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The UPC Authorizes Notarized Wills

by Lawrence W. Waggoner
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Editors' Synopsis: This article reports on a 2008 amendment to the Uniform Probate Code that permits notarization as a method of will execution.

The Uniform Law Commission (ULC) amended the Uniform Probate Code (UPC or Code) this past summer to authorize notarized wills as an optional method of execution.¹ The ULC took this step on the recommendation of the Joint Editorial Board for Uniform Trust and Estate Acts and a Special Drafting Committee to Amend the UPC.

ATTESTED WILLS.

In broad form, the statutory formalities for executing a valid will have remained unchanged throughout American history. The will must be (1) in writing, (2) signed by the testator, and (3) witnessed by attesting witnesses. These three requirements, which are derived from the English Statute of Frauds of 1677² and the English Wills Act of 1837,³ are continued in the American wills statutes, including the UPC. The Restatement (Third) of Property states that the purpose of the statutory formalities “is to determine whether the decedent adopted the document as his or her will.”⁴

SELF-PROVED WILLS.

Although the original UPC, promulgated in 1969, adopted the same three statutory formalities of writing,

signature, and attestation, the Code also popularized the concept of the self-proved will.⁵ The self-proved will allows the testator to execute a will and simultaneously or later attach an affidavit to the will, notarized and signed by the testator and the attesting witnesses.⁶ Now widely authorized in UPC and non-UPC states alike, the self-proved will procedure is routinely used by estate-planning professionals in supervising will-execution ceremonies.

HARMLESS-ERROR RULE.

The 1990 amendments to the UPC adopted another new concept—the harmless-error rule. Under that rule, a will that does not strictly comply with the statutory formalities for an attested will is treated as if it had been properly executed if the proponent proves by clear and convincing evidence that the decedent intended the document to be his or her will.⁷ So far, Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah, and Virginia have adopted statutes modeled on the UPC’s harmless-error statute.⁸

What about states that have not enacted a harmless-error rule by statute? Shortly after the UPC’s harmless-error rule was promulgated, the New Jersey Supreme Court adopted a version of that rule without the benefit of legislation.⁹ The harmless-error rule is also embraced in the Restatement (Third) of Property for adoption by case law.¹⁰

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¹ The principal focus of the UPC amendments was on intestacy rights of children of assisted reproduction. The author will report on these amendments in a later article.

² Section 5 of the ENGLISH STATUTE OF FRAUDS OF 1677, 29 Car.2, ch.3, provided: “[A]ll devises and bequests of any lands ... shall be in writing and signed by the party so devising the same or by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect.”

³ Section 9 of the ENGLISH WILLS ACT OF 1837, 7 Wm. 4 & 1 Vict., ch. 26, provided: “[N]o will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) 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 subscribe the will in the presence of the testator, but

no form of attestation shall be necessary.” The current version, though somewhat revised stylistically, is similar in substance. See R.E. MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY ¶¶ 14-015 (7th ed. Charles Harpum, Stuart Bridge & Martin Dixon 2008).

⁴ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (1999). The author serves as Reporter for the RESTATEMENT.

⁵ The idea of a self-proved will apparently originated in New York in 1923 (now codified at N.Y. Surr. Ct. Proc. Act § 1406). See Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 40 n. 6 (1985).

⁶ UPC § 2-504 (amended 2008).

⁷ UPC § 2-503.

⁸ COLO. REV. STAT. § 15-11-503; HAW. REV. STAT. ANN. § 560:2-503; MICH. COMP. LAWS ANN. § 700.2503; MONT. CODE ANN. § 72-2-523; N.J. STAT. ANN. § 3B:3-3; S.D. CODIFIED LAWS § 29A-2-503; UTAH CODE ANN. § 72-2-503; VA. CODE 64.1-49.1.

⁹ *In re Will of Ranney*, 124 N.J.1, 589 A.2d 1339 (N.J. 1991). New Jersey later enacted a statute modeled on the UPC’s harmless-error statute. See *supra* note 8.

¹⁰ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999).

Versions of the harmless-error rule have been in effect for decades in various Australian and Canadian jurisdictions and in Israel.¹¹ In *Sisson v. Park Street Baptist Church*,¹² the Ontario Court of Justice applied a harmless-error rule even though Ontario, unlike some other Canadian provinces, had not enacted such a rule by legislation. Although one of the witnesses (the drafting attorney!) inadvertently failed to sign the testator's will, the court nevertheless validated the will because the court was "satisfied that the will actually reflects the intention of the testatrix." The court found that "the ... absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against do not exist here."

