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Wills Formalities in a Post-Pandemic World: A Research Agenda

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The COVID-19 global pandemic has brought new focus to human mortality. The virus has reminded many people that they need to have a valid will or otherwise make plans for the effective transmission of their property on death. Yet stay-at-home orders and social distancing recommendations make it difficult or impossible to comply with the traditional rules for validly executing wills. Across most common law jurisdictions, the traditional requirements call for two witnesses in the physical presence of the testator. Because of the practical difficulties of safely executing documents during the pandemic with witnesses assembled in physical proximity, many jurisdictions internationally have implemented emergency measures that permit the remote witnessing of wills and other estate planning documents via audio-visual platforms like Zoom, Skype, or FaceTime.

This essay employs a dual Australian-United States perspective to investigate the purposes of traditional will-making requirements and to suggest their continued vitality in the context of remotely witnessed wills. Although emergency measures adopted in both countries arguably have made it easier to execute wills during the pandemic, these provisions will, for the most part, sunset in the near future. The desirability of increasing access to legal services generally, and will-making specifically, might argue in favor of making permanent the pandemic-era rules for will executions. Before embracing a permanent change, though, there needs to be more research. This essay proposes a research agenda comprised of four future empirical studies of pandemic and post-pandemic-era will-making. These studies aim to identify and address any problems with the remote witnessing of testamentary documents. The results of these and other studies can facilitate the development of evidence-based, workable rules for effective will-making in the twenty-first century.

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INTRODUCTION

Around the world, the COVID-19 pandemic has radically changed the ways people interact with each other. From voting and public demonstrations to work, education, and socializing with family and friends, every aspect of public and private life has been reconfigured in response to the public health crisis. Among the transformations are the ways that people deliver, consume, and access legal services. The pandemic has brought into sharp focus the mismatch between traditional rules that govern valid will executions, on the one hand, and contemporary restrictions, practices, and preferences, on the other.¹ As other scholars have explained, enabling access to and promoting valid will-making is desirable for various reasons, including the cost-effective and efficient facilitation of postmortem property transfers.² During an era of social distancing, isolation, and quarantine mandates, however, in many jurisdictions, it is both challenging logistically and undesirable from a personal and public health perspective to physically gather the testator and two unrelated witnesses who are not named in the will—as well as (potentially) a lawyer—in the same place at the same time.³ For that reason, to better enable access to valid will-making, some scholars advocate eliminating or relaxing traditional wills formalities,

¹ See, e.g., David A. Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. ONLINE 18, 19 (2020).

² See, e.g., *id.* (explaining that the benefits of wills include the distribution of property at death, a reduction in the likelihood of wealth fractionation, and, in the United States context, a possible decrease in the chance of litigation). *But see* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (explaining that because of the nature of wealth and the role played by financial intermediaries, the majority of wealth passes outside the probate system); David A. Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 627 (2015) (demonstrating that fewer than 10% of all decedents dying in 2007 in one California county left any probate estate at all, suggesting an increase in nonprobate transfers, while acknowledging the possibility of informal division of personal property in the case of small estates). In Australia, household wealth can include nonprobate assets such as property held as joint tenants that will pass outside the estate by way of survivorship, while assets owned in the testator's sole name or as tenants in common generally require probate to enable transmission to beneficiaries. See *Joint Tenants*, AUSTL. TAX'N OFF. (Jul. 17, 2017), <https://www.ato.gov.au/general/capital-gains-tax/deceased-estates-and-inheritances/inherited-dwellings/joint-tenants/> [<https://perma.cc/TSM5-RAZ9>]. Superannuation (i.e., retirement accounts) may or may not be paid into the estate subject to the determination of the trustee of the superannuation fund and the existence of a valid, binding death benefit nomination directing the trustee of the superannuation fund to pay the monies to eligible people nominated in accordance with the relevant legislation. See *Superannuation Binding Death Benefit Nominations and Kinship Structures – Taking Further Action on the Banking, Superannuation & Financial Services Industry Royal Commission*, COMMONWEALTH OF AUSTL. (Mar. 2019), <https://treasury.gov.au/sites/default/files/2019-03/c2019-t371937-discussion-paper.pdf> [<https://perma.cc/PF54-D4QK>]; see generally Gary N. Marks et al., *Household Wealth in Australia: Its Components, Distribution and Correlates*, 41 J. OF SOCIO. 47, 51, 56–47 (2005).

³ See *infra* Part II.A.

including the permanent adoption of pandemic-era emergency orders that permit remote witnessing of wills.⁴ Other commentators have observed that the remote witnessing provisions of the Uniform Electronic Wills Act (UEWA),⁵ promulgated in the United States in 2019, lack appropriate safeguards against fraud or undue influence.⁶ A key concern is whether remote witnesses—separated physically but connected by technology to the person executing the will—have the ability to satisfactorily assess whether the testator possesses the minimum legal capacity required to make a will (or, colloquially speaking, that the testator is of “sound mind and understanding”) and is acting voluntarily.⁷

This essay enters the scholarly debate about the necessity of remote witnessing in a variety of situations, including a public health crisis. Particularly in the area of wills formalities, Australia has been a world leader in legislative reform; several jurisdictions in the United States have adopted legislation modeled after Australia’s.⁸ Given that

⁴ See Horton & Weisbord, *supra* note 1.

⁵ UNIF. ELEC. WILLS ACT (UNIF. L. COMM’N 2019) [hereinafter UEWA]. To date, Utah, Washington, North Dakota, and Colorado have enacted the UEWA. See H.B. 6001, 2020 H.R., Spec. Sess. (Utah 2020); S.B. 5132, 2021 Reg. Sess. (Wa. 2021); H.B. 1077, 67th Leg. Assem. 2021 Sess. (N.D. 2021); H.B. 21-1004, 2021 Reg. Sess. (Colo. 2021). As of this writing, the UEWA is pending in state legislatures in Idaho and Virginia. See S.B. 1077, 2021 Reg. Sess. (Idaho 2021); H.B. 1856, 2021 Spec. Sess. (Va. 2021). Arizona, Florida, Indiana and Nevada have their own electronic wills laws, enacted before the UEWA. ARIZ. REV. STAT. ANN. § 14-2518 (2020); FLA. STAT. ANN. § 732.522 (West 2020); IND. CODE ANN. § 29-1-21-4 (West 2020); NEV. REV. STAT. ANN. § 133.085 (LexisNexis 2019).

⁶ See, e.g., Adam J. Hirsch & Julia C. Kelety, *Electronic-Will Legislation: The Uniform Acts Versus Australian and Canadian Alternatives*, 34 PROB. & PROP. 42, 43 (2020) (stating a preference for Canada’s cautionary approach to electronic wills because, in the words of one Canadian law reformer, such documents are the object of no more than a “curious interest” on the part of lawyers or members of the public) (quoting Law Reform Commission of Saskatchewan *Report on Electronic Wills* 24 (2004)); Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827, 846–51 (2020) (critiquing the UEWA as a response to a demand by business lobbyists, not consumers).

⁷ See *Tips for Assessing Capacity via Video Conferencing During COVID-19*, QUEENSL. L. SOC’Y (Apr. 2020), https://www.qls.com.au/Knowledge_centre/Ethics/Practice_Support_Resources/Practice_Support_Tips/Tips_for_assessing_capacity_via_video_conferencing_during_COVID-19 [<https://perma.cc/8SGW-YDUB>]. The precise rules for mental capacity vary from jurisdiction to jurisdiction, but the Restatement’s formulation is largely representative of most common law jurisdictions:

[T]he testator . . . [m]ust be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (AM. L. INST. 2003); see also *Banks v Goodfellow* (1870) LR 5 QB 549.

⁸ See, e.g., David Horton, *Wills Without Signatures*, 99 B.U. L. REV. 1623, 1631 (2019) (describing the impact of Australia’s “dispensing power” statutes and the way they served as a model for the Uniform Probate Code’s “harmless error” doctrine, subsequently adopted in eleven U.S.

history, we draw on a dual Australian-U.S. perspective to argue that any permanent change to the law should be driven by empirical data about will-making practices both before and during the pandemic. It is simply too early to know what effect electronic witnessing has had on will-making during the COVID-19 health crisis. To better understand what shape the laws governing valid will execution could or should take in the future, we outline a four-part research agenda to identify who availed themselves of emergency measures permitting remote witnessing of wills, why and how they did so, and the types of problems, if any, that may arise with wills executed and remotely witnessed during the pandemic.

Part I provides a brief overview of the traditional requirements for making valid wills and the doctrines that may be available to soften the consequences of failure to comply strictly with wills formalities. Part II explains why wills are desirable for legal and social reasons. It also considers the limitations of wills in preventing postmortem challenges to carefully crafted estate plans. Part III turns to a discussion of the ways that many jurisdictions have temporarily modified the rules governing the execution of wills during the COVID-19 pandemic by allowing for remote witnesses, for example. These modifications arguably are desirable from a practical perspective; they also are consistent with critiques that traditional wills formalities do not necessarily serve their stated purposes.⁹ According to one version of this argument, strict adherence to formalities is unnecessary when the formalities do not accomplish what they intend.¹⁰ On the other hand, radical departure from these formalities may prevent otherwise valid testamentary intentions from being recognized as such. In the context of this debate, we ask whether relaxed rules for will executions and other technology-driven reforms of will-making offer adequate protection for vulnerable testators, including older individuals. Part IV calls for more studies about pandemic-era will-making before law reformers and policymakers consider making the temporary rules permanent. Apart from understanding who made pandemic-era wills, future research should also identify the nature, extent, and scope of any difficulties that remote witnesses had in assessing testamentary capacity and in identifying possible cases of fraud, undue influence, or financial abuse, especially those perpetrated

states).

