subsection (b) (amended 2010), 8 U.L.A. 145 (Supp. 2012).

will purportedly requires strict compliance, the attested will, substantial. And while the attested will actually seems to be viewed quite strictly, a significant flexibility has permitted non-compliant handwritings to enter probate nevertheless. If the attested will is a wolf in sheep's clothing, the holograph is a peculiar sheep, dressed as a wolf.

*1. Judicial Interpretation and the Standards of Statutory Compliance:
General*

Desultory review of the case law suggests that the compliance standard required for the holographic will is both clear and clearly strict. As the Court of Civil Appeals in *In re Estate of Rigsby* stated in 1992, "The [c]ourts generally adhere strictly to statutory provisions regarding the execution, interpretation, and probate of wills. This rule is said to be especially true in the case of holographic wills."²²¹ The *Rigsby* pronouncement is not jarring: strict adherence presumably ensures that holographic execution achieves the evidentiary and, to a lesser extent, other functions that attestation normally serves.²²² But things may not be as stated.

First, it is questionable whether *Rigsby* should even be read to control. The quoted language does not commit to what Oklahoma courts do or say, but rather to what is *generally* done or said.²²³ This maneuver to general, third party terms thus appears to be *dicta*, an argument heightened by prior and subsequent case law's explicit application of the substantial compliance doctrine to attested wills, notwithstanding the *Rigsby* court's indiscriminate attribution of strict compliance to *all* issues pertaining to *all* wills.²²⁴ Moreover, subsequent application of *Rigsby* to the holographic will seems to gingerly limit its characterization and effect. The case is employed to support the innocuous and standardless proposition that "[a] holographic will must comply with [title 84, section 54]."²²⁵ It is also obliquely referenced in connection with subsidiary intent doctrines implicating will

221. 1992 OK CIV APP 165, ¶ 5, 843 P.2d 856, 858 (noting also that the right of testamentary disposition is entirely statutory); *see also In re Paull's Estate*, 1950 OK 8, ¶ 5, 254 P.2d 357, 359 (containing a virtually identical statement of policy and standard as applied to attempt to consolidate multiple sheets of paper into a single holographic will).

222. For a general discussion of the intermediate goals of formalities, *see supra* note 12 and accompanying text.

223. *Rigsby*, ¶ 5, 843 P.2d at 857.

224. *See, e.g., In re Estate of Mowdy*, 1999 OK CIV APP 4, ¶ 17, 973 P.2d 345, 350 (stating "[s]ubstantial . . . compliance is required for . . . attestation, publication and acknowledgment").

225. *In re Estate of Foreman*, 1999 OK CIV APP 63, ¶ 2, 982 P.2d 258, 259.

composition and construction, which are quite different than the constitutive inquiry over whether a will even exists at all.²²⁶

Second, *In re Hail's Estate*, decided some seventy years before *Rigsby*, comprehensively discussed whether a holographic will must be "letter and figure perfect"²²⁷ and rejected the strict compliance doctrine in favor of a more liberal standard:

Taking the provisions of our statute on interpretation of wills above quoted, and the decisions of our Supreme Court, we are constrained to hold that Oklahoma is inclined to the liberal construction or substantial compliance rule, and applying these rules to the record in this case, and the [holographic] will here involved, we hold that [its execution constituted] substantial compliance with the statute.²²⁸

Although the court in *In re Abrams' Will* arguably constrained its analysis to the precise will under consideration, it reiterated that compliance position by subsequent assessment of the validity of a holographic will which stated that "[w]e cannot hold, *under the rule of liberal construction to which we are committed*, that there has been a substantial compliance with the statute."²²⁹ *In re Abram's Will*, while old, has never been expressly overruled.²³⁰

Realistically, it may be difficult to conceptualize how a putative testator's compliance with a statute containing such few and emphatically stated requirements could ever be "substantial" without also being strict. As such, the question may be moot, and in any event, should certainly not

226. See *id.* ¶¶ 2-4, 984 P.2d at 258-60 (quoting the relevant portion of *Rigsby* excerpted above but focusing on the remainder of the *Rigsby* excerpt which targeted testamentary intent and integration).

227. 1923 OK 689, ¶ 6, 235 P. 916, 918.

228. *Id.* ¶ 26, 235 P. at 921.

229. *In re Abrams' Will*, 1938 OK 162, ¶ 6, 77 P.2d 101, 103 (emphasis added).

230. In *Coplin v. Anderson*, 1955 OK 26, ¶ 10, 281 P.2d 186, 190 (Halley, J., dissenting), the dissent adverts to the *Hail* court's acceptance of "November 1919" as a proper date for a holographic instrument and notes that the decision was "in effect overruled by later decisions" (presumably, *Abrams'*). Aside from difficulty distinguishing a virtual overruling from an actual one, the point overruled would seem to have been the sufficiency of the date rather than the compliance standard demanded of holographic wills: (1) *Coplin* involved an attested document rather than a holographic one, and (2) *Abrams'* affirmed the principle of substantial compliance. See *Abrams'*, ¶ 6, 77 P.2d at 103 (affirming the "substantial compliance" component of the *Hail* decision but determining that the complete absence (rather than incomplete nature) of the date fails to meet it).

determine the conduct of any careful practitioner overseeing the execution of a holograph.

*2. Judicial Interpretation and Standard of Statutory Compliance:
Specific*

Assuming *arguendo* that strict compliance is indeed the standard required of the holographic will, and accepting the Oklahoma Supreme Court's pronouncement in *In re Abrams' Will* that the statute plainly demands that the holograph be "(a) . . . entirely *written* by the hand of the testator; (b) that it be entirely *dated* by the hand of the testator; and (c) that it be entirely *signed* by the hand of the testator,"²³¹ the rigor of these pronouncements is belied by case law tempering each component. As an initial proposition, this broader ambiguity may result from ambiguity in the very definition or usage of the word "will," which could be used either to describe those oral or written words (wherever found) reflecting testamentary intent or the document on which those relevant words appear.²³²

a) "Entirely" Handwritten

The statutory requirement that the will be "entirely" in decedent's handwriting suggests *per se* will invalidation upon documentary presence of words typed, stamped, or in another's hand. Consider a preprinted card upon which the putative testator writes "Happy Birthday. As I may not live to see your next one, I want you to inherit everything when I die." If the will is the entire card, it is obviously not "entirely" in the decedent's handwriting. If the will is the handwritten words appearing thereon, it is.

The case law instruction that extraneous preprinted material on the face of the will, such as letterhead, does not have invalidating effect is relatively unsurprising if the will equals testamentary words rather than the page upon which they appear.²³³ Indeed, the Oklahoma Supreme Court indirectly admitted as much when endorsing an opinion from a New York court, which had held that a will is "not the paper on which it is written, but the

231. *Id.* ¶ 3, 77 P.2d at 102.

232. *See* Guzman, *supra* note 24, at 322-30 (detailing the imprecision with which the word "will" is defined and the effect of same upon the definition of the term "testamentary intent").

233. *In re Bennett's Estate*, 1958 OK 97, ¶ 10, 324 P.2d 862, 866 (upholding probate of holograph bearing personalized letterhead); *see also* Hartman v. Perdue, 1961 OK 292, ¶ 1, 365 P.2d 163, 164 (noting but not discussing fact that testator's will was written on stationary bearing printed letterhead of the American Cancer Society).

words written thereon.”²³⁴ Integrating these results suggests that Oklahoma courts would nevertheless have a limit, past which the requirement that the will be “entirely handwritten” would fail. For example, were the proponent to offer a single partially typed, partially handwritten will (such as a blank form completed with handwritten dispositive designation) to probate, jurisdictions that only require its handwritten material provisions or portions would accept it far more readily than one demanding that it appear “entirely” by hand. Such a document, if viewed as a single, integrated instrument, would violate the proscription against printed material on the face of the holographic instrument that either “forms a part of” or is referenced therein.²³⁵ But as presently discussed, Oklahoma law has not toed that line, instead issuing inconsistent rulings that at times are paradoxically more liberal than even “substantial compliance” should suggest, yet stricter than even the least forgiving standard should compel.

First, a testator-handwritten document with a single witness’s attestation could be invalid as a holograph for not appearing entirely within the decedent’s handwriting, and invalid as an attested will for lacking the requisite number of witnesses. Yet it appears that in Oklahoma, a third party’s handwritten attestation clause or signature appearing on the face of

234. *Coplin*, ¶ 8, 281 P.2d at 189 (citations omitted); see also *Bennett*, ¶ 7, 324 P.2d at 865 (stating that the “presence [of pre-printed language] on the sheet of paper, on which [the will] was written, has nothing to do with the writing’s validity as a holographic will”).

235. *Bennett*, ¶ 7, 324 P.2d at 864-65. Note, however, that the actual holding of *Bennett* itself, which excused the presence of preprinted material even though it clearly formed “a part” of the will, renders this pronouncement less stringent in practice than as stated. *Id.* *Bennett* seems to reflect the intent theory as discussed *infra* note 245, rather than the surplusage theory that both *Bennett* and other Oklahoma cases actually adopt. Moreover, Oklahoma law permits holographic wills to incorporate printed material by reference, which *a priori* simultaneously renders that printed material both “a part of” and “referred to” in the holographic instrument. *Bennett*, ¶ 7, 324 P.2d at 864-65; see, e.g., *Estate of Nielson*, 165 Cal. Rptr. 319 (Ct. App. 1980); *In re Estate of Gutierrez*, 11 Cal. Rptr. 51 (Ct. App. 1961); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.6 cmt. f (1999). Note that the *Restatement* acknowledges a jurisdictional split where the relevant state statute requires, as does Oklahoma, that the holograph be “entirely” in the decedent’s handwriting, but arguably inappropriately cites *Johnson* as supporting authority in Oklahoma given that that case is more likely assessed under “republication by codicil” theory. Note also the *Restatement’s* position that an extrinsic writing incorporated into a holographic will is “treated as” a part of the will for construction and related purposes, but “is not a physical part of the will and need not be offered for probate nor be made part of the public record.” *Id.* § 3.1 cmt. h (1999). Oklahoma case law seems to agree. See *In re Fullerton’s Estate*, 1962 OK 168, §§ 48-56, 375 P.2d 933, 945.

an attempted holographic will does not compel its invalidation.²³⁶ If Oklahoma is truly a strict compliance jurisdiction, this does not make sense. By contrast to mere letterhead or preexisting non-testamentary print on the subject document, writing such as this that is not in the testator's hand is not extraneous, but rather referential or even relatively central to the document. Moreover, its presence raises the intriguing possibility that the holographic document was not intended by its maker to have testamentary effect unless validly attested.