The leading American decision, so far, under the UPC's harmless-error rule is the Montana case of *In re Estate of Hall*.¹³ Jim Hall died at age 75 on October 23, 1998, survived by his wife, Betty, and two daughters from a previous marriage. In 1997, Jim and Betty's attorney transmitted to them a draft of a new joint will, which was to replace Jim's thirteen-year-old earlier will. On June 4, 1997, Jim and Betty met at their attorney's office to discuss the draft. After making several changes, Jim and Betty agreed on the terms of the new will. Jim and Betty were prepared to execute the new will once the attorney sent them the final version.

At the conclusion of the meeting, however, Jim asked the attorney if the draft (as marked up) could stand as a will until the final version could be prepared. The attorney, apparently in ignorance of the statutory requirement of two attesting witnesses, advised them that the draft would be valid if Jim and Betty signed the draft and he notarized it. Betty testified that no one else was in the office at the time to serve as an attesting witness. Jim and Betty proceeded to sign the will and the attorney notarized it without anyone else present. When they returned home, Jim told Betty to tear up his earlier will, which she did.

Jim died before the final version could be prepared and properly executed. The probate court upheld the draft under Montana's enactment of the UPC's harmless-error rule. On appeal, the Supreme Court of Montana affirmed, saying that the uncontradicted testimony that Jim's intent for the joint will "to stand as a will until [the attorney] provided one in a cleaner, more final form" was sufficient to support the trial court's judgment admitting the will to probate.¹⁴

NOTARIZED WILLS.

The 2008 UPC amendments introduced another new concept in will execution: the notarized will.¹⁵ Under this concept, a will that is in writing, signed by the testator, and notarized is validly executed.¹⁶ Notarization is an option only, and not required. A will is still validly executed under the UPC if it is attested by two witnesses who witnessed the testator's act of signing or acknowledging the signature or the will. The rebuttable presumption that the events recited in an attestation clause occurred is now codified,¹⁷ and the self-proving affidavit procedure is also still authorized.¹⁸

What is the rationale for recognizing notarized wills? The will-execution formalities are thought to serve several functions—evidentiary, cautionary (ceremonial), channeling, and protective.¹⁹ A notarized will would seem to serve all of these functions. The danger that a notarized will would not reliably represent the decedent's wishes seems minimal. A notarized will would almost always be upheld under the UPC's harmless-error rule.²⁰ Treating a notarized will as validly executed would allow such a will to be upheld without the need to satisfy the clear and convincing standard of proof, and would be especially beneficial in states that have not enacted a harmless-error rule.²¹

The UPC and many non-UPC states authorize holographic wills. One of the reasons for validating a holographic will is that the larger handwriting sample yields greater assurance of the identity of the maker of the document than a mere signature.²² In the case of a notarized will, the notarial seal serves the same function, because

¹¹ See 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 (2007).

¹² 24 E.T.R.2d 18 (Ont. Gen. Div. 1998).

¹³ 2002 MT 171, 310 Mont.486, 51 P.3d 1134 (Mont. 2002).

¹⁴ 51 P.3d at 1136.

¹⁵ See UPC § 2-502 (amended 2008), set forth in the Appendix.

¹⁶ Under UPC § 2-502, *id.*, a signature guarantee does not qualify a will as a notarized will. The signature guarantee program, which is regulated by federal law, is designed to facilitate transactions relating to securities. See 17 C.F.R. § 240.17Ad-15.

¹⁷ See UPC § 3-406 (amended 2008).

¹⁸ See UPC § 2-504 (amended 2008).

¹⁹ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (1999).

²⁰ See *In re Estate of Hall*, *supra* note 13.

²¹ The Iowa Court of Appeals in an unpublished opinion, *Estate of Phillips*, 2002 WL 1447482 (Iowa Ct. App. 2002), declined to adopt the harmless-error rule of the Restatement (*see supra* note 10) on the ground that adopting such a view was a matter for the legislature.