⁹ See, e.g., Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2018 WIS. L. REV. 269, 276–77 (critiquing the traditional functions of wills formalities).

¹⁰ See, e.g., Kelly Purser & Tina Cockburn, *Wills Formalities in the Twenty-First Century—Promoting Testamentary Intention in the Face of Societal Change and Technology: An Australian Response to Professor Crawford*, 2019 WIS. L. REV. FORWARD 46 (2019) (evaluating function of wills formalities in Australian context).

against older persons. This data will enable policymakers to identify and address problems with remote witnessing and to develop rules for the execution of wills that are both appropriate for the digital age and adequately protective of vulnerable individuals.

I. WILLS FORMALITIES AND THE BENEFITS OF WILL-MAKING

A. Brief Overview of Wills Formalities

For hundreds of years, wills have been executed in accordance with the same formalities. Details vary, but the basic requirements are the same across most common-law jurisdictions. Generally speaking, a will must be in writing, signed by the testator (or by someone else in the testator's conscious presence and at the testator's direction), and signed by at least two individuals as witnesses in the testator's and each other's physical presence.¹¹ Particular jurisdictional variations may include requirements that the witnesses are disinterested, meaning not receiving any benefit under the will;¹² the option of having a will notarized instead of witnessed;¹³ or a requirement that the testator subscribe the will (i.e., sign at the bottom) or "publish" it, meaning openly declare in the presence of the witnesses that the document is the testator's will.¹⁴

If a decedent dies without a will, or if a will is found to be invalid for some reason, including failure to comply with the requisite formalities, the decedent's probate property will pass pursuant to the laws of

¹¹ See, e.g., UNIF. PROB. CODE § 2-502(a) (UNIF. LAW COMM'N 1990, as amended 2008) (requiring two witnesses) and *Succession Act 2006* (NSW) s 6(1)(c) (Austl.) (requiring two witnesses). Under the (U.K.) Wills Act of 1837, both witnesses were required to be present together with the testator when the will was signed or acknowledged. Wills Act 1837, 7 Will. 4 & 1 Vict., c. 26 § 9. This is no longer the case under many modern statutes. See UNIF. PROB. CODE § 2-502(a)(3) (requiring the witnesses to sign "within a reasonable time after the individual witnessed either the signing of the will . . . or the testator's acknowledgement of that signature or acknowledgment of that will," with no requirement that the two witnesses be present together); *Succession Act 1981* (Qld) s 10(4) (Austl.) (providing that a will must be signed by two witnesses "in the presence of the testator, but not necessarily in the presence of each other").

¹² See, e.g., 79 Am. Jur. 2d *Wills* § 258 ("A subscribing witness to a will should be some person acquainted with the testator, having no interest, direct or indirect, as a beneficiary . . ."); *Succession Act 1981* (Qld) s 11(2)–(3) (Austl.) (voiding a disposition to an interested witness, except in limited circumstances, without invalidating the will itself). *But see* UNIF. PROB. CODE § 2-505 cmt. (UNIF. LAW COMM'N 1990, as amended 2008) ("Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will.").

¹³ See, e.g., UNIF. PROB. CODE § 2-502(a)(3)(B) (permitting notarization in lieu of witnesses).

¹⁴ See, e.g., N.Y. EST. POWERS & TRUST LAW § 3-2.1(3) (McKinney 2021) ("The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will."). By contrast, in Queensland, Australia the witnesses do *not* need to know that the document they attested and signed is a will. See *Succession Act 1981* (Qld) s 10(5).

intestacy to the heirs designated by statute. A typical intestacy statute in the United States or Australia provides for some or all of the decedent's estate to pass either entirely to a surviving spouse (or spousal equivalent, in some jurisdictions)¹⁵ or be split in specified proportions between the surviving spouse and issue, depending on the jurisdiction.¹⁶ Typically, if the decedent is not survived by any spouse or issue, the property will pass to other collateral relatives.¹⁷ Non-probate property passes by operation of law, as in the case of joint tenancies, for example, or pursuant to a contractual designation, such as life insurance payable to a designated beneficiary or bank accounts with payable-on-death designations.¹⁸

B. Trending Away from Formal Requirements

1. Holographic wills, dispensing powers, and harmless error statutes

In the United States, the strictness of traditional formalities is softened by laws in approximately half of all states that permit holographic wills—unwitnessed documents signed by the decedent and written entirely or in “material portion” in the decedent’s own handwriting.¹⁹ In Australia, no state or territory expressly permits holographic wills. Since 1975, however, the State of South Australia has had a dispensing power that permits a court to accept a will not otherwise

¹⁵ See, e.g., N.J. REV. STAT. § 3B:5-3 (1982) (providing for the intestate share of a decedent’s surviving spouse or domestic partner); *Administration and Probate Act 1958* (Vic) s 70 (providing that in the case of an intestate decedent who dies without descendants, if the decedent dies survived by one “partner,” that partner is entitled to the whole of the intestate’s residuary estate”). A partner is defined in the Victoria intestacy statute as an intestate decedent’s “spouse, domestic partner or registered caring partner at the time of the intestate’s death.” *Administration and Probate Act 1958* (Vic) s 70B. A “domestic partner” of a person who dies means a registered domestic partner or an unregistered domestic partner of that person. *Id.* at s 3(1). A “registered domestic partner” of a person who dies means a person who, at the time of the person’s death, was in a registered domestic relationship with the person within the meaning of the Relationships Act 2008. *Id.* at s 3(1). It is possible under the laws of Victoria and other Australian states for a decedent to be survived by more than one “partner.” See *id.* at s 70J(2). If a decedent leaves no issue but more than one partner, each partner takes in equal share, unless there is a distribution order or distribution agreement in effect that would alter such equal division. *Id.* at 70Z.

¹⁶ See, e.g., *Succession Act 1981* (Qld) pt 3, sch 2.

¹⁷ See, e.g., N.J. REV. STAT. § 3B:5-4 (1982) (providing for the intestate share of heirs other than a decedent’s surviving spouse or domestic partner); *Administration and Probate Act 1958* (Vic) ss 700–70ZL (providing for distribution of a decedent’s intestate estate, if the decedent is survived by one or more partner, including a “registered caring partner” or a “registered domestic partner,” as provided in *Relationships Act 2008* (Vic); children; or other relatives).

¹⁸ See generally Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora’s Box*, 62 TEMP. L. REV. 277, 280–92 (1989) (providing an overview of the multiple types of non-probate property).

¹⁹ See Horton & Weisbord, *supra* note 1; UNIF. PROB. CODE § 2-502(b).

executed in accordance with the necessary statutory formalities, as long as the court is satisfied that the decedent intended the document to constitute his will.²⁰

In the State of Queensland, courts experimented for approximately twenty-five years with a South Australian-style substantial compliance rule for wills.²¹ In 2006, Queensland formally adopted a dispensing power that is far more capacious than the substantial compliance doctrine. Under current Queensland law, a court can dispense with the formal requirements if multiple conditions are met: (1) there must be a document or part of a document that purports to be the decedent's will; (2) the document must not be executed in accordance with the requisite traditional formalities; and (3) the court must be satisfied that the testator intended the document or part of a document to serve as a will, alteration, or full or partial revocation of a will.²² Any documents not otherwise executed in accordance with the traditional formalities that are recognized by the courts as valid wills are called *informal wills* under Queensland law.

Two caveats round out the discussion of Queensland's dispensing power. First, the definition of a "document" is very broad; it includes "any material from which sounds, images, writings or messages are capable of being produced or reproduced."²³ Thus, Queensland courts have determined that a note on an iPhone, an unsent text message, and a video recording on a DVD were "documents" for purposes of this statute.²⁴ Second, the court's ability to dispense with traditional formalities applies to the making, altering, and revocation of a will, but not to republication.²⁵ Because of this broad dispensing power, Queensland can recognize as valid what are called "holographic wills" in some U.S. jurisdictions. However, recognition of a document as an informal will under the dispensing power requires an application to the court, which may be time consuming and costly, and there is, of course, no guarantee of success.

In the United States, there is no equivalent of the Queensland "informal will." But a minority of U.S. states have adopted a variation on

²⁰ *Wills Act Amendment Act (no. 2) 1975* (SA) s 9, amending *Wills Act of 1936* (SA) s 12(2).

²¹ See *Succession Act 1981* (Qld) s 9(a). Under the substantial compliance rule, a nonconforming will can be admitted to probate if the court is satisfied that the purposes of wills formalities—evidentiary, protective, ritual, and channeling—were satisfied. *Id.*

²² *Id.* at ss 18(1)(a)–(b), (2).

²³ *Id.* at s 18(5); *Interpretation Act 1954* (Qld) s 36.