A more egregious presentation of the issue, and perhaps the Court's most progressive ruling to date, appears within *Johnson v. Johnson*.²³⁷ There, an experienced attorney drafted a one-page typed will, which was not executed nor attested.²³⁸ The attorney later signed the will, after appending the following handwritten language to the very bottom of the page:

To my brother James I give ten dollars only. This will shall be complete unless hereafter altered, changed or rewritten.

Witness my hand this April 6, 1947. Easter Sunday, 2:30 P.M.²³⁹

In a stunning turn, the court gave effect to the entire instrument by holding that (1) the "testamentary flair" of the top typewritten portion turned it into a will even though it was never validly executed²⁴⁰ and (2) the holographic appendage at the bottom was a valid, stand-alone codicil which republished the earlier typed "will" and effectuated all statements in their entirety.²⁴¹

236. *Hartman*, ¶¶ 1, 6, 365 P.2d at 164-65; *Foote v. Carter*, 1960 OK 234, ¶¶ 4, 26, 357 P.2d 1000, 1002-03, 1005.

237. 1954 OK 283, 279 P.2d 928, *reconsideration granted*, 1967 OK 16, 424 P.2d 414.

238. *Id.*

239. *Id.* ¶ 12, 279 P.2d at 929-30.

240. *Id.* ¶ 7, 279 P.2d at 930. The *Johnson* court accomplished this end by torturing the commonly recognized (although itself fraught) definition of a will: "[a] will may be so defective, as here, that it is not entitled to probate but if testamentary in character it is a will, nonetheless." *Id.*

241. *Id.* The court's reasoning has been universally rejected by other courts. *See, e.g., In re Will of Marinus*, 493 A.2d 44 (N.J. Super. Ct. App. Div. 1985). Moreover, its precedential value is probably limited. There has not been a similar Oklahoma case since *Johnson* was decided over fifty years ago. While it has never been overruled, its periodic appearance within Oklahoma decisions is not for the proposition that holographic wills need not strictly comply with the statute, but rather for the breadth with which it defines a will. *E.g., Miller v. First Nat'l Bank & Trust Co.*, 1981 OK 33, ¶ 7, 637 P.2d 75, 77. Finally, and although there is no evidence that untoward pressures affected this particular decision, the

Again, there is no way that Oklahoma's alleged strict reading of the holographic will statute would have legitimated the *Johnson* holding. Integration theory asserts that a will comprises any pages actually present at execution and intended to be a part thereof.²⁴² As such, the document should have failed as both a holographic and attested attempt as it was neither entirely in the handwriting of the decedent nor properly witnessed.

Through a concurrence indirectly admitting compliance failure by focusing on intent, Justice Corn seemed to agree.²⁴³ Dissenting Chief Justice Halley was far more direct. As he railed, the holding was "fantastic[al]," "wholly unwarranted," and a "mockery."²⁴⁴ Regardless of how one feels about either the centrality of testamentary intent to a will or the degree to which statutory formalities should be met, if Oklahoma truly takes the "strict" position that it claims, history has proven Chief Justice Halley correct.

So far, it thus appears that Oklahoma case law inverts the stated rule and standard scenario reflected in the attested will. "Strict" remonstrations aside, Oklahoma case law actually reveals a fairly progressive substantial compliance thrust, in part through a "surplusage theory" under which a document can achieve holographic status if all of its necessary elements intelligibly remain after non-handwritten material is excised,²⁴⁵ and in part

deciding votes in the majority were later convicted of income tax evasion for failing to report bribes that they received while on the bench. See Linda Burkett O'Hearn, *Supreme Court Scandal Examined*, NEWSOK (Feb. 23, 1997, 12:00 AM), <http://newsok.com/supreme-court-scandal-examined/article/2569910/?page=1> (outlining the bribery scandal that implicated Justices Corn, Welch, and Johnson, three of the majority votes in *Johnson*).

242. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.5 (1999). For an example of this doctrine applied, see *Walsh v. St. Joseph's Home for the Aged*, 303 A.2d 691 (Del. Ch. 1973).

243. *Johnson*, ¶ 1, 279 P.2d at 932 (Corn, J., concurring).

244. *Id.* ¶¶ 11, 26, 279 P.2d at 936, 937 (Halley, C.J., dissenting). "I can never subscribe to the proposition that a holographic codicil will validate as a will an instrument that is typewritten, unfinished as to content, undated, unsigned, and unattested." *Id.* ¶ 18, 279 P.2d at 936 (Halley, C.J., dissenting).

245. See Natale, *supra* note 38, at 171-76. Contrast the more strict "intent theory," under which an attempted holograph will fails if the putative testator intended any part of preprinted or non-handwritten matter—whether critical or material to the will or not—to comprise part of the will. *Id.* Such an approach presumably would have invalidated the will in *In re Bennett's Estate*, in which the testator wrote the word "Will" before her preprinted name and then continued with the body of the document thereafter. 1958 OK 97, ¶ 3, 324 P.2d 862, 864-65. The testator's actions suggest her desire to incorporate her preprinted name as partial identification within her will. *Id.*

It is difficult to conceive of many situations where there would not be at least *some* peripheral (and thus will-defeating) intent to include the preprinted language on the

by amplifying that theory to give testamentary effect even to typed words under contorted republication principles. But in true paradoxical fashion, it is difficult to reconcile these cases and the observations they invite with a more recent holding that appears to turn them on their head, pushing even strict compliance far beyond what would seemingly be its proper boundary.

In *In re Estate of Shaw*, the decedent validly executed a holograph, which the residuary beneficiary found after the decedent's death.²⁴⁶ Mistakenly believing that it must be attested, he fraudulently added a notarial jurat backdated to the original date of execution.²⁴⁷ The lower court refused to admit the will to probate, finding that the decedent lacked testamentary intent and that the residuary beneficiary had unduly influenced the testator²⁴⁸—both undoubtedly reasonable grounds upon which to invalidate an attempted testamentary disposition. But on appeal, the Court of Civil Appeals blended equitable principles and a distinctly formalistic tack. It admonished that the addition of the back-dated jurat (adding, as it did, language on the holograph that was not “entirely” in the decedent's handwriting) nullified any testamentary effect that the document could have otherwise held.²⁴⁹ The court cited for authority the following 1939 California case, which bore roughly analogous facts.²⁵⁰

document, save the peculiar instance where proof reveals that a testator in extremis merely grabbed a paper close at hand, such as a crossword puzzle, upon which to write her will, or the more plausible, but no less troubling, situation where the printed material was added *after* the will's execution and without the testator's knowledge or consent. The *Restatement* suggests that a jurisdiction committed to the intent theory should soften its effects through a presumption that a testator would not have intended any extraneous material deemed “surplus” to be part of the will. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 cmt. b. *But see In re Estate of Shaw*, 2004 OK CIV APP 38, 90 P.3d 588 (providing an Oklahoma reaction).

246. *Shaw*, ¶ 3, 90 P.3d at 589.

247. *Id.* Under the Model Notary Act:

“Jurat” means a notarial act in which an individual at a single time and place:

- (1) appears in person before the notary and presents a document;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence;
- (3) signs the document in the presence of the notary; and
- (4) takes an oath or affirmation from the notary vouching for the truthfulness or accuracy of the signed document.

MODEL NOTARY ACT § 2.7 (2010).

248. *Shaw*, ¶ 1, 90 P.3d at 589.

249. *Id.* ¶ 4, 90 P.3d at 590.

250. *Id.*

In *In re Towle's Estate*, the testator had executed a valid holographic will but later consulted a third party to prepare a formally attested version.²⁵¹ In the testator's presence, that party made changes to the face of the original holograph, the evident intent being to create a memorandum to guide the new will.²⁵² The next day, the testator executed an inter vivos trust with terms based on the altered holograph.²⁵³ Unfortunately, the testator died without having completed that trust's funding, and California real property remained within her estate.²⁵⁴ The issue was whether that property passed through the terms of the holographic will or through intestacy.²⁵⁵ Opting for the latter, the California Supreme Court refused to admit the will to probate:

[W]e think the obvious purpose and intent of the legislature of making an holographic will completely, entirely and wholly the exclusive act of the testator, leads necessarily to the conclusion that the slightest change by a stranger *with the knowledge and consent of the testator*, at any time during its existence, will completely vitiate any instrument as an holographic will.²⁵⁶

In *Towles*, the testator witnessed and consented to the third party's holographic changes. The California Supreme Court's observation that the will was no longer entirely in the decedent's handwriting was obviously correct, and its resulting decision against admitting the document to probate at least colorably so. The lesson to be learned is that a testator should make handwritten changes herself. But the Oklahoma Court of Civil Appeals inappropriately thrust that ruling upon the facts of *Shaw*, where the changes to the valid holographic will were made *after* the testator's death and thus both critically and by necessity *without* either her knowledge or consent.²⁵⁷

The jurisprudence of revocation theory, which bears its own complement of formalities and standards, further weakens the *Shaw* holding. Wills can only be revoked or altered by (a) the testator's valid execution of a subsequent writing with revocatory or amendatory intent; (b) the testator's

251. *In re Towle's Estate*, 93 P.2d 555, 558 (Cal. 1939).