²² See John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 493 (1975).

one of the notary's principal duties is to verify the identity of the person signing the document.²³

The American notary does not serve the same function as the notary in the European civil-law countries. The civil-law notary supervises the execution of an "authenticated will," in which the notary is a quasi-judicial officer who determines whether the testator has mental capacity and is free of duress and undue influence.²⁴ Compliance with the American execution formalities does no such thing: A validly executed will is still subject to contest on grounds of lack of capacity, undue influence, duress, fraud, or forgery.²⁵

Allowing notarization as an optional method of execution can benefit practice. Cases have begun to emerge in which the supervising attorney, with the client and all witnesses present, circulates one or more estate-planning documents for signature, and fails to notice that the client or, in the case of the will, one of the witnesses has unintentionally neglected to sign one of the documents.²⁶ Such an omission often, but not always, arises when the attorney prepares multiple estate-planning documents—a will, a durable power of attorney, a health-care power of attorney, and perhaps a revocable trust.²⁷ It is common practice, and sometimes required by state law, that the documents

other than the will be notarized.²⁸ It would reduce confusion and chance for error if all of the documents could be executed with the same formality.

For a variety of reasons, some individuals avoid professional advice and attempt to execute wills on their own. As long as it is clear that the decedent adopted the document as his or her will,²⁹ the law has no reason to deny validity on the ground of defective execution. The harmless-error rule is one curative measure for this problem. Allowing notarization as an optional method of execution is another. The public is accustomed to thinking that a document is made "legal" by getting it notarized.³⁰ To some, this conception is mistakenly but understandably carried over to executing a will.³¹ A testator who goes to the trouble of going to a bank or even a package or photocopy store³² to get a home-drawn will notarized shows as much of a deliberate purpose to make the will final and valid as asking a couple of individuals to sign as witnesses. In effect, the UPC as amended treats the notary as the equivalent of two attesting witnesses. The case law invalidating a notarized will after death arises from the decedent's ignorance of the statutory requirements, not in response to evidence raising doubt that the will truly represents the decedent's wishes.³³

²³ See, e.g., Uniform Law on Notarial Acts § 2(a) (1985), which provides: "In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument." See also the websites of the National Notary Association <<http://www.nationalnotary.org>> and the United States Notary Association <<http://www.enotary.org>> (both last visited July 12, 2008).

²⁴ See NIGEL P. READY, BROOKE'S NOTARY (12th ed. 2009); Nicole M. Reina, *Protecting Testamentary Freedom in the United States by Introducing Into Law the Concept of the French Notaire*, 19 N.Y.L. SCH. J. HUM. RTS. 427 (2003); Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945 (1998); Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 150-52 (1990); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 64-66 (1978).

²⁵ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1 to 8.5 (2003). This is true even in Louisiana, the only American civil-law state. Although the website of the Louisiana Notary Association describes the Louisiana notary as a civil-law notary (see <<http://www.lna.org>> last visited on July 12, 2008), and although Louisiana's notarial testament requires two competent attesting witnesses and notarization (see LA. CIV. CODE ANN. art. 1577), a notarial testament is still subject to contest on the grounds of lack of capacity, undue influence, duress, fraud, or forgery (see LA. CIV. CODE ANN. arts. 1470-1484).

²⁶ If the testator neglects to sign, the harmless-error rule might or might not save it. Compare Estate of Denner, 2006 WL 51053 at *4 (N.J. Super. Ct. Ch. Div. Feb. 28, 2006), with Fisher v. Barnes

(*In re Estate of Dancer*), 13 P.3d 1231 (Colo. Ct. App. 2000); Allen v. Dalk, 826 So.2d 245 (Fla. 2002) (dictum in concurring opinion). In the case of an ERISA unsigned change-of-beneficiary form, compare Davis v. Combes, 294 F.3d 931 (7th Cir. 2002), with Bankamerica Pension Plan v. McMath, 206 F.3d 821 (9th Cir. 2000).

²⁷ See, e.g., Dalk v. Allen, 774 So.2d 787 (Fla. Dist. Ct. App. 2000); Sisson v. Park Street Baptist Church, 24 E.T.R.2d 18 (Ont. Gen. Div. 1998).

²⁸ Under the EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA), as amended by the RETIREMENT EQUITY ACT OF 1984 (REAct), ERISA grants a surviving spouse certain rights to ERISA-covered pension plans. The spouse can waive those rights, but the waiver must be witnessed by a plan representative or a notary public. See 29 U.S.C. § 1055(c)(2)(A); I.R.C. § 417(a)(2)(A).

²⁹ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, *supra* note 4 & accompanying text.

³⁰ According to Dictionary.com, <<http://dictionary.reference.com/>>, the verb "notarize" means "to certify a document."