²⁴ *Re Yu* [2013] QSC 322 (6 November 2013) (note on iPhone); *Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220 (9 October 2017) (unsent text message); *Mellino v Wnuk & Ors* [2013] QSC 336 (27 November 2013) (recording on DVD).

²⁵ See *Succession Act 1981* (Qld) ss 18(1)(a)–(b), (2).

the Australian dispensing power in the form of laws known as harmless error statutes.²⁶ Unlike the Queensland law, though, the U.S. harmless error statutes typically apply to *any* document that the decedent intended to constitute a will, alteration, full or partial revocation, or full or partial revival.²⁷ As long as there is clear and convincing evidence that the decedent intended the document to serve as her will, revocation, or the like, the court will treat the document as if it had been executed in accordance with all of the traditional formalities.²⁸ The harmless error rule takes a forgiving approach: A will can be recognized as valid even if the testator did not comply with traditional wills formalities. In both the United States and Australia, then, one can discern a relaxation in some jurisdictions of the hundreds-year-old rules that have traditionally governed the execution and validity of wills, provided the testamentary intentions of the deceased can be deduced from available evidence.

2. Wills formalities may not fully serve their stated purposes

The purpose of wills formalities is well-trodden scholarly territory.²⁹ The formalities are typically understood as having four aims: (1) evidentiary, by providing a record of the decedent's wishes to facilitate grants of probate; (2) protective, by guarding against fraud or wrongdoing, including undue influence; (3) ritual or cautionary, in affording a certain seriousness to the occasion; and (4) channeling, because the will execution process results in an instrument that is readily discernible by a court as a will.³⁰ But the very fact that some jurisdictions recognize the validity of holographic wills³¹ or informal wills³² means that some

²⁶ See UNIF. PROB. CODE § 2-503 (providing uniform rule); HAW. REV. STAT. ANN. § 560:2-503 (West, 2021); MONT. CODE ANN. § 72-2-522 (2021); N.J. STAT. ANN. § 3B:3-2 (West 2021); OHIO REV. CODE ANN. § 2107.24 (West 2021); S.D. CODIFIED LAWS § 29A-2-503 (2021); UTAH CODE ANN. § 75-2-502 (West 2021); VA. CODE ANN. § 64.2-404.1 (2021).

²⁷ See UNIF. PROB. CODE § 2-503.

²⁸ See *id.*

²⁹ See, e.g., Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3–5 (1951) (rationalizing formalities (1) because “the court needs to be convinced that the statements of the transferor were intended to effectuate a transfer”; (2) to supply evidence of will execution, in the event that the witnesses died before the testator; (3) for the purpose of “protecting the testator against imposition”; and (4) to make sure that the testator was not “acting in a casual or haphazard fashion”).

³⁰ See, e.g., Crawford, *supra* note 9; Ronald J. Scalise, Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 LA. L. REV. 1331, 1333–1337 (2020) (discussing history of function of wills formalities); Purser & Cockburn, *supra* note 10.

³¹ See *supra* note 19 and accompanying text.

³² See *supra* notes 22–25 and accompanying text.

lawmakers have made a policy choice to move away from strict formalities to an intention-based approach, at least in some cases.

Scholars have different views on the wisdom of loosening the traditional wills formalities. One of us has argued that “there is good reason to doubt that the primary motivation for those formalities were fully (or even adequately) described as having cautionary, ritual, evidentiary, and channeling functions” and would be comfortable dropping most traditional formalities.³³ Two of us have argued that the evidentiary and protective functions still retain vitality, especially in light of concerns about elder abuse.³⁴ Regardless of one’s perspective, however, the natural intuition might be that a will executed with less formality is more likely to lead to litigation than a traditionally executed will because of potential questions about the document’s authenticity or meaning. Did the decedent intend this document to serve as her will? In other words, did the *decedent* (and not some other person) intend that *this* document (and not some other document) serve as the decedent’s *will* (and not, for example, notes to oneself)? And what did the decedent mean by particular language, especially if a lawyer was not involved in the will preparation? The traditional wills formalities—especially when accompanied by an attestation clause—do quite a bit of work in answering many of those questions, so formal will-making has advantages.³⁵ At the same time, having a will is not an ironclad guarantee that the decedent’s wishes will be respected, as explored in the next Part.

II. WILL-MAKING BRINGS BOTH BENEFITS AND UNCERTAINTIES

A. Benefits

Legal commentators typically identify four common benefits of will-making. First, wills permit testators to tailor the distribution of their estates and to make appointments of executors and guardians for minor

³³ Crawford, *supra* note 9, at 290.

³⁴ See, e.g., Kelly Purser et al., *Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study*, 48 BRIT. J. OF SOC. WORK 887 (2018) (empirically examining 121 Australian cases of alleged financial abuse under an enduring power of attorney); Purser & Cockburn, *supra* note 10, at 51.

³⁵ An attestation clause typically appears after the testator’s signature and recites the facts of due execution; the witnesses sign underneath. See, e.g., Roger W. Anderson, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57, 70 (1994) (“Attestation clauses typically appear after the testator’s signature, but above the witnesses’ signatures. Lawyers phrase these clauses from the witnesses’ point of view, attesting that the will followed the elements of the local statute.”). The attestation clause gives rise to a rebuttable presumption of due execution. See UNIF. PROB. CODE § 3-406(3); see also Kelly Purser, Tina Cockburn & Bridget J. Crawford, *Wills Formalities Beyond COVID-19: A Comparative Australia-U.S. Perspective*, 5 UNSW L.J. FORUM 1, 6 (2020) (discussing the attestation clause as giving rise to a rebuttable presumption of due execution of a will under U.S. and Australian laws).

children.³⁶ A second benefit is that wills increase wealth integrity, meaning non-fractionation of assets like the family home.³⁷ Real property that is owned by ten beneficiaries as tenants-in-common may be more difficult to sell than property that is owned by one or two beneficiaries (or a trust), for example. A third benefit of having a valid will is more efficient postmortem administration. Professor David Horton, for example, has found evidence that, compared to testate estates, intestate estates are more likely to lead to litigation and typically are open longer.³⁸ A fourth benefit of will-making is psychological comfort in the form of knowing that one's affairs are in order before death.³⁹

To this familiar list of the advantages of having a will, we add an important ancillary benefit: To the extent that testate estates move through the probate system more quickly than intestate estates,⁴⁰ will-making decreases the likelihood that heirs might need to arrange for a “probate loan,” or a commercially exploitative advance on their inheritance.⁴¹ Especially in pandemic times, when many people have suffered job losses, pay cuts, and other economic hardships,⁴² maximizing any

³⁶ See Horton & Weisbord, *supra* note 1, at 19; 6 N.J. PRAC., WILLS & ADMIN. (rev. 3d ed.) §§ 681 (Appointments of Executors—In General) (detailing process by which appropriate New Jersey court will appoint an executor under a will), 722 (Appointment of Guardians for Minors—In General) (detailing process by which appropriate New Jersey court will appoint guardian of a minor).

³⁷ See Horton & Weisbord, *supra* note 1, at 19; Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2610 (2020) (“Intestacy is not a good estate plan for a variety of reasons, not least of which is the likelihood of fractionation, partition, or sale that results from intestate properties passing to multiple heirs.”).

³⁸ David A. Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 649 (2015).

³⁹ See, e.g., Horton & Weisbord, *supra* note 1, at 19; Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 150–57 (2012).

⁴⁰ See Horton, *supra* note 38, and accompanying text.

⁴¹ See, e.g., David A. Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 108 (2016) (raising concerns about “consumer exploitation and the disruptive effect of outsiders on the judicial process” by probate lenders, based on a data set of 594 probate cases in Alameda County, California).

⁴² See, e.g., *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU LAB. STATS. (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> [<https://perma.cc/N5LX-F9B5>] (reporting unemployment rate in United States of 14.7% in April, 2020 as the highest rate since the agency's formal collection of data in 1948); *Labour Force, Australia*, AUSTL. BUREAU OF STATS., <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release> [<https://perma.cc/7KYK-HFVU>] (reporting unemployment rate in Australia of 7.48% in July 2020). Pandemic-era unemployment rates in Australia are lower than the national unemployment rate of 11% in the early 1990s. See Peter Dawkins, *The Australian Labour Market in the 1990s*, RES. BANK OF AUSTL., <https://www.rba.gov.au/publications/confs/2000/dawkins.html> [<https://perma.cc/Z7KH-9NPB>]. See, e.g., *COVID-19: Australia and the United States by the Numbers*, U.S. STUD. CENTRE (Aug. 28, 2020), <https://www.ussc.edu.au/analysis/australia-and-the-united-states-by-the-numbers> [<https://perma.cc/5W67-W6S3>] (reporting that in August 2020, the

inheritance by minimizing fees paid to commercial lenders is a worthy goal.

To be sure, many people are persuaded of the wisdom of making valid wills. Estimates are that between 31 and 57 percent of all adults in the United States have a will⁴³ and that 59 percent of adults in Australia do.⁴⁴ However, even though many individuals do, in fact, take steps to assure the orderly distribution of their property after death, having a will is no guarantee that a decedent's wishes will be respected.

B. Uncertainties

Despite the many persuasive reasons to make a will, postmortem will challenges are common enough that they are fodder for regular news stories in both the United States and Australia.⁴⁵ Grounds for challenging a will depend on applicable state law and the facts of each particular case.