252. *Id.* at 557-58.

253. *Id.*

254. *Id.* at 558-59.

255. *Id.* at 561.

256. *Id.* (emphasis added). The proponents argued that the testator lacked the necessary intent to revoke the holograph. *Id.* at 560-61. However, the court found that intent, based on the testator's acquiescence to the alterations and the execution of a trust on the following day. *Id.* at 561.

257. *In re Estate of Shaw*, 2004 OK CIV APP 38, ¶ 3, 90 P.3d 588, 589.

burning, tearing, cancellation, obliteration, or destruction of the document with the intent and purpose of effecting revocation; or (c) some third party's performance of one of these enumerated physical acts if done at the testator's request and in his presence.²⁵⁸ Clearly, none of these situations occurred in *Shaw*, as none could have occurred after the decedent's death.²⁵⁹

The *Shaw* court accentuated the deceitfulness of the will proponent's conduct, which would have been a far more appropriate basis for the will's invalidation than the overbroad foray into formalities that the court ultimately (but somewhat covertly) engaged.²⁶⁰ For if correctly decided, *Shaw* leads to the preposterous conclusion that *any* disappointed heir confronting a holographic will could invalidate it merely by writing thereon after the decedent's death.²⁶¹

b) "Entirely" Dated

At least in terms of statutory rules, Oklahoma and Louisiana stand alone in demanding that the holographic will be dated in the testator's handwriting.²⁶² Requiring a date is sensible, as it establishes the time at which testamentary intent and capacity would be demanded, permits the court to determine which document controls when numerous wills are found after death, and clarifies potential integration and revocation issues.

The following synthesis of Oklahoma case law instructs that to satisfy the Oklahoma requirement, the date must be on the face of the will,

258. 84 OKLA. STAT. § 101 (2011).

259. Perhaps the Oklahoma Court of Civil Appeals overlooked or ignored the following observation that the *Towle*'s court made: "It is true that if someone, unknown to the testatrix and without her authority, had marked up the decedent's will, said instrument, as originally executed by the testatrix and with said alterations deleted, would [have been] entitled to probate." 93 P.2d at 560.

260. To do so, the court of appeals would merely have needed to uphold the lower court's decision—that the testator lacked testamentary intent or was unduly influenced—which would have been a fairly clean and easy ruling given the procedural posture of the case. One might question, however, whether absent evidence to establish same, the "mere" act of the fraudulent backdating should cause the will proponent and beneficiary to lose his share. After all, the testator's intent would then be clear, and the beneficiary would merely be acting, albeit mistakenly and inappropriately, so as to (self-servingly) ensure that the testator's intent was upheld.

261. Of course, one so acting could be found guilty of fraud or wrongdoing, rendering the attempted amendment of the document a nullity, which again would be superior to claiming that the will itself was invalidly executed.

262. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 Statutory Note (1999).

handwritten by the testator, and complete. It appears that the first two elements are indeed as strictly construed as the courts' broader statements about the holograph have claimed.²⁶³ As to the third, however, the date may be abbreviated²⁶⁴ and in some cases, even incomplete.²⁶⁵

In light of the probable purposes of the dating requirement, Oklahoma courts presumably would accept any testator-written notation on the face of the will that would permit its fairly precise determination of the date of execution. Thus, while the recitation of a testator's age identifies a one-to-twelve month period during which the will could have been executed, it would fall short of the statutory requirement to provide a specific year, much less month or day. By contrast, a statement such as "April Fools Day, 2013" readily converts to a single month, day, and year, and accepting such a term works no disservice to the statutory objectives.²⁶⁶ This is particularly true given courts' acceptance of other irregularities that prevent precision in determining the date of execution, especially as multiple dates can satisfy a holographic will statute, as can incorrect or mistaken ones.²⁶⁷

263. See *supra* Part III.B.1; *Day v. Williams*, 1938 OK 554, ¶ 12, 85 P.2d 306, 308 (requiring identification and provisions of holographic will to appear on its face); *In re Abrams' Will*, 1938 OK 162, ¶ 7, 77 P.2d 101, 103 (refusing to permit extrinsic evidence to establish the date of attempted, entirely undated holograph will); see also *In re Noyes' Estate*, 105 P. 1017, 1020-21 (Mont. 1909) (applying statute similar to that enacted in Oklahoma and refusing to accept into probate a will entirely in the handwriting of the decedent save for the preprinted numerals "190_" in the date); cf. *In re Estate of Martin*, 58 Cal. 530, 533 (1881) (reciting a testator's age is not equal to a date).

264. See *In re Bennett's Estate*, 1958 OK 97, ¶ 5, 324 P.2d 862, 864 (approving a will that was dated "Oct. 1st-54").

265. See *In re Hail's Estate*, 1923 OK 689, ¶ 26, 235 P. 916, 921 (upholding a will that omitted the day of month from the date where no challenge based on capacity or undue influence was levied). See, however, *Coplin v. Anderson*, 1955 OK 26, ¶ 10, 281 P.2d 186, 190 (Halley, J., dissenting), which suggested that *Hail* "was in effect overruled by later decisions of [the Oklahoma Supreme] Court." Other than *Coplin*, the only other Oklahoma case citing *Hail* for authority is *Abrams'*, which actually discussed the total absence, rather than incomplete nature, of a date. See *supra* note 230. However, in *In re Estate of Dickson*, the Oklahoma Supreme Court adverted to the ongoing efficacy of *Hail* should the appropriate case present. 2011 OK 96, ¶ 2 n.4, 286 P.3d 283, 285 n.4.

266. This example admittedly raises significant questions with respect to testamentary intent.

267. See *Randall v. Salvation Army*, 686 P.2d 241, 243 (Nev. 1984) ("The fact that the instrument bears more than one date does not necessarily make its date uncertain or otherwise prevent it from being probated as a holographic will."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 cmt. e (1999). The issue appears not to have arisen in Oklahoma, which could fall back to a strict requirement and invalidate the will. See *In re Estate of Shaw*, 2004 OK CIV APP 38, ¶ 1, 90 P.3d 588, 589 n.1 (citing *In re*

c) “Entirely” Signed

The holographic will must be signed in the decedent’s hand by any mark intended by the decedent to serve as a signature.²⁶⁸ In requiring a mere signature rather than a “signature at the logical end” (i.e., subscription²⁶⁹), Oklahoma law seemingly accepts as a signature any point in the document that the decedent handwrites his own name.²⁷⁰ Nevertheless, there may be a difference between a handwritten name and an actual “signature,” with the latter reserved for situations where it reveals its writer’s intent to authenticate or adopt the textual material.²⁷¹ If so, it would be prudent (if not required) for testators to subscribe holographic wills as well as attested ones and thereby avoid unnecessary litigation over the intent with which the signing was made and the extent of the text it was intended to cover.

The following trio of cases reflects the Oklahoma courts’ willingness to elide the tough questions in favor of easier, but not necessarily considered, resolution. For example, in *Davis v. Davis*,²⁷² the decedent’s heirs sought invalidation of a purported holographic will because the testator’s handwritten name appeared solely within the introductory exordium clause.²⁷³ Sidestepping whether extrinsic evidence could be adduced to establish signatory intent, the court described the name’s physical position as:

Murphy’s Estate, 38 P. 543 (Cal. 1895)) (noting that two separate written statements of an identical date can constitute a holographic will but failing to address the outcome for inconsistent ones).

268. See, e.g., *Hicks v. Cravatt*, 1951 OK 219, 235 P.2d 936; see also *infra* note 271.

269. Subscription, which is demanded for attested wills, is a signature appearing at the document’s logical end. See *infra* note 275.

270. The UPC clearly rejects the position that a testator’s signature must be at the end of the will. It can be found anywhere within the subject document as long as the testator wrote her name with signatory intent. UNIF. PROBATE CODE § 2-502 cmt. on subsection (b) (amended 2010), 8 U.L.A. 145 (Supp. 2012).

271. For example, the Oklahoma Commercial Code defines a signature as “any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.” 12A OKLA. STAT. § 3-401(b) (2011). Although that statute permits the signature to be made manually or by any device or machine, the holographic context demands that the signature be in the decedent’s handwriting. See generally *In re Hail’s Estate*, 1923 OK 689, ¶ 8, 235 P. 916, 918 (remonstrating that a holographic will must be entirely handwritten, including the signature, to prevent forgery).

272. 1922 OK 214, 207 P. 1065.

273. *Id.* ¶ 7, 207 P. at 1066.

Ordinarily . . . although written by his own hand . . . merely descriptive of the person unless there is competent evidence which would reasonably tend to establish as a fact that he intended it to constitute a signing of the instrument, or that his name so written by him was intended as a complete execution of the instrument.²⁷⁴

The court continued by observing that decedent closed the document by writing “[w]itness my hand this the 1st day of August, 1901” but did not thereafter append his signature as most people normally would.²⁷⁵

Taken cumulatively with the language above, the following factors should have removed all doubts:

- the formal and technical language used in the document;
- the apparent completeness of the document;
- the document’s request that “no legal procedure” be interceded against it; and
- the evidence that the putative testator later informed others that he had made a will.²⁷⁶

274. *Id.* ¶ 9, 207 P. at 1066-67.

275. *Id.* ¶ 10, 207 P. at 1067. In this regard, the court makes an interesting point, particularly where the document’s writer is well-versed in the typical use of this sort of phrase. However, the argument is weakened by two, perhaps slight, observations: first, as used in the decedent’s document, the phrase did not close with a comma or colon, but rather with a period; second, it appears that the phrase was not followed by a blank line or other physical cue of saved space. Both points suggest that this particular testator’s thoughts were already complete, obviating both the desire and perceived need for a subsequent “sign off” via a second, handwritten name. Instead, it as easily looks as though the testator believed that he had already signed, and was merely reinforcing that fact, as well as the solemnity of the occasion, through the florid language employed. *But see In re Estate of Fegley*, 589 P.2d 80, 81-82 (Colo. App. 1978) (finding no signatory intent where holographic will ended with notation “Witness my hand this 16th day of September, 1976,” followed by blank signature space and attestation clause).