³¹ See, e.g., *In re Estate of Hall*, *supra* note 13. The lawyer supervising the execution ceremony in Allen v. Dalk, *supra* note 26, had the will notarized. Chief Justice Warren Burger had his home-drawn will witnessed and notarized. See LAWRENCE W. WAGGONER, ET AL., FAMILY PROPERTY LAW p. 5-4 (4th ed. 2006).

³² A California statute provides that "[a]t least one person involved in the management of a professional photocopier shall be required to hold a current commission from the Secretary of State as a notary public in this state." CAL. BUS. & PROF. CODE § 22454.

³³ See, e.g., Estate of Sauressig, 38 Cal. 4th 1045, 44 Cal. Rptr. 3d 672, 136 P.3d 201 (Cal. 2006); Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985).

What about the possibility of wrongdoing? To be sure, someone could forge a relative's will and, using fake identification, perhaps succeed in getting it notarized. That danger is also present, however, in the case of an attested will in which, under the UPC and many non-UPC statutes, the attesting witnesses need not know the testator and need not be disinterested.³⁴ A fraudulent will, whether attested or notarized, would typically be challenged by the decedent's disappointed relatives. The law has long relied upon the courts to identify such cases and rule accordingly.³⁵

Other uniform acts affecting property or person do not require either attesting witnesses or notarization. For example, the Uniform Trust Code provides that a trust is created if the settlor "indicates an intention to create the trust."³⁶ There is no requirement that an inter-vivos trust document be witnessed or notarized. In fact, unless another statute requires a writing (such as the Statute of Frauds in the case of a trust of land), the Uniform Trust Code recognizes an oral inter-vivos trust if its creation and terms are established by clear and convincing evidence.³⁷ Such a trust can be a revocable inter-vivos trust, which in many respects is the equivalent of a will.

The Uniform Power of Attorney Act provides that a power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney.³⁸ Although there is no requirement that the power be witnessed or notarized, the principal's signature is presumed to be genuine if

the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments. A power of attorney can expressly grant the agent the authority, among other things and with certain restrictions, to create, amend, revoke, or terminate an inter-vivos trust, make a gift, create or change rights of survivorship, create or change a beneficiary designation, delegate authority granted under the power of attorney, or waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.³⁹

The Uniform Health-Care Decisions Act provides that a health-care power must be in writing and signed by the principal, but there is no requirement that the power be witnessed or notarized.⁴⁰ The Uniform Anatomical Gift Act provides that a donor can make an anatomical gift by a donor card or other record signed by the donor or by authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card, in a will, or, during a terminal illness or injury, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness.⁴¹ There is no requirement that the gift-document (other than a will) be witnessed or notarized.

If these uniform acts affecting property or person do not require either attesting witnesses or notarization, it seems prudent to allow notarization as an optional method of executing a will.

³⁴ See UPC § 2-505.

³⁵ Proof of fraud or forgery affecting the acknowledgment would invalidate a notarized will. See UPC § 3-406 (amended 2008). See also *supra* note 25 & accompanying text; Fisher v. Barnes (*In re Estate of Dancer*), *supra* note 26; Estate of Legeas, 210 Cal. App. 3d 385, 258 Cal. Rptr. 858 (Cal. Ct. App. 1989) (fraudulent revocation of a will discovered and punished).

³⁶ UNIFORM TRUST CODE § 402(a)(2) (2005).

³⁷ See *id.* at § 407. Oral inter-vivos trusts of personal property have long been recognized in the case law. See RESTATEMENT (THIRD) OF TRUSTS § 20 (2003).

³⁸ UNIFORM POWER OF ATTORNEY ACT § 105 (2006).

³⁹ *Id.* at § 201.

⁴⁰ UNIFORM HEALTH-CARE DECISIONS ACT § 2(f) (1993).

⁴¹ UNIFORM ANATOMICAL GIFT ACT § 5 (2007). If the donor is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or other person and must be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person and state that it has been signed and witnessed as required. *Id.*

APPENDIX

UPC § 2-502. Execution; Witnessed or Notarized Wills; Holographic Wills.

- (a) **[Witnessed or Notarized Wills.]** Except as otherwise provided in subsection (b) and in Sections 2-503, 2-506, and 2-513, a will must be:
- (1) in writing;
 - (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
 - (3) one of the following:
 - (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testa-

tor's acknowledgment of that signature or acknowledgment of the will; or
(B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.

- (b) **[Holographic Wills.]** A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
- (c) **[Extrinsic Evidence.]** Intent that a document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.