1. United States

In the United States, challenges to wills tend to fall into two broad categories. The first category is what we will call “procedural” challenges: allegations of one or more defects in the will execution that are not “cured” by some other doctrine, such as the qualification of the instrument as a holographic will or through a harmless error statute.⁴⁶

number of COVID-19 cases per million people in the United States (15,065) as much higher than in Australia (861)).

⁴³ See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41–42 (2009) (reporting results of telephone survey of 324 adults conducted in July, 2006); Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011) (estimating that 35% of U.S. adults have a will); David A. Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1121 (2015) (reporting that 57% of decedents dying in 2007 in Alameda County, California, were testate).

⁴⁴ See Cheryl Tilse et al., *Making and Changing Wills: Prevalence, Predictors, and Triggers*, SAGE OPEN, Jan.–Mar. 2016, <https://doi.org/10.1177%2F2158244016631021> [<https://perma.cc/H8B6-LBKQ>] (reporting the results of a telephone survey of 2,405 adults in Australia in order to determine the prevalence of will-making and reporting that 59 percent of the respondents had a will).

⁴⁵ See, e.g., Thomas Upchurch, *Estate and Will Contests of the Rich and Famous*, UPCHURCH L. (Jan. 31, 2020), <https://www.upchurchlaw.com/famous-will-contests> [<https://perma.cc/KYD3-AFCU>] (providing summaries of noteworthy litigation involving the estates of U.S. residents Michael Jackson, Jimi Hendrix, Whitney Houston, Philip Seymour Hoffman, James Gandolfini, Leona Helmsley and Howard Hughes); Amy Dale, *Where There's a Will (There's a Legal Dispute)*, LSJ ONLINE, (Oct. 30, 2019), <https://lsj.com.au/articles/where-theres-a-will-theres-a-legal-dispute> [<https://perma.cc/7FHV-DDET>] (describing litigation involving the estates of several famous Australians, including former Prime Minister of Australia Bob Hawke; Katharine Howard Olson, the wife artist John Olson; cricketer Richie Benaud; and former New South Wales Premier Neville Wran).

⁴⁶ See *supra* notes 19–20, 26–28 and accompanying text. See also EUNICE L. ROSS & THOMAS

The second category of challenges, which we will call “substantive,” includes concerns about an underlying condition or set of facts that might render an otherwise validly executed will invalid on some other grounds. In this latter category, “substantive” will contests typically involve allegations of: a lack of testamentary capacity (e.g., being “of sound mind and understanding”),⁴⁷ undue influence,⁴⁸ duress,⁴⁹ fraud,⁵⁰ or some combination of these.⁵¹

Because there is no comprehensive data about the incidence of will contests in the United States, it is difficult to quantify the likelihood that a postmortem will contest may occur. One study of wills filed in Davidson County, Tennessee, conducted over thirty years ago reveals that fewer than 1 percent of all wills probated over a seven-year period involved any kind of contest.⁵² In contrast, in Professor Horton’s study of probate records for decedents dying in 2007 in Alameda County, California, the rate of estate litigation was 12 percent for all decedents.⁵³

J. REED, WILL CONTESTS § 5:1 (2d ed. 2020) (“A will may be set aside by a court as a matter of law if the drafter failed to comply with testamentary formalities and in so doing created a will that cannot be enforced. . . . The most common ground for voiding a will for improper execution is the testator’s failure sign the will in the presence of the attesting witnesses—a ground commonly required by most wills formalities statutes.”).

⁴⁷ See, e.g., 79 Am. Jur. 2d *Wills* § 62 (“Testamentary capacity exists if, at the time a will is executed, the testator is capable of recollecting his or her property, the natural objects of his or her bounty, and their claims upon him or her; knew the business about which he or she was engaged; and how he or she wished to dispose of the property.”); see also *supra* note 7 and accompanying text.

⁴⁸ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(b) (AM. LAW INST. 2003) (“A donative transfer is procured by undue influence if the wrongdoer exerted such an influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.”).

⁴⁹ *Id.* at § 8.3(c) (“A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.”).

⁵⁰ *Id.* at § 8.3(d) (“A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.”).

⁵¹ See Horton, *supra* note 43, at 1131 (showing that in the 16 identified will contests in his sample, contestants asserted 20 different legal theories, 4 of which related to execution). Of course, a will contest might involve alternative pleadings that raise procedural and substantive objections to the will, i.e., an allegation of improper execution, coupled with a claim that even if the will were validly executed, it was the product of undue influence. See *id.*

⁵² See Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 611–12 (1987) (reporting that of the 7,638 wills filed for probate in Davidson County, Tennessee, only 66 were contested). Commenting on that data, Professor Langbein has cautioned that “one-in-a-hundred litigation patterns are very serious.” John L. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994).

⁵³ See Horton, *supra* note 43, at 1121, 1126–27 (finding that for decedents during in Alameda County, California in 2017, litigation occurred in 70 out of 571 total estates, but involving both testate and intestate decedents).

The Tennessee and California studies may or may not be representative; we are not aware of any national-scale study of will contests in the United States.⁵⁴

2. Australia

Using the Tennessee and California studies as benchmarks, the likelihood of a decedent's testamentary plan being disrupted in Australia would appear at first glance to be even greater than in the United States, due to two aspects of Australian law that have no U.S. counterparts. First, courts in Australia have the ability to create, alter, or revoke a will on behalf of a person who lacks testamentary capacity to make their own (because of advanced dementia, for example).⁵⁵ This is what is known as a "statutory" or a "court-ordered will" in Australia.⁵⁶ Generally speaking, any "appropriate person" may apply to the court for permission to make an application to the court for this type of will for another person.⁵⁷ The applicant must provide a variety of information, including evidence of the alleged lack of testamentary capacity;

⁵⁴ Other empirical studies of will contestations include an examination of Cuyahoga County (Ohio) probate files from the 1960s. See MARVIN SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 44–45 (1970) (estimating that 1.3% of all wills are contested). See also Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 393–94 (reporting on study of 415 estates from Dane County, Wisconsin from the years 1929 to 1944 and estimating that 3.6% of all wills are contested); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (reporting results of the study of a small number of estates from Cook County, Illinois from the years 1953 and 1957).

⁵⁵ See *Succession Act 1981* (Qld) ss 21–28; *Succession Act 2006* (NSW) ss 18–26; *Wills Act 1997* (Vic) ss 21–30; *Wills Act 1936* (SA) s 7; *Wills Act 2008* (Tas) ss 21–8; *Wills Act 1970* (WA) ss 40–41; *Wills Act 1968* (ACT) ss 16A–16I; *Wills Act 2000* (NT) ss 19–26. Note that in Victoria, the court does not have the authority to alter a will; the court's authority is limited to creating a will or revoking an existing will. See *Wills Act 1997* (Vic) s 21(1). Practically speaking, then, a party seeking to alter an existing will in Victoria would instead seek permission to apply for the creation of an entirely new will. See *id.*

⁵⁶ These are also known as "court-authorized wills." See Richard Williams & Sam McCullough, *Statutory Wills: The Australian Experience*, STEP (Dec. 1, 2014), <https://www.step.org/step-journal/tqr-december-2014/statutory-wills-australian-experience> [<https://perma.cc/48LL-LERC>] (describing statutory wills legislation in Australia, which is "comparable but not uniform" across the states and territories).

⁵⁷ See, e.g., *Succession Act 1981* (Qld) s 21. Although "appropriate person" is not defined in the statute, courts typically include in this class a spouse, a parent who the primary caretaker of a child, another relative with a relationship with the person for whom a statutory will is sought, or the person's court-appointed administrator. See, e.g., *What Is a Statutory Will?*, CRHLAW, <https://www.crhlaw.com.au/our-expertise/estate-planning/statutory-wills/> [<https://perma.cc/CGR4-D47R>] (answering, without citation, the question, "Who may apply for a statutory will?"). See also *Re DH; Application by JE and SM* [2011] ACTSC 69 (4 May 2011) (granting an application for a statutory will to a guardian of the proposed testator); *Re JT* [2014] QSC 163 (23 June 2014) (granting the application for a statutory will to the agent designated under the testator's durable power of attorney); *Application by Peter Leslie Kelso* [2010] NSWSC 357 (22 April 2010) (granting an application for a statutory will to a solicitor who previously represented the testator in a successful claim for compensation as a crime victim); *Re Fenwick; Application of*

a draft of the proposed will, alteration, or revocation; and evidence of the allegedly incapacitated person's wishes.⁵⁸ Before ordering the creation of the requested statutory will, the court must be satisfied that the allegedly incapacitated person "is, or is reasonably likely to be incapable of making a will."⁵⁹ In addition, the applicant must establish that "the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity,"⁶⁰ among other factors.⁶¹ The court seeks evidence of the wishes of the allegedly incapacitated person⁶² and grants ample opportunity for representation of those who have a reasonable right to be heard.⁶³ These protections limit the risk that a court will go against the intent of the person for whose benefit the statutory will is sought. Even so, self-serving or unscrupulous behavior by applicants could potentially lead to the upsetting of the testator's original testamentary intention. This is especially significant when considering that the testator may not be able to meaningfully participate in any opposition to the application for a statutory will, if they lack capacity. Furthermore, statutory wills are still subject to "family provision" applications, to which we now turn.