For thorough discussion of signature placement, testamentary intent versus signatory intent, and the type of extrinsic and/or intrinsic evidence permissible to establish them, see *Estate of Erickson v. Misaka*, 766 P.2d 1085, 1088 (Utah Ct. App. 1988), *aff’d sub nom. In re Estate of Erickson*, 806 P.2d 1186 (Utah 1991) (denying probate to purported holographic document written on three index cards and “signed” only in the exordium). For an extended discussion of the subscription requirement for *attested* wills and its role in ensuring that proper intent exists, see *Coplin v. Anderson*, 1955 OK 26, 281 P.2d 186, and see generally *supra* Part III.A.1.b.

276. *Davis*, ¶¶ 4-5, 207 P. at 1066.

The court nevertheless held that there was insufficient evidence to establish that the decedent had intended the particular document found after his death to be his last will rather than, for example, a different will or even a draft.²⁷⁷ In so doing, it implicitly conflated the independent principles of signatory and testamentary intent, ultimately holding that the latter was insufficiently established to permit the document's admission into probate.

The court again intimated the interplay between testamentary and signatory intent in the later case of *Elrod v. Purdin*.²⁷⁸ Specifically, the court determined that the arguably incomplete character of the proffered document revealed the absence of testamentary intent, thereby extending "no occasion to give attention" to the "difficult task" of determining whether an exordium "signature" for an attempted holograph would suffice.²⁷⁹ Most recently, the court has noted in dicta that "the usual place for a signature in a will is at the bottom, and this location is evidence that at that point the will is complete."²⁸⁰

Whether or not subscription is a wise requirement at all for the attested will is debatable, and amending the holographic statute to demand the same might be foolish. Nevertheless, it may be superior to permitting inefficient, intent-based end-runs around statutory text to flourish, with the litigation cost borne by those for whom the testator may well have cared most.

Physical placement is not the only issue that attends the signature requirement. Although other courts have held that a testator may alter a valid holographic will without re-signing it,²⁸¹ Oklahoma courts have not yet decided the issue. The case of *Hooker v. Barton* comes close.²⁸²

277. *Id.* ¶ 10, 207 P. at 1067.

278. 1945 OK 291, 163 P.2d 209.

279. *Id.* ¶ 4, 163 P.2d at 210.

280. *In re Estate of Rigsby*, 1992 OK CIV APP 165, ¶ 3, 843 P.2d 856, 858 (sidestepping whether the presence of the testator's initials at the top of two pages would suffice as a valid signature when only the first page was signed); *see also In re Estate of Foreman*, 1999 OK CIV APP 63, ¶ 6, 984 P.2d 258, 260 (affirming lower court's denial of admission to probate of purported five-page holographic will where some pages were signed and/or dated while others were not and pages bore no internal appreciable relation).

281. *See Randall v. Salvation Army*, 686 P.2d 241, 243 (Nev. 1984) (upholding validity of two-page holographic will under statute identical to Oklahoma's when page 1 was dated two days after page 2 and signature only appeared on page 2); *Moyers v. Gregory*, 7 S.E.2d 881, 882 (Va. 1940); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 cmt. f (1999); 2 PAGE ON THE LAW OF WILLS § 22.4 (Jeffrey A. Schoenblum ed., 2013).

282. 1955 OK 81, 284 P.2d 708.

In *Hooker*, the decedent handwrote, dated, signed, and later modified (but did not re-sign) a document propounded as a will.²⁸³ The proponents argued, *inter alia*, that the decedent's subsequent modifications did not require a separate, second signature.²⁸⁴ The Oklahoma Supreme Court stepped over the issue, however, by holding that the decedent lacked testamentary intent when she initially wrote the document.²⁸⁵ Although the subsequent modifications arguably supplied evidence of same, the court determined that a valid will requires the simultaneous confluence of intent and execution formalities (which obviously includes a signature).²⁸⁶ Because the first document was not a valid will for lack of demonstrable testamentary intent, later handwritten and unsigned modifications to it could not cure the defect. The court observed: "[t]estamentary intent is never retroactive. It must concur with the writing, else it is of no effect."²⁸⁷

The court's reading of the requirements seems unnecessarily strict. Consider a document whose maker intends it to serve as a draft, or subject to some unstated condition not yet fulfilled, and who files it away without signature or witnessing pending final determination. Under the court's approach, the time lapse between the start of the execution and its last requisite act would derail its ultimate and valid completion (although proof of that gap between execution and intent might be difficult to obtain).

Perhaps the *Hooker* court intended to limit its demand for simultaneous intent and formalities to holographic wills, or more specifically, those ambiguous situations where multiple or modified documents are offered as a single will. If not, the holding seems overbroad. If the putative testator in *Hooker* truly intended to clarify as (or even convert her previous writing into) a will, then she effectively "reacknowledged" her prior signature when she altered and redated some original provisions on the document but kept others, and her signature, intact. Moreover, as testators need not sign attested wills in front of witnesses at all,²⁸⁸ it is unclear why the Court would impede testamentary conduct for a holographic will through such pro forma technicality when reviewing a single and entirely handwritten, dated, and signed document reflecting testamentary intent.

283. *Id.* ¶¶ 3-6, 284 P.2d at 709.

284. *Id.* ¶ 8, 284 P.2d at 710.

285. *Id.* ¶ 10, 284 P.2d at 710.

286. *Id.*

287. *Id.* ¶ 11, 284 P.2d at 710 (citing *In re Pagel's Estate*, 125 P.2d 853 (Cal. Ct. App. 1942)).

288. Recall that subsequent acknowledgement of a prior signature will suffice. *See supra* note 137 and accompanying text.

d) Proof and Appellate Review

Under Oklahoma law, whether a holograph is a valid will is a legal question rather than a factual one.²⁸⁹ Once the underlying objective and subjective requirements for validity are established, a holographic will may be established “in the same manner [as] other private writings” when attempting to admit it to probate.²⁹⁰ The decedent’s handwriting and signature may be established by comparing it to her other acknowledged writings.²⁹¹ Lay opinion testimony is acceptable, although more scientific evidence, such as that supplied by a handwriting expert, may be necessary should the writing fall into dispute.²⁹²

Even if conflicting evidence is offered, the judgment and findings of the trial court regarding execution will not be disturbed on appeal if supported by substantial testimony²⁹³ or not clearly against the weight of the evidence.²⁹⁴ As some of the cases reflect, however, appellate courts have been willing, when it suits them, to disregard a lower court’s determination in favor of their own view of whether the statutory requirements have been met.²⁹⁵

IV. Testamentary Intent

Recall that a valid will requires formalities *and* testamentary intent.²⁹⁶ Although when assessing formalities, Oklahoma law has been both more and less strict than the cases aver, the same cannot be said for its handling of testamentary intent. At least for the holographic will, Oklahoma courts claim to be, and are, exacting over intent on constitutive and constructional levels.

Although questions of intent might seem peripheral to facial statutory compliance, how a court approaches the question overtly and covertly affects its evaluation of the formalities themselves as well as their case-specific attainment.

289. *In re Bennett’s Estate*, 1958 OK 97, ¶ 10, 324 P.2d 862, 866.

290. 58 OKLA. STAT. § 31 (2011).

291. *In re Estate of Wilder*, 1976 OK 113, ¶ 6, 554 P.2d 788, 789 (citing *Burns v. State*, 1941 OK CR 118, 117 P.2d 144).

292. *Id.* ¶ 6, 554 P.2d at 790.

293. *In re Stock’s Will*, 1935 OK 662, ¶¶ 13-14, 49 P.2d 503, 505.

294. *In re Estate of Bruner*, 1987 OK CIV APP 32, ¶ 8, 737 P.2d 125, 127 (citing *In re Estate of Bogan*, 1975 OK 134, 541 P.2d 854; *In re Estate of Bracken*, 1970 OK 185, 475 P.2d 377).

295. *See, e.g., In re Estate of Speers*, 2008 OK 16, ¶¶ 19-20, 179 P.3d 1265, 1272-73.

296. *See supra* notes 8-23 and accompanying text.

A. Primary Intent

Establishing testamentary intent presents few difficulties for most attested wills, which will normally bear a caption entitled "Last Will and Testament" and an introductory clause expressing the testamentary nature of the undertaking.²⁹⁷ Similar ease exists when the proffered holograph reflects standard testamentary language,²⁹⁸ as where its drafter works from a sample form or prior, more formal will. For example, the court had little trouble locating testamentary intent in a holograph that stated "[b]y this will I leave" and "[t]his is my last will and testament."²⁹⁹

Problems arise, however, when the proponent offers a less targeted document for probate.

It is generally conceded that in addition to the usual burden of proof resting upon the proponent of a will in probate proceedings, it is also presumed that an informal instrument, such as a letter, not purporting on its face to be a will, was not executed *animo testandi* [i.e., with testamentary intent].³⁰⁰

The curious case of *Craig v. McVey*³⁰¹ called upon the court to determine whether testamentary intent existed in the following portion of a letter written to the will's proponent:

You have been so sweete [sic] to me I am not going to forget you You & Sam & Jack are all I have & *when I die I want you to have what I leave*—Jack has plenty & don't need it. Sam & I either at the best can only be here a short time. We are both getting old & you are nearer & dearer to me than any one but Jack—I am sure looking out for you.³⁰²

In refusing to accord testamentary intent to that language, the court noted that

297. However rare, it does remain possible for such documents to be challenged on grounds that testamentary intent does not exist. See *supra* note 8 and accompanying text.

298. As the court noted in *Footo v. Carter*, 1960 OK 234, 357 P.2d 1000, however, "[t]he employment of technical words is not required in order to render an instrument prepared by the testator himself a valid holographic will. It is sufficient if the writing expresses, however informally, a testamentary purpose in language sufficiently clear to be understood." *Id.* ¶ 16, 357 P.2d at 1003 (quoting 57 AM. JUR. *Wills*, § 633 (1948)).

299. *Id.* ¶¶ 15-16, 357 P.2d at 1003.

300. Annotation, *Letter as a Will or Codicil*, 54 A.L.R. 932 (1928).

301. 1948 OK 161, 195 P.2d 753.

302. *Id.* at 754 (mistakes in original) (emphasis added).

- the letter was one of many letters written to the same proponent;
- the letter was “similar in tone” to those written to other persons;
- the purported testamentary portion was but a small piece of a longer casual writing principally focused on unrelated issues;
- the quoted language could as easily reflect the letter writer’s present intent to effect a future will (non-testamentary intent) as her present intent to effect a present will (testamentary intent);
- the decedent was “familiar with customary testamentary terminology,” having written an attested will some years before; and
- in the eleven years between the letter’s post and its writer’s death, there was no evidence reflecting her belief that she had made a testamentary disposition thereby.³⁰³

Additional considerations could have included the decedent’s relationship with the purported beneficiaries and presumptive heirs, the decedent’s health and the presence of exigent circumstances in attempting to complete a testamentary act, and the delivery or retention of the subject document.³⁰⁴

That testamentary intent is requisite is unquestionable, but the *Craig* opinion also indirectly illuminates what sort of evidence may be used to establish it. The court commits to the rule that “[w]here an instrument is tendered for probate as an holographic will, [testamentary intent] must be plainly apparent.”³⁰⁵ Ironically, it is unclear whether that “plain appearance” must derive from the face of the document or may be

303. *Craig*, ¶¶ 2-7, 195 P.2d at 753-55. *But see In re Rigsby*, 1992 OK CIV APP 165, ¶ 2, 843 P.2d 856, 857 (testamentary intent apparently beyond question to the litigating parties in phrase “[i]nasmuch as I do not have a will, I would like to make the following arrangements in the event of my death”).

304. *See* 80 AM. JUR. 2d *Wills* § 364 (2011). For additional discussion of relevant factors, including the type of evidence admissible and related integration intent issues, *see infra* notes 323-324 and accompanying text.

305. *Craig*, ¶ 4, 195 P.2d at 754 (quoting, in part, *In re Young’s Estate*, 1923 OK 729, 219 P. 100) (endorsing the “plainly apparent” rule in rejecting holographic status of letter stating, in part, “[t]he deed will be made to me to do as I please with while I live . . . [i]f I should die first, I want you and your heirs to have what I have left”); *see also* *Hooker v. Barton*, 1955 OK 81, ¶ 10, 284 P.2d 708, 710 (“We have long been committed to the rule that where an instrument is tendered for probate as an holographic will, it must be plainly apparent that it was the intention of the deceased that the paper should stand for her last will and testament, and an instrument should be denied probate unless such intention is plainly apparent.”) (citations omitted).

discerned from extrinsic sources.³⁰⁶ Although Oklahoma courts have obliquely suggested that the intrinsic approach controls,³⁰⁷ and indeed have explicitly directed this rule in other testamentary contexts,³⁰⁸ no Oklahoma statute or case directly assessing primary testamentary intent specifically so provides.³⁰⁹ Indeed, “[i]n determining whether or not an instrument offered

306. It is telling that the court made this pronouncement after employing non-documentary “proof” to discredit the existence of intent. The issue can be acute, with different jurisdictions, courts in the same jurisdiction, and even judges on the same court failing to agree. *See, e.g.,* Edmundson v. Estate of Fountain, 189 S.W.3d 427, 432 (Ark. 2004) (holding, inexplicably, that extrinsic evidence was inadmissible to establish testamentary intent where the instrument itself contained no evidence of such intent on its face, even though the holographic document was titled “Last Will”).

In re Estate of Kuralt, 2000 MT 359, 303 Mont. 335, 15 P.3d 931, reveals tortured litigation over the issue. While hospitalized, Charles Kuralt wrote a letter to his non-marital paramour, stating, “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.” *Id.* ¶ 11, 15 P.3d at 933. Although the note reflected future rather than present intent, and although Kuralt had in the past executed a clearly effective holographic will, the court imbued the letter with testamentary intent in part because of its willingness to admit extrinsic evidence of that intent into probate. For more information on extrinsic evidence, see generally 95 C.J.S. *Wills* § 320 (2010).

307. *See, e.g.,* Day v. Williams, 1938 OK 554, ¶ 12, 85 P.2d 306, 308 (refusing to probate purported copy of lost holographic will, the court stated that “[t]he law contemplates that the identity of the will and the provisions thereof must be determined from the instrument itself.”).

In *Hooker*, the court affirmed a lower court’s holding that no testamentary intent could be found in a signed and dated document addressed “[t]o whom this may concern,” and initially stating, “Should anything happen to me that I should be incapable of handling my business or in case of death the contents of this box are to be turned over to [others].” *Hooker*, ¶ 3, 284 P.2d at 709. Although the document was later modified to cover *all* real and personal property of its maker, the court noted the “plainly apparent” rule to observe that “[n]o such [testamentary] intention is apparent in connection with the instrument in question as originally executed.” *Id.* ¶ 10, 284 P.2d at 710. The court’s rationale suggests that testamentary intent would have had to have appeared on the face of the document as originally executed. *See supra* Part II.

308. *See, e.g., In re Severns’ Estate*, 1982 OK 64, ¶ 6, 650 P.2d 854, 857 (rejecting extrinsic evidence that decedent’s omission of children from will was intentional and noting that intent to disinherit must appear on the will’s face “in strong and convincing language”); *In re Abrams’ Will*, 1938 OK 162, ¶ 7, 77 P.2d 101, 103 (“The omission of the date from the will cannot be supplied by evidence aliunde”); *Davis v. Davis*, 1922 OK 214, ¶ 7, 207 P. 1065, 1066 (the court refused to “express[] any opinion as to the admissibility of evidence aliunde [regarding signatory intent]”). Notably, the *Davis* court continued by considering broadly many factors in concluding that the proposed will lacked testamentary intent. *Id.* ¶¶ 9-10, 207 P. at 1066-67.

309. The Oklahoma Statutes provide that “[i]n case of uncertainty, arising upon the face of a will, as to the application of any of its provisions, the testator’s intention is to be

for probate constitutes a holographic will, the court will consider all of the facts and circumstances surrounding its execution in order to arrive at the true intent of the testator.”³¹⁰

B. Secondary Intent

If primary intent is essentially constructional—the intent to make a will—secondary intent could be described as that which guides the court in the construction and interpretation of its component parts, once it is held to be valid.³¹¹ It is here that the “holographs must strictly comply” assertion usually surfaces, and most specifically when confronting whether and how to integrate multiple documents.

Consider a decedent who dies leaving three distinct handwritten sheets of paper, all of which are offered for probate, and each reflecting, to various degrees, testamentary intent. Several possibilities result:

- All three documents individually meet holographic formalities and are thus subject to probate as three distinct wills. The only question will be the effect of each on the others.³¹²

ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.” 84 OKLA. STAT. § 152 (2011). While the statute seems to speak directly to ascertaining testamentary intent, its text actually guides the construction or interpretation of a document that has already been determined to be a will.

310. *In re Paul’s Estate*, 1950 OK 8, ¶ 16, 254 P.2d 357, 361.

311. For example, intent is critical in construing documents and determining whether a testator held the intent to integrate, incorporate, or revoke them.

312. “Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.” 84 OKLA. STAT. § 154 (2011); *see, e.g., In re Estate of Woodruff*, 1963 OK 44, ¶ 3, 379 P.2d 692, 693 (sustaining admission of two sheets of paper into probate where each was independently written, dated, and signed by testator although not stapled together or otherwise physically connected); *Reeves v. Duke*, 1943 OK 212, ¶¶ 2-6, 137 P.2d 897, 898 (sustaining admission of two separate documents as a single holographic will where both documents met statutory requirements and reflected testamentary intent, though the court’s holding may have been influenced by its willingness to view the second document as a holographic codicil to the first).

The interesting question is whether the term “testamentary instrument” is to be read as meaning “validly executed.” On one hand, the answer seems to be yes, as evidenced by the court’s admonition in *Paull’s Estate*, ¶ 9, 254 P.2d at 359 that title 84, section 154 of the Oklahoma Statutes deals with the interpretation of wills and is thus inapplicable unless and until a will is initially found. As *Hooker* reminds, “an instrument which is not a will does not become one until executed as required by law.” ¶ 12, 284 P.2d at 710. On the other hand, the court’s liberal and criticized construction of a will in *Johnson v. Johnson*, 1954 OK 283, ¶ 7, 279 P.2d 928, 930, as essentially anything testamentary in character regardless of whether it was defectively executed may suggest that title 84, section 154 applies to any

- Only one document meets the intent plus formalities standard, and is alone accepted into probate with the others deemed legal nullities.³¹³
- While one document meets formalities, the existence of the other two sufficiently clouds testamentary intent to persuade a court that no intention is “plainly apparent” and that the decedent therefore died intestate.³¹⁴
- While only one of the documents meets formalities, it is deemed to cover the other two, either inferentially or through explicit integration or incorporation by reference, thus validating all expressed provisions irrespective of their documentary source and triggering second-level inquiries over will construction should inconsistencies exist.³¹⁵

No single document meets all formalities, but taken together, formalities might be satisfied. This is the most vexing possibility on form and substance levels, raising the “intent bar” vis-a-vis a court’s comfort level in discerning whether the documents’ scrivener held testamentary intent at all, much less the additional, integrative intent that all of the documents complemented (indeed, completed) each other.³¹⁶

instrument with a testamentary cast, which could pave the path for many noncompliant documents to be read together as a single, compliant one.