The second reason that an Australian decedent cannot be sure that their testamentary wishes will be carried out, and why even statutory wills are not completely fixed, is that each of Australia's eight states and territories has what is known as a "family provision" jurisdiction.⁶⁴

JR Fenwick and Re Charles (2009) 76 NSWLR 22 (granting an application for a statutory will to the Minister of Community Services, as the person formally responsible for the intended testator's welfare).

⁵⁸ See, e.g., *Succession Act 2006* (NSW) s 19 (listing twelve categories of information that the applicant must supply to the court).

⁵⁹ *Succession Act 2006* (NSW) s 22(a).

⁶⁰ The precise test, called the "core test," does vary among Australian jurisdictions, however. Compare, e.g., *Succession Act 1981* (Qld) s 21(2)(b)(iii) with *Wills Act 2008* (Tas) s 23.

⁶¹ See *Succession Act 1981* (Qld) s 22 (listing five matters about which the court must be satisfied in order to grant an application for an order to make a statutory will).

⁶² It is possible that in some circumstances, a person will never have had capacity to execute a will ("nil capacity" cases). This might be the case, for example, where a young child at an early age has sustained a brain injury so severe that, when they reach the age of majority, they could not legally execute a will because their lack of mental capacity persisted since the time of the brain injury. In this circumstance, the individual, despite having attained the age of majority, has not had the opportunity to form or express any testamentary intention. See, e.g., *Re W, DJ* [2015] SASC 45 (25 March 2015).

⁶³ See *Succession Act 1981* (Qld) s 22.

⁶⁴ See *Succession Act 1981* (Qld) ss 40–44; *Succession Act 2006* (NSW) ss 55–73; *Administration and Probate Act 1958* (Vic) ss 90–99A; *Family Provision Act 1972* (SA); *Testator's Family Maintenance Act 1912* (Tas); *Family Provision Act 1972* (WA); *Family Provision Act 1970* (NT); *Family Provision Act 1969* (ACT).

Generally speaking, regardless of the contents of a decedent's will (including statutory wills) or the applicable intestacy rules, anyone in the statutorily-designated class of "eligible persons," which includes the decedent's "spouse,"⁶⁵ "children,"⁶⁶ and "dependents,"⁶⁷ has the right to apply to the court for a share of the decedent's estate. Depending on the jurisdiction, the applicant must show either that the decedent has not made adequate provision for the applicant's "proper maintenance and support"⁶⁸ or that the decedent failed to provide for the applicant's "maintenance, education or advancement in life."⁶⁹ Upon the court's determination that the applicant has "need," it will then consider the question of "quantum" in determining what provision, if any, should be made for the applicant.⁷⁰ Note, however, that the court's role is not to remake a will for a testate decedent.⁷¹ Rather, the court applies the statute in determining whether adequate provision has been made, regardless of whether the decedent was testate or intestate. Then the court determines what quantum, or amount, is necessary to rectify failure to make appropriate provision, given the specific circumstances.⁷² In any event, because there is no ability to "contract out" of these family provision statutes through a premarital agreement or otherwise,⁷³ a

⁶⁵ See, e.g., *supra* note 15 and accompanying text (explaining the definition of "spouse" for purposes of Victoria law and the fact that a decedent may have more than one "spouse").

⁶⁶ The term "child" can include biological and adopted children and stepchildren. See, e.g., *Testator's Family Maintenance Act 1912* (Tas) ss 3A, 2(1); *Succession Act 1981* (Qld) s 40.

⁶⁷ The term "dependent" generally refers to any person who was being wholly or substantially maintained or supported by the deceased, for example, the decedent's minor grandchildren. See, e.g., *Succession Act 1981* (Qld) s 40. For a summary of the provisions, see Ben White et al., *Estate Contestation in Australia*, 28 U. NEW S. WALES L.J. 880, 908 (2015).

⁶⁸ See, e.g., *Family Provision Act 1972* (SA) s 7(1)(b). Note, however, that the precise property subject to a claim by an eligible person can differ depending on the Australian state or territory within which the family provision application is made. In the State of New South Wales, for example, the property subject to family provision claims include the decedent's "notional estate" (similar to the U.S. federal estate tax concept of transfers made within three years of death under 26 U.S.C § 2035). See generally *Succession Act 2006* (NSW) pt 3.3. These "notional estate" provisions are a unique feature of New South Wales law. Assets disposed of inter vivos by trust or outright transfer are generally immune from a family provision claim, subject to notional estate claw back provisions in New South Wales, and the inter vivos transaction being set aside under equitable doctrines such as undue influence or unconscionability. See, e.g., *Bridgewater v Leahy* (1998) 194 CLR 457 (referring case back to the Supreme Court for a determination of a family provision allowance after voiding a lifetime transfer by the decedent to his nephew). See generally Tina Cockburn, *Equity in Estate Litigation*, 23 (10) *TRS. & TRS.* 1066 (2017) (detailing the increase in assertions of the applicability of the equitable doctrines of undue influence and unconscionable contracts in order to set aside lifetime transfers, and the impact of equitable action on estate litigation).

⁶⁹ See, e.g., *Succession Act 2006* (NSW) s 59.

⁷⁰ See, e.g., *Singer v Berghouse* (1994) 181 CLR 201; *Vigolo v Bostin* (2005) 221 CLR 191.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See, e.g., *Barns v Barns* (2003) 214 CLR 169 (holding that a decedent's promises to make

carefully drafted dispositive scheme can potentially be upset by courts in Australia.⁷⁴

Scholars have explained the Australian family provision statutes as striking a balance between absolute testamentary freedom, on the one hand, and the legal and moral obligations of the testator to provide for certain classes of people, on the other. In attempting to achieve this balance, the court considers a number of factors, including the needs of the applicant and other beneficiaries, as well as the size of the decedent's estate.⁷⁵ However laudable these goals may be, the fact that Australian law provides for statutory wills and family maintenance provision applications means that there are legislatively authorized methods for altering established estate plans in specific circumstances.⁷⁶ Also, as in most common-law jurisdictions, Australian law provides for will contests on other grounds, such as lack of testamentary capacity; lack of knowledge and approval of the document's contents; as well as suspicious circumstances, fraud, or undue influence.⁷⁷ The question, thus, is whether the rate of estate contestation is higher in Australia than in the United States. The tentative answer appears to be no.

According to a comprehensive study of Australian succession law judgments for the year 2011, Australian courts handled 195 contested estates in that year.⁷⁸ In order to make a very rough estimate of the rate of will contests, one needs to know how many grants of probate (in testate estates) or letters of administration (in intestate estates) were

certain testamentary dispositions do not preclude a party from asserting claims under the family provisions statute.)

⁷⁴ Perhaps most well-known to law students in the United States is the case of *Lambeff v Farmers Co-operative Executors & Trustees Ltd* (1991) 56 SASR 323 (granting a modest family maintenance provision to the decedent's daughter from his first marriage, from whom he was estranged, despite the fact that the decedent's will left all of his property in trust for his two sons from his second marriage who had worked with the decedent in the family business), because the case is reprinted in a popular casebook. See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS & ESTATES* 566–69 (10th ed. 2017). Note that the property subject to a family provision claim includes the “notional estate” in New South Wales. See *supra* note 68. The closest analogous provision in the United States is the surviving spouse's elective share right. See, e.g., UNIF. PROB. CODE art. II, pt. 2 (elective share of surviving spouse). However, only the surviving spouse has an elective share, and that share is defined by statute, with no discretion in the court. See, e.g., UNIF. PROB. CODE § 2-202(a) (referring to surviving spouse's elective share right).

⁷⁵ See generally White et al., *supra* note 67, at 883.

⁷⁶ See, e.g., Michael S. Willmot & Craig P. Birtles, *Testamentary Dispositions*, 2016 AUSTL. BAR REV. LEXIS 51, 61–78 (describing will contests on the basis of lack of testamentary capacity, the testator's lack of knowledge and approval of the will's contents, undue influence and fraud).

⁷⁷ Note that the aim of statutory wills is for a court to order a will that is reflective of the deceased's testamentary intentions, whereas the family provision jurisdiction gives the court the power to infringe upon the testamentary freedom of the deceased (where expressed through a valid will). Compare, e.g., *Succession Act 1981* (Qld) ss 21–28 (providing for the creation of a statutory will), with *Succession Act 2006* (NSW) s 59 (providing for the family provision jurisdiction).

⁷⁸ See White et al., *supra* note 67, at 894.

made by the probate registry; this information was not included in the study. Furthermore, the Australian study considered *judgments* issued in 2011, but it was not limited to judgments issued in estates of decedents who *died* in 2011.

One can make only the roughest (and inherently inaccurate) estimates of the number of unique estates handled by Australian courts each year by reference to the average number of annual deaths in Australia and the national rate of testation. For the three-year period from 2008 to 2010 inclusive, the average number of annual deaths in Australia was 142,726.⁷⁹ Of those who died, how many had wills? If one assumes that 59 percent of the adult population in Australia has a valid will, as a 2012 study suggests,⁸⁰ then one might expect that there would be 84,208 (or 59 percent of 142,726) testate decedents in Australia in 2011. But this number undercounts the number of cases that would be handled by Australian courts, as it does not include intestate decedents. Thus, 84,208 would represent the low end of the range of potential cases in which an estate contestation may arise. Regardless, given that researchers identified only 195 contested estates in 2011, an estimated rate of contestation in Australia is barely greater than one in one thousand cases—a rate much lower than that found in the United States.⁸¹ The actual rate of contestation in Australia is likely even lower because of the non-inclusion of intestate decedents in our rough calculation.