313. See, for example, *In re Purcell’s Estate*, 1947 OK 25, 176 P.2d 986, where the court refused to find that a handwritten, signed, dated, and witnessed letter addressed “To Whom it may Concern,” and completed after the execution of a validly attested will and codicil, operated itself as a codicil under the substantial compliance doctrine. *Id.* ¶ 8, 176 P.2d at 987. Although the letter stated the decedent’s intent regarding the disposition of certain items of personal and real property and referred to disposition to take effect after her death, the court noted that the letter did not use accepted testamentary language and rejected the claim that it should operate as a codicil given the ambiguity over its writer’s actual intent. *Id.* ¶¶ 4, 8, 176 P.2d at 986-87.

314. The Oklahoma Statutes state that “of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.” 84 OKLA. STAT. § 160 (2011). Again, this language should not be read to support the validation of multiple documents of questionable holographic compliance and intent, but rather to guide the subsequent construction of a will once found to be valid.

315. See, for example, *Miller v. First National Bank and Trust Co.*, 1981 OK 133, ¶¶ 7-8, 637 P.2d 75, 77, where the court found that testator’s will and pour over trust operated together to dispose of his estate, permitting the court to incorporate the trust into decedent’s will so that title 84, section 114 of the Oklahoma Statutes eliminated provisions in the trust in favor of the testator’s divorced spouse. See 84 OKLA. STAT. § 114 (1971).

316. Langbein, *supra* note 18, at 498-99, 530. The concept of integrating individual documents, none of which independently satisfy the Statute of Wills, into a single document

Oklahoma courts have struggled with situations two through five, evidencing a jurisprudential bias against collecting disparate holographic documents into a single unified one. Notwithstanding the *Johnson Court's* peculiar willingness to permit an arguably invalid holograph to “republish” an earlier invalidly attested one, most proponents’ attempts to bundle documents have met resistance from the reviewing court.³¹⁷

For example, in *In re Estate of Rigsby*, the will proponent offered a two-page document as a holographic will, but the court only accepted a single page.³¹⁸ Both sheets of paper were written in the decedent’s hand, initialed and dated with the same date, and found interfolded within a single ledger by someone other than their proponent.³¹⁹ The court nevertheless invoked strict compliance to hold that the absence of numbering or explicit cross reference between the two pages, coupled with the fact that only the first was signed at the bottom and exhibited clear testamentary intent, meant that it alone would be accepted as the decedent’s will.³²⁰ The court surmised that the second page could “easily be interpreted as a work sheet listing Decedent’s assets as a preliminary step before drafting the first page,”³²¹ and marshaled *In re Paull’s Estate* for the proposition that “where the instrument offered consists of more than one sheet of paper, it must be made clearly apparent the testator intended that together they should constitute [his or her] last will and testament.”³²²

that does, would be similar to the “composite document” rule adopted as the secured transactions analog to reading separate writings together to form a single contract under the Statute of Frauds. See 10 WILLISTON ON CONTRACTS § 29:29 (4th ed. 2013) (stating that a valid memorandum under the Statute of Frauds “need not be contained in in any one paper, but may include unsigned writings” as long as there is a “sufficient connection” between them); Andrew Maratzka, *The Composite Document Rule: Useful Tool or Narrow Exception?*, AM. BANKR. INST. J., Feb. 2007, at 24, 25.

317. See *supra* note 231.

318. 1992 OK CIV APP 165, ¶¶ 6-7, 843 P.2d. 856, 858.

319. *Id.* ¶¶ 1-2, 843 P.2d at 857.

320. *Id.* ¶¶ 6-7, 843 P.2d at 858. The effect was to nullify the second page’s list identifying assorted items of personal property and the legatees to which they were to pass, which in part conflicted with certain provisions of the first page. *Id.*

321. *Id.* ¶ 6, 843 P.2d at 858.

322. *Id.* ¶ 5, 843 P.2d at 858 (citing *In re Paull’s Estate*, 1950 OK 8, ¶ 10, 254 P.2d 357, 360 (“While a holographic will may cover more than one sheet of paper and need not be written at the same time or mechanically fastened together, if the pages are written at different times and neither standing alone meets the essential requirements of a holographic will, it must be apparent either by certain reference of one to the other, or by evidence, that the deceased intended that the several sheets of paper should constitute one single instrument and that it be effective as his last will and testament.”)).

The court's analysis invites observers to consider, and partially answers, what would constitute sufficient evidence of integrative intent between multiple documents. For example, page numbering, internal cross reference, and signature "at the end" of papers capable of logical ordering would pass muster. Mere physical concurrence or storage within a single envelope or file would not.³²³ Consistent Oklahoma cases suggest additional factors that could dissuade or embolden efforts to integrate numerous papers into a single will.³²⁴ The upshot appears to be that although Oklahoma permits the holographic will, from an intent-based

323. Were it impossible to constrain the will to a single holographic page, the decedent should take care to ensure that logical and physical interconnection between them is beyond question. For example, the decedent could label each page "one of five, two of five," etc., note "Last Will and Testament of Decedent—Continuation" at the top of each page, independently sign and fully date the bottom of each page, and bind the pages together (such as stapling). Such procedures, which arguably exceed the ritual of an attested will, are unlikely given the usual informal manner in which holographic wills are usually created. See *supra* notes 310-312 for discussion of the related doctrines of integration, incorporation by reference, and republication by codicil.

324. See *In re Paull's Estate*, 1950 OK 8, 254 P.2d 357; *Elrod v. Purdin*, 1945 OK 291, 163 P.2d 209; *In re Estate of Foreman*, 1999 OK CIV APP 63, 984 P.2d 258. These cases deny probate to asserted multi-page holographic wills and suggest assorted factors as relevant to integration intent.

Factors suggesting against integrative intent: failure to sign and date all sheets of paper; inexplicable failure to use entire page; use of different types of writing utensils or paper; different forms of decedent's handwriting on different pieces of paper; different time of completion; possession of the purported will by proponents during decedent's life; location by or possession of purported will by proponents after decedent's death; time delay in attempting to probate document; inference of proponent's concern over document's validity; apparent incompleteness of words, thoughts, sentences, provisions, or the will itself (as through peculiar punctuation); lost will argument; absence of numbering or internal cross reference/logical interrelation; existence of others' handwriting or printed notation on the document or on the envelope or folder within which the document is contained; evidence of mutilation or interlineation; evidence weakening claim of testamentary intent, present intent, or non-conditional intent; evidence of decedent's knowledge of or familiarity with execution or probate issues, including past holographic or attested will execution or service as executor personal representative of another's estate.

Factors insufficient to overcome concern over integration: evidence that pages were once physically connected to each other as reflected by paper indentation and rust marks or pin holes; enclosure within a single manuscript cover, ledger, folder, internal envelope, external envelope, or combination thereof; evidence that others' writing on cover is presumably product of earlier, arguably replaced, will; anything but the most explicit of witness testimony establishing both testamentary intent in general and the document proffered in specific; extrinsic evidence suggesting reason behind different paper, writing utensil, or handwriting of decedent.

perspective it can be difficult to assure its acceptance into probate unless the document states that it is a will and consists of a single page.

V. Suggestions for Reform

There are a dizzying number of levels at which will execution in Oklahoma reflects asymmetry. Substantively, the rules are old if not also outdated. Communicatively, the stringency demanded for their achievement can be difficult to discern.

Legal discrepancies yield unfortunate effects wherever they arise; flawed information decreases effective decisional analysis at legislative, transactional, and judicial levels.³²⁵ But in particular, clarity in wills law may be now more critical than ever. Testamentary intent, which is already an inherently subjective proposition, continues its ascent over rules in reducing, tempering, and even excusing execution defect, as does the acceptance of broader types of evidence admissible to prove it.³²⁶ Electronic forms for many writings and signatures have become common,³²⁷ and the creation and use of will substitutes continues to accelerate.³²⁸ If law both describes and drives behaviors, then such ranging developments may deformalize the expression of testamentary intent and dilute the care with which wills are executed. This could lead to devastating results in jurisdictions such as Oklahoma where such intent-driven correctives are claimed but not actually applied.

It is difficult to reconcile the judicially asserted standards with case-specific outcomes. Many explanations exist: Perhaps the court doesn't truly want to shoulder the burden of a flexible substantial compliance approach, but lacks the institutional desire to admit it. Perhaps the court

325. See, e.g., Guzman, *supra* note 24, at 352-54.

326. See generally Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65 (2005).

327. The Electronic Signatures in Global and National Commerce Act permits electronic records and signatures in certain contexts, but specifically excludes wills, codicils, and testamentary trusts. 15 U.S.C. § 7003(a)(1) (2012). Nevada is the only state to have passed an electronic wills statute. NEV. REV. STAT. ANN. § 133.085 (West Supp. 2011).

328. See, e.g., Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149 (2011). For example, the Uniform Real Property Transfer on Death Act, which attempts to standardize the transfer on death deed, was just finalized in 2009. By 2013, it has been adopted in eight jurisdictions, with six more having introduced it this year. See *Real Property Transfer on Death Act*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act> (last visited Oct. 24, 2013).

conceptually embraces substantial compliance, but is unsure of what it exactly is, where it should apply,³²⁹ or how it may be appropriately restrained in the face of a “standardless will.” Perhaps the court is concerned that substantial compliance is mostly flash, but reserves it as backstop rationale should the perfect case present.³³⁰ Or perhaps the cases reveal something more subtle at play: sets of unsettling facts where incapacity and coercion might be involved, but the court sidesteps such messy inquiries with sterile rulings on procedural, formalist grounds.³³¹ None of these possibilities, however, warrant the problems that asymmetry creates.