The types of disputes considered by the courts in Australian estate cases in 2011 varied. Just over 50 percent of all estate litigation involved family provision applications, and 21.9 percent raised claims about the validity of the will (whether through “procedural” or “substantive” claims, as we have defined those terms above).⁸² Because of

⁷⁹ See *Deaths, Year of Registration, Summary Data, Sex, States, Territories, and Australia*, AUSTRALIAN BUREAU OF STATS., http://stat.data.abs.gov.au/Index.aspx?DatasetCode=DEATHS_SUMMARY [https://perma.cc/7X9S-TKQF] (providing number of deaths in Australia as 143,946 in 2008, 140,760 in 2009, and 143,473 in 2010).

⁸⁰ See Cheryl Tilse et al., *supra* note 44 and accompanying text. The authors of the Australian study acknowledge that the incidence of will-making increases with age and the size of the estate. *Id.* Furthermore, at least 50 percent of the 2012 study’s respondents were aged eighteen to forty-five years. *Id.* The average age of decedents dying in for the three-year period 2008 to 2010 inclusive was eighty-one. See *Deaths, Year of Registration, Summary Data, Sex, States, Territories, and Australia*, *supra* note 79 (providing median age for all deaths as 80.9 in 2008, 80.8 in 2009 and 81.2 in 2010). Therefore, the rate of testation for all decedents—who tend to be older—may, in fact, be higher than the rate of testation for the entire adult population. See *id.*

⁸¹ See *supra* notes 52–53 (discussing empirical studies of will contexts in Tennessee and California).

⁸² See *supra* notes 46–50 and accompanying text (defining “procedural” and “substantive” claims in U.S. courts) and *supra* notes 64–74 and accompanying text (describing family provision jurisdiction in Australian courts). See also White, et al., *supra* note 67, at 894 (reporting that out of 196 estates, ninety-nine involved family provision claims, forty-three involved questions of will

different methodologies, it is not possible to make a direct comparison to Professor Horton's study of will contests in Alameda County, California for decedents dying in 2017.⁸³ Case categories used by Horton are only roughly analogous to those in the Australian study. Of the seventy cases that Horton identified as involving an adversarial or quasi-adversarial proceeding, as opposed to a purely routine administrative matter, 4.9 percent of all cases involving testate decedents included a challenge to the validity of the will itself.⁸⁴ A smaller percentage of all cases involved the appointment of a fiduciary, such as an executor, administrator, or trustee, the construction of a testamentary instrument, or other matters.⁸⁵ Because claims under family provision legislation represent over 50 percent of succession law judgments by Australian courts in 2011 (claims that have no counterpart in U.S. law), one might expect that Australia has a higher rate of estate litigation than the United States. Yet the opposite appears to be true.⁸⁶

Even though evidence from both the United States and Australia demonstrates that valid wills do not prevent postmortem will challenges, wills nevertheless remain important. Unless a decedent holds all assets in non-probate form,⁸⁷ or surviving family members decide privately how to divide a small estate among themselves,⁸⁸ failure to make a will means the state—via the laws of intestacy—decides how a

validity, twenty-one involved the construction, or interpretation, of the will, and thirty-three involved "other" claims). The "other" claims likely include applications to make a statutory will, *see supra* Part II.B. (five out of 195 estates) and intestate decedents (fifteen out of 196 estates).

⁸³ *See Horton, supra* note 43.

⁸⁴ *See id.* at 1121, 1127 (reporting sixteen cases involving "validity of instrument" in sample of 571 matters that included 324 testate decedents).

⁸⁵ Claims other than those challenging the validity of the instrument were present at varying levels in 571 decedents' estates: contesting the appointment of a fiduciary (n=22, 3.9%), disputing the meaning of a testamentary instrument (3, 0.5%), the exercise of fiduciary duties (n=18, 3.2%), heirship petitions (n=9, 1.6%), petitions to recover property (6 or 1%) and an "other" catch-all category (n=10, 1.8%). *See id.*

⁸⁶ *See supra* notes 79–81 and accompanying text. It is not clear what role local rules about litigation costs may play into the rates of probate claims. The traditional Australian rule is that those who unsuccessfully challenge the will or default intestacy provisions, or who commence frivolous or vexatious estate litigation, must indemnify the estate for its expenses. *See, e.g., Re Besanko* (No 2) [2020] VSC 281 (9 April 2020). Increasingly courts have allowed strike-out applications, meaning summary dismissal, in order to bring an early end to unmeritorious claims. *Charlesworth v Anor* [2018] QDC 115 (21 June 2018). In contrast, California, the locus of Professor Horton's study, *see supra* note 27, follows the standard American rule of each side bearing their own litigation costs. *See* CAL. CIV. PROC. CODE § 1021 (West 2021); *In re Bevelle's Estate*, 81 Cal. App. 2d 720 (1947). There are exceptions to this rule, however. *See, e.g.,* CAL. PROB. CODE § 8872(c) (permitting attorney's fees to be awarded against a petitioner who wrongfully alleged that another has taken assets from a decedent's estate).

⁸⁷ *See supra* note 18 and accompanying text (providing examples of non-probate property).

⁸⁸ *See, e.g.,* Naomi Cahn & Amy Zietlow, "Making Things Fair": An Empirical Study of How People Approach the Wealth Transfer System, 22 ELDER L.J. 325 (2015) (describing the frequency of use of private ordering processes to distribute decedents' estates).

decedent's property is distributed.⁸⁹ For some individuals, these default rules will be intent-effectuating, meaning they comport with personal preference about postmortem property distribution.⁹⁰ For other individuals, however, the intestacy rules will not match with personal preferences at all, and a will is therefore necessary.⁹¹ Indeed, a valid will also offers the best evidence of the decedent's testamentary intentions in the event that the estate is contested.⁹² The next Part considers the challenges of making a valid will during the COVID-19 pandemic, especially during times of stay-at-home orders or social-distancing recommendations, in jurisdictions that adhere to traditional requirements for wills formalities, including the physical presence of two witnesses.⁹³

III. PANDEMIC-ERA WILLS

Beginning in March 2020 and continuing for several months thereafter, local, state, and national governments around the globe implemented a variety of preventative measures in order to reduce the spread

⁸⁹ See, e.g., JEFFREY A. SCHOENBLUM, *MULTISTATE AND MULTINATIONAL ESTATE PLANNING* (3d ed. 2017) (providing a comparison of intestacy laws for all fifty U.S. states and many other countries).

⁹⁰ Intestacy rules are designed to effectuate the intentions of the “average” decedent, most commonly imagined as a married person with a surviving spouse (and only one spouse) with shared children only, although later revisions to intestacy laws do take into account the possibility of successive marriages and descendants who are not shared between the spouses. See, e.g., UNIF. PROB. CODE, art. II, pt. 1, gen. cmt. (UNIF. LAW COMM’N 2010) (“The pre-1990 Code’s basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.”); see also Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 912 (1992) (“[S]uccession law should reflect the desires of the ‘typical person,’ both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented.”).

⁹¹ See, e.g., Wright, *supra* note 37, at 361–71 (concluding, based on study of approximately wills recorded in two Florida during the year 2013 that patterns of actual testation—used as a proxy for personal preference—differed from intestate distribution patterns particularly in cases involving decedents who had been married multiple times, who have unmarried partners, or whose non-genetic children who have not been adopted formally).

⁹² More accurately, the will typically functions as the *second*-best evidence of the decedent’s intentions, as the decedent himself is dead. See discussion *infra* note 137 and accompanying text.

⁹³ See *supra* notes 11–14 and accompanying text.

of COVID-19. These included travel restrictions,⁹⁴ stay-at-home orders,⁹⁵ social distancing mandates,⁹⁶ and requirements to wear face masks in public.⁹⁷ In some places, initial stay-at-home orders were lifted only to be reimposed after a new surge in COVID-19 cases.⁹⁸ Of these preventative measures, stay-at-home orders posed a particular obstacle for executing a valid will in jurisdictions that require wills to have two disinterested witnesses physically present for the signing of a will.⁹⁹ For those who lived alone or were quarantining with family members named in the will, it was difficult—if not impossible—to execute a will

⁹⁴ See, e.g., Kelly Burk, *Australia Closes Borders to Stop Coronavirus*, 7NEWS.COM.AU (Mar. 10, 2020), <https://7news.com.au/lifestyle/health-wellbeing/australia-closes-borders-to-stop-coronavirus-c-752927> [<https://perma.cc/29US-XHL3>] (reporting the closing Australia’s national borders to all non-residents and non-citizens); *Coronavirus (COVID-19): Red List Travel Ban Countries*, U.K. DEPT OF TRANSP. (Feb. 11, 2021), <https://www.gov.uk/guidance/transport-measures-to-protect-the-uk-from-variant-strains-of-covid-19> [<https://perma.cc/RS9W-PFA7>] (providing a “red list” of countries from which all travel into the United Kingdom is banned, except for U.K. and Irish citizens and those with the legal right to reside in the United Kingdom).

⁹⁵ See, e.g., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm> [<https://perma.cc/3SGF-VZ2B>] (detailing the issuance of stay-at-home orders by forty-two states and territories in the United States between March 1 and March 31, 2020); Jeffrey Gettleman & Kai Schultz, *Modi Orders 3-Week Total Lockdown for All 1.3 Billion Indians*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/world/asia/india-coronavirus-lockdown.html> [<https://perma.cc/S2B3-FXGB>] (reporting on India Prime Minister Narendra Modi’s announcement of twenty-one-day “lockdown” in an effort to combat the spread of the coronavirus).

⁹⁶ See, e.g., *Australia’s Social Distancing Rules Have Been Enhanced to Slow Coronavirus—Here’s How They Work*, ABC.NET.AU (Mar. 20, 2020), <https://www.abc.net.au/news/2020-03-20/coronavirus-covid-19-scott-morrison-enhanced-social-distancing/12075532> [<https://perma.cc/WZS5-DZWP>] (reporting on Australia Prime Minister Scott Morrison’s limitations on the number of people permitted at indoor gatherings and his recommendation that people “should continue to practise wherever possible the 1 metre or 1.5 metres of healthy distance between each of us, to ensure that we are limiting the contact and limiting the potential for the spread of the virus”); Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP (Mar. 3, 2021), <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> [<https://perma.cc/9363-TQ7G>] (providing state-by-state overview of restrictions in the United States, including social distancing requirements).

⁹⁷ See, e.g., *Public Health (COVID-19 Mandatory Face Coverings) Amendment (No 4) Order 2021* (May 3, 2021) (requiring mask wearing on public transportation in the greater Sydney area, in airports and on aircraft landing in or taking off from an airport in New South Wales); Bunis & Rough, *supra* note 96 (reporting on mask-wearing requirements in gyms in Connecticut and Massachusetts, on land managed by the National Park Service in Washington, D.C., and at indoor entertainment facilities in Minnesota, for example).

⁹⁸ See, e.g., *Daniel Andrews Announces 10 Postcodes Returning to Stage 3 Stay-at-Home Laws—As It Happened*, GUARDIAN (U.K.) (July 1, 2020), <https://www.theguardian.com> [<https://perma.cc/QQ8N-X89T>] (reporting reimposition of stay-at-home orders in Victoria, Australia); Melanie Grayce West, *New York Sets New Lockdown Restrictions Where Coronavirus Has Resurged*, WALL ST. J. (Oct. 6, 2020), <https://www.wsj.com/articles/new-yorks-mayor-prods-state-to-approve-business-closures-in-covid-19-hot-spots-11602005344> [<https://perma.cc/WW3S-Q7D8>] (publicizing New York Governor Andrew Cuomo’s announcement of new “lockdown restrictions” in parts of New York City, Rockland and Orange Counties).

⁹⁹ See *supra* notes 11–14 and accompanying text.

in the presence of disinterested witnesses.¹⁰⁰ After stay-at-home orders eased, fears of catching the virus even in socially distanced settings continued to present a challenge to validly executing a will in the traditional manner.¹⁰¹ At the same time, fears of catching the virus and dying from it caused people to focus on the need to have a will—some were motivated to do so for the first time.¹⁰²

A. Remote Witnessing Wills in the Pandemic Era and Beyond

Recognizing the need to create valid wills without the physical presence of two other individuals during a pandemic, several jurisdictions in the United States, Australia, and elsewhere enacted temporary measures that authorize the remote witnessing of wills through simultaneous and continuous audio-visual platforms like Zoom, FaceTime, or Skype.¹⁰³ Precise details vary by jurisdiction, but the basic approach is

¹⁰⁰ *But see* Bridget J. Crawford, *Executing a Last Will and Testament During a Pandemic*, THE FACULTY LOUNGE (Aug. 6, 2020), <https://www.thefacultylounge.org/2020/04/executing-a-last-will-and-testament-during-a-pandemic.html> [<https://perma.cc/H9QZ-ETKW>] (suggesting the possibility of witnessing a will execution through a window, and passing the originally-signed will through a mail slot or under the door to witnesses who would then return the document to the testator the same way).

¹⁰¹ *See* Susan Garland, *What to Know About Making a Will in the Age of Coronavirus*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/article/what-is-a-will-and-how-to-make-one.html> [<https://perma.cc/MRW5-T5WB>] (describing an outdoor will-execution ceremony held on a table put in someone's front yard, with papers held down by rocks, and all participants bringing their own pens and maintaining physical distance).

¹⁰² *See id.* (quoting one sixty-six-year-old man explaining about his and his wife's approach to estate planning: "The virus accelerated the need not to wait another week or another day. We wanted to focus on what if both of us were gone tomorrow. There was a real sense of urgency to ensure the documents say what we want them to say.").

¹⁰³ *See, e.g.*, Conn. Exec. Order. No. 7Q § 3.g (Mar. 20, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7Q.pdf?la=en> [<https://perma.cc/K8Z3-PFKH>]; CONN. GEN. STAT. ANN. § 51-85 (West 2021) (permitting remote witnessing of a will if done under attorney supervision); N.Y. Exec. Order No. 202.14 (Apr. 7, 2020), <https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> [<https://perma.cc/N8V7-B9EM>] (permitting remote witnessing of wills under certain circumstances during the COVID-19 pandemic), as extended through July 5, 2021 by N.Y. Exec. Order No. 202.110 (June 5, 2021), <https://www.governor.ny.gov/news/no-202110-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> [<https://perma.cc/WKR9-7VDP>]. For Australia, see, e.g., *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW); *COVID-19 Emergency Response Bill 2020* (Qld); *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld) ss 6–8; *COVID-19 Emergency Response and Other Legislation Amendment Act 2021* (Qld); Supreme Court of Queensland, *Practice Direction No 10 of 2020: Informal Wills/COVID-19* (Apr. 22, 2020); *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic); *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) pt 5. Note that these measures have been made permanent in Victoria. *See Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic). There is a pilot underway in New South Wales to assess permanency; on September 28, 2020, the government moved the provisions to the *Electronic Transactions Act 2000* (NSW) as part of this plan. For Canada, see, e.g., Ont. Reg. 129/20 (Can.), https://www.ontario.ca/laws/regulation/200129?_ga=

the same: under emergency measures, a will can be validly witnessed by means of remote real-time audio-visual technology.¹⁰⁴

Given the long-standing nature of traditional wills formalities,¹⁰⁵ it is notable how swiftly lawmakers adapted will-making rules to pandemic-era exigencies. In the United States, the fact that some states already permitted electronic wills may have paved the way. Arizona, Nevada, Illinois, and Florida allowed electronic wills even before the pandemic.¹⁰⁶ Also, in 2019, the Uniform Law Commission had promulgated the Uniform Electronic Wills Act (UEWA).¹⁰⁷

The UEWA makes two major innovations to the traditional law of wills. First, the UEWA makes valid an “electronic will,” such as a document fully executed on a tablet computer, even if it is not reduced to paper form.¹⁰⁸ Generally speaking, most commentators do not appear to have concerns about treating as a “will” an electronic record (as opposed to paper copy) of the decedent’s wishes.¹⁰⁹ Indeed, experience with Queensland’s capacious approach to what constitutes a “document” in the context of the dispensing power suggests that the UEWA is both

2.238534857.830463278.1598471742-937989279.1592602866 [https://perma.cc/H8DH-HSF9] (permitting witnessing of wills by “any electronic method of communication in which participants are able to see, hear and communicate with one another in real time”). For England and Wales, see, e.g., *Guidance on Making Wills Using Video-Conferencing*, U.K. MINISTRY OF JUST. (Jul. 25, 2020), <https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic> [https://perma.cc/ZT62-AQNY] (announcing plans for new law to permit witnessing of wills retroactive to January 31, 2020 and continuing until January 2022).

¹⁰⁴ See, e.g., *Guidance on Making Wills Using Video-Conferencing*, U.K. MINISTRY OF JUST. (July 25, 2020), <https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic> [https://perma.cc/ZT62-AQNY] (providing for remote witnessing of testator’s signature, transmittal of the original document to each witnesses, who—using remote technology again—either sign it or acknowledge their signature in the virtual presence of the testator, and for the latter step to be repeated if the two witnesses are not in the same physical location).

¹⁰⁵ See *supra* notes 11–14 and accompanying text.

¹⁰⁶ ARIZ. REV. STAT. ANN. § 14-2518 (2020); FLA. STAT. ANN. § 732.522 (West 2020); IND. CODE ANN. § 29-1-21-4 (West 2020); NEV. REV. STAT. ANN. § 133.085 (LexisNexis 2019).

¹⁰⁷ UNIF. ELEC. WILLS ACT (UNIF. L. COMM’N 2019). Utah enacted the UEWA in 2020. UTAH CODE ANN. §§ 75-2-1401–1411 (West 2020). As of this writing, the UEWA also has been adopted in Washington, North Dakota, and Colorado. See *supra* note 5. Other states likely will follow.