Strict compliance jurisdictions place a heavy premium on rules, substantial compliance jurisdictions on standards. Neither approach can avoid all disadvantages.³³²

Approach	Rule	Standard
Costs	Higher drafting costs Decreased flexibility Decreased capacity for individualized justice	Higher decision costs Decreased predictability Decreased consistency Higher agency costs
Benefits	Lower decision costs Enhanced predictability Enhanced consistency Lower agency costs	Lower drafting costs Enhanced flexibility Enhanced capacity for individualized justice

329. See, e.g., Lester, *supra* note 13, at 600-02.

330. Ms. Sara Daly, class of 2014, astutely made this observation during my Spring 2013 Wills & Trusts class.

331. See, e.g., Price v. Price, 1971 OK 6, ¶¶ 3, 9, 479 P.2d 952, 953, 954 (rejecting the will while taking care to note that the testator suffered from Parkinson’s Disease); *In re Stover’s Will*, 1924 OK 917, ¶¶ 1, 8, 231 P. 212, 212, 214 (rejecting the will based on publication error where the testator’s children received unequal amounts); see also Pool v. Estate of Shelby, 1991 OK 124, ¶¶ 1-2, 821 P.2d 361, 361-62 (avoiding whether refileing a revoked will constitutes republication by holding that revocation by affidavit requires attestation); *In re Estate of Shaw*, 2004 OK CIV APP 38, ¶¶ 3-4, 90 P.3rd 588, 589-90 (invalidating a will after its primary beneficiary fraudulently added notarization).

332. Although there are many general sources to which one could turn for insight into the law and economics field, an excellent compilation and extension of the research, with focus on succession, can be found in Kelly, *supra* note 23. His article was the primary source for the material contained within the textual table.

There rests an additional paradox. Oklahoma ultimately accepts the worst of all worlds. The courts have created this disconnect. Oklahoma courts claim to adopt a substantial compliance, standard-based approach to attested wills. But in such cases they actually apply a strict compliance, rule-based approach. Simultaneously, they claim to adopt a strict compliance, rule-based approach for the holographic will but actually apply a substantial compliance, standard-based one. The result of this doublespeak is the burdens of both with few benefits of either. For example, there is no enhanced predictability—a typical benefit conferred by requiring strict adherence to stated rules—where the court judicially creates a new rule to rationalize its rejection of an attempted will that would seem to have convincingly met a substantial compliance requirement (if not indeed a strict one).³³³

There will always be hard cases, or outcomes with which others do not agree. But there need not be the additional difficulties generated by inconsistency. Whether a court claims to be strict but acts with indulgence or claims to be flexible but acts with a whip, both of these disconnects cloud perception and strategy in unfortunate ways. The second is worse than the first: rather than trying to sneak past without incident, the wolf masked as a sheep is angling for ambush and its deleterious ends. Although the court is assuredly not acting with such intent, claiming substantial compliance for the attested will but applying strict, is a wolf in sheep's clothing for those caught unaware. And for holographic will, it is the reverse.

A. Application Realignment: Stringent Standard

Misperception can be adjusted either by re-signaling intent to force behavior to match the rules or changing the rules to match the behavior. One response would be simply to reassert the statutory rules, rededicate to the need for their strict application, and overtly reject the substantial compliance overlay with which the courts have toyed. Doing so would immediately halve the costs outlined above and provide the optimal response if it is “as important that property law be predictable as that it be right.”³³⁴

333. See, e.g., *Pool*, ¶¶ 10-11, 821 P.2d at 363 (suggesting that an attestation clause is prerequisite to revoking a valid will by affidavit).

334. *In re Estate of Propst*, 788 P.2d 628, 639 (Cal. 1990) (Broussard, J., concurring and dissenting). Justice Broussard was actually speaking of the retroactive application of a ruling reversing precedent and returning to the earlier, common law of joint tenancy

But clarity alone may be too timid a step. The centrality of the will to testamentary intent, and the donative freedom that it actuates, demands better. Outdated rules, even where made transparent, remain outdated. Although the court plays a valuable role in assessing statutory impacts as applied, direct legislative modification of the execution requirements themselves seems superior to sanding the jagged edges of either a statute or reform effort into an approximate judicial fit.

Statutorily lowering the bar by adjusting the quantity or the quality of the rules should reduce the instances where a reviewing court struggles with a strict versus substantial approach. Presumably, one may more easily and perfectly capture any set of testamentary prerequisites if the factors comprising it decrease in number, increase in intuitiveness, or both.

For example, recall that Oklahoma joins a small minority of jurisdictions in requiring that an attested will be subscribed³³⁵ and that it be published.³³⁶

severance. Although there is an element of justifiable reliance not present within the present testamentary context, his full comments nevertheless instruct:

When, as here, we reject a well-established rule that lacked a sound theoretical basis but caused little confusion or dispute, we should make every effort not to make the cure worse than the disease. It is almost as important that property law be predictable as that it be right. When we break with the past in a retroactive opinion, but make substantial reliance on the old rule an affirmative defense, we inevitably engender a far larger volume of litigation than the old rule created. I would prefer to make our opinion take effect prospectively, since I believe this is the only way to cause less disruption and litigation than was caused by the rule we now reject.

Id. at 639-40.

335. Neither the UPC nor state statutes derived from the English Statute of Frauds specify the demanded location of the testator's signature; seven states, besides Oklahoma, with statutes based upon the English Wills Act continue to require subscription: Arkansas (ARK. CODE ANN. § 28-25-103 (West 2013)); Florida (FLA. STAT. ANN. § 732.502 (West 2003)); Kansas (KAN. STAT. ANN. § 59-606 (2012)); Kentucky (KY. REV. STAT. ANN. § 394.040 (West 2013)); New York (N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (Consol. 2012)); Ohio (OHIO REV. CODE ANN. § 2107.03 (West 2012)); Pennsylvania (20 PA. CONS. STAT. ANN. § 2502 (West 2013)).

336. The requirement of publication did not exist under either the English Wills Act of 1837 or the English Statute of Frauds of 1677. Moreover, the UPC does not impose the obligation. Along with Oklahoma, the following eight jurisdictions require publication: Arkansas (ARK. CODE ANN. § 28-25-103(b) (West 2013)); California (CAL. PROB. CODE § 6110 (West 2009) (stating that "publication" per se is not necessary, but the witnesses must understand that the instrument is the testator's will)); Indiana (IND. CODE ANN. § 29-1-5-3 (West 2013)); Iowa (IOWA CODE ANN. § 633.279 (West 2013)); Louisiana (LA. CIV. CODE ANN. art. 1577 (2012)); New York (N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (Consol. 2012)); Pennsylvania (20 PA. CONS. STAT. ANN. § 2502(3) (West 2013) (proxy signatures)); and Tennessee (TENN. CODE ANN. § 32-1-104 (2013)).

These statutory tempests in teapots should be removed. While they contribute little toward establishing confidence that the instrument in question was the product of a considered and deliberate act, they have generated enough controversy to render them troublesome in assessing execution validity. The same can be said of both the request and presence requirements for attestation. It does not appear that striking any of these requirements would overwhelm the judicial system with attempts to classify freewheeling documents as wills. Moreover, concern along these lines could be mitigated if, instead of deleting difficult attestation rules, our execution formalities were instead to supplement them by providing that notarization could provide an alternate means of will validation.³³⁷

B. Application Realignment: Moderate Standard

If the concern is less with the content of the execution rules than with how compliance with them is achieved, statutory change may not be required. Instead, the Oklahoma courts could rededicate to the substantial compliance theory and render decisions accordingly.

There are at least three ways in which this possibility could find expression, two of which admittedly may have already been met. First, when faced with competing constructional options, the court could select from the more expansive reading of a given existing rule under the mantle of substantial compliance.³³⁸ Nevertheless, a *post hoc* definition of an existing statutory term is not tantamount to accepting “substantial compliance” with its mandate. Indeed, such an exercise means that the compliance actually becomes strict, with no need for the “substantial” modifier at all. Second, Oklahoma law could legitimize testamentary

337. In 1998, the UPC approved notarization as a replacement for attestation. UNIF. PROBATE CODE § 2-502(a)(3) (amended 2010), 8 U.L.A. 136 (Supp. 2012); *see also* Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83 (2008) (discussing the rationale behind the provision).

338. It is possible that this is what the Oklahoma courts have generally meant. For example, “presence” in Oklahoma is demanded, either explicitly or implicitly, in three contexts: (1) proxies must sign in the presence of the testator; (2) testators must sign or acknowledge their signature in the presence of the witnesses; (3) witnesses must sign in the testator’s presence. Presence is met most strictly under a “line of sight” approach, more broadly by any “conscious presence,” where conduct occurs within the range of senses. Oklahoma case law appears to waver between the two, with an apparent (but slight) tilt toward the latter. *See supra* notes 136-145 and accompanying text.

Of course, the Oklahoma legislature could do away with the presence requirements altogether, as has the UPC except for instances of proxy signature. *See Andersen, supra* note 119, at 67.

attempts that fall into a particular category of questionable compliance, and then call that legitimation “substantial compliance”³³⁹—again, not an unreasonable claim. Nevertheless, narrow exceptions to the stated rules, generally created on ad hoc bases, are actually judicial rewritings of the rules themselves rather than true articulation of a commitment to the broader principle of substantial compliance.³⁴⁰

A third approach, superior to either of the preceding ones, would be a reasoned attempt to address how substantial compliance with stated rules could and should look. As an early supporter of the substantial compliance doctrine, Professor John Langbein lamented its devolution from a meaningful inquiry into whether a noncompliant document nevertheless inspired confidence that the protections sought by wills formalities had been met to a virtual numbers game,³⁴¹ with courts superficially gauging how close to perfection the putative testator had come or how many rules he had achieved.³⁴²

339. For example, all jurisdictions (save perhaps the UPC) demand that an attested will be signed by the testator as well as the witnesses. Oklahoma case law has accepted documents into probate as wills where those required signatures appear not on the will itself, but on either an attestation clause or within a self-proving affidavit. See *supra* notes 177-180 and accompanying text.

340. Consider, for example, *Stevens v. Casdorph*, 508 S.E. 2d 610 (W. Va. App. 1998). There, the court held that a will signed by a wheelchair-bound testator in his bank’s lobby, thereafter taken by a bank employee across the lobby for witnessing by two others, did not comply with the presence requirements imposed by the state’s statute. *Id.* at 612-13. Although the jurisdiction’s supreme court had earlier adopted the substantial compliance approach in *Wade v. Wade*, 195 S.E. 339 (W. Va. 1938), the decisional court crammed that holding into a narrow exception: “*Wade* stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness and the testator, then the will is properly witnessed within the [statutory rules].” *Id.* at 613.

341. Langbein, *supra* note 18, at 489 (“The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent’s testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?”). Building upon the authoritative work of Ashbel Gulliver and Catherine Tilson, Professor Langbein identified those purposes as protective, evidentiary, cautionary, and channeling, each pointing toward the identification of testamentary intent. *Id.* at 491-98; see also Gulliver & Tilson, *supra* note 12, at 5-13. As such, formalities generally offer some sort of protection: of the decedent from herself and others (including overreaching courts); of the system from unnecessary litigation; and of third parties with an interest in the estate.

342. 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 (1987).

Restoring substantial compliance to its intended role would shift specific statutory requirements from *ends* in themselves to the *means* through which testamentary intent was secured. In result, cases would more carefully address whether the circumstances under which an attempted will was defectively executed still revealed that the evidentiary, cautionary, protective, and channeling functions of those requirements had been served.

C. Standard Revision: Progressive

Most boldly, it may be time to move past both strict and substantial compliance with the Statute of Wills. “Harmless error” permits courts to accept a noncompliant document into probate upon clear and convincing proof of its maker’s testamentary intent. The UPC endorses this approach:

Although a document or writing added upon a document was not executed in [statutory] compliance . . . [it] is treated as if it had been . . . if [its] proponent . . . establishes by clear and convincing evidence that the decedent intended the document or writing to constitute [his or her will].³⁴³

Were the Oklahoma Legislature to join the nine or so other jurisdictions³⁴⁴ that have adopted harmless error, it could supplement any specific statutory modification that it chose with a direct legislative grant of authority to the judiciary to temper rule application in the proper case.³⁴⁵ This would confer upon the court the theoretical ability to dispense with any or even all statutory requisites found in sections 54 and 55 upon the proponent’s ability to meet the heightened standard of proof regarding the decedent’s intent. Although the charge of a documentary free-for-all is commonly levied by harmless error critics, the heightened evidentiary

343. UNIF. PROBATE CODE §2-503 (amended 2010), 8 U.L.A. 146 (Supp. 2012); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (1999).

344. *See, e.g.*, CAL. PROB. CODE § 6110(c)(2) (West 2009); COLO. REV. STAT. § 15-11-503(2) (2008); VA. CODE ANN. § 64.2-404 (2012).

345. The “harmless error” statute would be best placed immediately following the traditional rules for nuncupative, holographic, and attested will execution, which would signal that the rules remained in place as the default scheme, with deviation permitted only where sufficient evidence convinced the fact-finder that testamentary intent indeed existed. For a second example of what that enactment might provide, *see* Sean P. Milligan, Comment, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court*, 36 ST. MARY’S L. J. 787, 817-18 (2005).

burden may be enough to ward off that situation as well as dissuade cavalier attempts to leverage obviously defective documents.³⁴⁶

A shift toward harmless error should not shock legal observers. As early as 1954, concurring Oklahoma Supreme Court Justice Corn revealed his enthusiasm for not only meaningful substantial compliance, but perhaps the more forgiving and flexible theory toward which harmless error points:

It was the purpose of our lawmakers, in passing [the Wills Act], to make it impossible for fraud or undue influence to be practiced in the execution of the Will, and in the disposition of the property disposed of by the Will. It was not the intent of our law-makers, in enacting these statutes, if substantially complied with, to ever allow a miscarriage of justice by a wrongful disposition of the testator's property contrary to his intent. 84 O.S. 1951 § 151 provides: "Intention of testator governs.-A will is to be construed according to the intention of the testator."

* * *

I am of the opinion, when a person dies leaving a written instrument which he intended to be his last Will, and it is free from fraud or undue influence and in harmony with the purpose of our law-makers for enacting statutes regulating the execution of Wills, . . . it would be a miscarriage of justice to not admit the Will to probate, and thereby allow the property to be disposed of contrary to the testator's intent.³⁴⁷

346. UPC commentary to section 2-503 highlights the effect that this heightened burden could have upon litigation risk-taking: "By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which courts at the trial and appellate levels are urged to police with rigor), Section 2-503 imposes procedural standards appropriate to the seriousness of the issue." UNIF. PROBATE CODE § 2-503 cmt. (amended 2010), 8 U.L.A. 146 (Supp. 2012); see also John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 30 (2004) (noting the role that harmless error could play in decreasing litigation over technicalities to focus instead on the decedent's intent). 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, 433-34 (2012) (expressing concern over the potential for costly litigation to determine the parameters of California's dispensing power approach, but noting that many of the issues could have been resolved through more careful legislative drafting).

347. *Johnson v. Johnson*, 1954 OK 283, ¶¶ 1-4, 279 P.2d 928, 932 (Corn, J., concurring).

Justice Corn's words were strikingly prescient. Over a half-century later, they aptly describe a role for the court where the intent that animates an act is restored to its rightful position.

VI. Conclusion

If law maximizes legitimacy when it reflects a considered, appropriate balance between policy and the modern behaviors of those it affects, it loses that legitimacy once irretrievably out of step. Of course, the point at which value becomes "irretrievable" is its own question. But that a rule may start off wise, and even become venerable, does not forever make it right. Few would quarrel, for example, with the notion that livery of seisin has become obsolete, or that the once-robust primogeniture rule has rightfully given way to a more egalitarian distributive method, or that people should be able to write their own wills without relying on a "feoffee to uses" to dodge formal doctrine and then beg relief from the king's conscience.

Although less anachronistic than the preceding examples, strictly written and imposed rules for the execution of a valid will have also outlived their usefulness—at least that is the impression suggested by decades of scholarship and actual, but slow-moving, legal change. Tracking one of the possible avenues for reform, Oklahoma law purports to embrace the substantial compliance doctrine for attested wills and thereby avoid the much maligned technicalities to which testamentary intent occasionally falls prey. But if anachronism alone is a high price to pay, worse is its continuation under cover of reform. Courts become less accountable to the citizens who have faced or will face a surprisingly strict outcome. Decisions become less useful predictors. And rulings become less informative to legislatures, which are presumably less concerned about revisiting old rules when a court claims to have progress well in hand. On a lesser scale, the same can be said where a court is more indulgent than it admits. Checks and balances work well when information is sufficiently clear to permit them, less so when it is not.

It is significant that through both statutory and case law, Oklahoma lawmakers state a commitment to the presumption that a testator intends to avoid intestacy.³⁴⁸ That presumption admittedly seems targeted to will

348. See, e.g., *In re He-ah-to-me's Estate*, 1958 OK 46, ¶ 11, 325 P.2d 746, 750 (noting the "well-recognized" presumption against intestacy and citing 84 OKLA. STAT. §§ 166, 167 (1951) and other cases in support); *In re Estate of Hodges*, 2011 OK CIV APP 2, ¶ 10, 247 P.3d 755, 758 ("It is presumed in Oklahoma, a testator intends to dispose of his entire estate and avoid intestacy in whole or in part.") (quoting *In re Tayrien's Estate*, 1980 OK 8, ¶ 11,

interpretation and construction rather than will formation—for example, there can be no “testator,” nor can any will be construed, without a valid will.³⁴⁹ Nevertheless, legislative and judicial bodies truly committed to upholding the intent through which testamentary freedom is expressed would create a framework aimed at facilitating its exercise and would trust each other’s commitment to continuing the dialogue should overly burdensome problems arise.³⁵⁰

Such an ongoing exchange might be costly and difficult. But significant rights are at stake and sufficient systems exist to attain them. Of our judges and our legislators, we should expect no less.

609 P.2d 752, 755); *In re Estate of Worsham*, 1993 OK CIV APP 122, ¶ 7, 859 P.2d 1134, 1136 (“It is well settled in Oklahoma that one who executes a will is presumed to have wanted his estate to pass under his will rather than by intestate succession.”).

349. Of course, if the *Johnson* court’s definition of a will as any instrument reflecting testamentary intent is upheld, then a testator should include any person with testamentary intent who executed that instrument. *See supra* notes 29-30 and accompanying text.

350. Notably, there does not seem to have been inordinate formalities litigation generated in the jurisdictions that have adopted a harmless error take on the validity of wills. *See, e.g.*, Lester, *supra* note 13, at 605.

APPENDIX A

THE STATE OF OKLAHOMA
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said _____, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament or a codicil to his last will and testament, and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament or codicil to his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind.

Testator

Witness (signature)

Name and Residence (printed)

Witness (signature)

Name and Residence (printed)

Subscribed and acknowledged before me by the said _____, testator, and subscribed and sworn before me by the said _____, and _____ witnesses, this _____ day of _____, A.D., _____.

(SEAL)

(SIGNED) _____

(OFFICIAL CAPACITY
OF OFFICER)

APPENDIX B

We the undersigned are the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and we do hereby declare that said _____, testator, declared to said witnesses that said instrument is his last will and testament or a codicil to his last will and testament, and that he willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and said witnesses further declare that the said testator declared to them that said instrument is his last will and testament or codicil to his last will and testament, and that he executed same as such and wanted each of us to sign it as a witness; and that we did sign the same as witnesses in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind, all of which we declare and sign under penalty of perjury this _____ day of _____.

Testator

Witness (signature)

Name and Residence (printed)

Witness (signature)

Name and Residence (printed)