¹⁰⁸ UEWA §§ 3 (“An electronic will is a will for all purposes of the law of this state.”), 2(7) (defining a will as including “a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.”), 2(1) (defining “electronic” as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities”).

¹⁰⁹ Cf. Hirsch & Kelety, *supra* note 6, at 44 (framing one objection to electronic wills not by reference to the lack of paper per se, but rather the ability of witnesses to “sign” an electronic will by typing their names).

sensible and consistent with contemporary practices for all sorts of electronic communications.¹¹⁰ It should be noted, however, that while the dispensing power has in some cases allowed “electronic wills” to be admitted to probate in Queensland, these cases required an application to the court. There is currently no legislation in Queensland or in any other Australian jurisdiction like the UEWA that explicitly endorses the validity of electronic wills.

More controversial is the UEWA’s second major innovation: A state may choose to permit the testator and witnesses to sign in each other’s “electronic presence” instead of the traditional physical presence.¹¹¹ The principal question is whether electronic witnesses are *at least as able as in-person witnesses* to (1) gather enough information to make a determination about the testator’s testamentary capacity and (2) detect the possible presence of fraud, duress, or undue influence.¹¹²

Consider a scenario where a testator goes online and creates a will using the platform provided by a company that specializes in creating, validating, and storing remotely witnessed wills.¹¹³ Assume that the testator is located in Florida, as are all of the people who work for the commercial entity, which we will call Acme, for illustration purposes. Ready to sign the will, the testator logs onto Acme’s website at a designated time, where she is greeted by a notary and two witnesses who work for Acme.¹¹⁴ None of the parties are physically present in the same place, because of pandemic-related concerns, but they all can see and hear each other. The proceedings are video recorded, in order to preserve an electronic record of all that transpires.¹¹⁵ After confirming the identity of the testator and the witnesses through specifically designated methods,¹¹⁶ the notary must ask the testator three questions to

¹¹⁰ See *supra* notes 21–25 and accompanying text (discussing Queensland’s dispensing power).

¹¹¹ UEWA § 2(2) (defining “electronic presence” as “the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location”). Unlike the pandemic-era rules for remote witnessing of wills in England and Wales, see *supra* note 104, the UEWA does not spell out procedures for the transmission of the original will to one or both witnesses and back to the testator. See UEWA at § 2(2). Presumably, the drafters of the UEWA contemplate the development of more specific guidelines or best practices by the adopting jurisdiction, but this is speculation on our part.

¹¹² See *supra* note 7 and accompanying text and *supra* Part I.B.2.

¹¹³ See, e.g., Paul Sullivan, *A Will Without Ink and Paper*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/your-money/electronic-wills-online.html> [<https://perma.cc/M3AX-984N>] (naming several companies that provide these types of services).

¹¹⁴ FLA. STAT. §§ 732.521–732.525.

¹¹⁵ See, e.g., *id.* at § 117.285(5)(i) (requiring a “perceptible indication” of the presence of the witnesses during the remote will execution).

¹¹⁶ FLA. STAT. §§ 732.522(2)(a) (providing for the supervision by a notary of a document signed and witnessed electronically), 117.265(4) (providing for the authentication of the testator’s identity through personal knowledge or presentation of verified government-issued identification and

make sure that the testator is eligible to avail herself of remote witnessing under Florida law, namely:

1. Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?
2. Do you have any physical or mental condition or long-term disability that impairs your ability to perform the normal activities of daily living?
3. Do you require assistance with daily care?¹¹⁷

If the answer to any of these questions is “yes,” then the remote will execution may not proceed.¹¹⁸ If the answer to all of the screening questions is “no,” the notary must then ask the testator five more questions:

1. Are you currently married? If so, name your spouse.
2. Please state the names of anyone who assisted you in accessing this video conference today.
3. Please state the names of anyone who assisted you in preparing the documents you are signing today.
4. Where are you currently located?
5. Who is in the room with you?¹¹⁹

After the notary records the testator’s answers to these questions, the testator can then sign the instrument and make a verbal acknowledgement that she has done so.¹²⁰ The witnesses then sign electronically and, because the will designates Acme as the “qualified custodian” of the will (for an annual fee, of course), the notary takes possession of the electronic will and stores it using Acme’s secure system.¹²¹ The testator now has a valid will under legislation that explicitly authorizes this method of execution.

“identity proofing” by answering questions in accordance with rules promulgated by State Department, similar to the questions that one may be asked when confirming online the validity of a financial request, such as, “At which of these addresses have you not lived in the last 10 years?” or “What is the amount of your outstanding mortgage with X institution?”), 117.285(2) (providing for the authentication of the witnesses’ identities in the same manner as the testator).

¹¹⁷ *Id.* at § 117.285(5)(a).

¹¹⁸ *Id.* at § 117.285(5)(b).

¹¹⁹ *Id.* at § 117.285(5)(d).

¹²⁰ *Id.* at § 732.522(2)(c)–(d).

¹²¹ *Id.* at § 732.524 (defining a “qualified custodian” and its duties).

In Australia, peak legal bodies—meaning the leading professional organizations—published broad guidelines to support lawyers’ compliance with the emergency legislation permitting remote witnessing of wills during the pandemic. These guidelines also assist lawyers in meeting their ethical responsibilities, including exercising the requisite standard(s) of care when supervising the remote execution of wills.¹²² The guidelines generally provide that lawyers should meet clients in person where possible, adopt remote electronic witnessing cautiously, and take detailed contemporaneous file notes.¹²³ In particular, the guidelines produced by the New South Wales Law Society advise lawyers engaging in remote witnessing of wills to ask open-ended questions to test their client’s testamentary capacity and understanding and to inquire whether anyone else is present in an attempt to identify undue influence.¹²⁴ Given the challenges associated with remotely assessing capacity and concerns about increased risks of undue influence and elder abuse, Australian peak legal bodies have not generally supported the emergency provisions becoming permanent.¹²⁵ In Australia, the introduction of electronic wills has not been a law reform priority.¹²⁶

¹²² Kelly Purser et al., *End of Life Decision-Making, Advance Care Planning and Estate Planning During a Pandemic*, in PANDEMIC, PUBLIC HEALTH EMERGENCIES AND GOVERNMENT POWERS: PERSPECTIVES ON AUSTRALIAN LAW (Belinda Bennett & Ian Freckelton eds., Federation Press 2021).

¹²³ See *Tips for Assessing Capacity via Video Conferencing During COVID-19*, supra note 7. See also Purser, supra note 122. The recent Queensland case of *Re Sheehan* highlights the importance of taking detailed contemporaneous file notes. See *Re Sheehan* [2021] QSC 89 (5 May 2021). In that case, the Supreme Court of Queensland considered an application for probate of a will which was executed online under the *COVID-19 Emergency Response Act 2020* (Qld) and the *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld). See *id.* Despite the best efforts of the lawyer who drafted the will and who served as one of the online witnesses, the court found that the execution of the will did not meet the statutory requirements (i.e., the testator had not signed every page, a more onerous requirement than the ordinary rules that require the testator to sign at the end of the document). See *id.* Because the testator did not sign one page, the will was not validly executed according to the emergency provisions. See *id.* It was therefore necessary to nevertheless make an application for probate of an informal will under s 18 of the *Succession Act 1981*, which was granted. See *id.*

¹²⁴ See *Implications of the Electronic Witnessing Provisions*, THE L. SOC’Y OF NEW SOUTH WALES (May 22, 2020), <https://www.lawsociety.com.au/sites/default/files/2020-06/Implications%20of%20Electronic%20Witnessing%20Provisions.doc.pdf> [<https://perma.cc/NV3P-T536>] (including updates about the recent changes to the NSW remote witnessing legislation); *FAQs – Electronic Witnessing Under 2B of the Electronic Transactions Act 2000 (NSW)*, THE L. SOC’Y OF NEW SOUTH WALES (Oct. 7 2020), https://www.lawsociety.com.au/sites/default/files/2020-10/COVID-19%20Witnessing%20of%20Documents_%20FAQs%207%20October%202020%20CLEAN.pdf [<https://perma.cc/Q4KA-MNE3>]; see also Purser et al., supra note 122.

¹²⁵ See Purser et al., supra note 122.

¹²⁶ See *id.*

B. Potential Problems with Remote Witnesses

The Florida hypothetical provides just one example of electronic wills and remote witnessing legislation; that state's law was in place prior to the pandemic. The UEWA does not contain the same level of specificity that Florida has for verifying identity or inquiring about the circumstances and physical surroundings.¹²⁷ Australian professional organizations have promulgated guidelines on pandemic-era remote witnessing of wills, but these guidelines do not derive from the emergency legislation itself.¹²⁸

All electronic wills legislation and pandemic-era remote witnessing rules raise the same concern: how well can remote witnesses perform their intended functions? The drafters of the UEWA seem to dismiss any concerns, reasoning that in-person witnesses and remote witnesses are on the same footing.¹²⁹ Practically speaking, this may be true in many cases. But without being physically present with the testator, the witnesses have no way of determining that, even if the testator says that she is alone, there is not someone just off-screen or in another room who appears unusually insistent that the testator execute the will. In the Florida hypothetical, what if an overly eager family member nearby coached the testator on what to say, just before the testator joined the Acme employees on screen? Furthermore, issues of testamentary capacity may not be able to be fully explored and may, in fact, be more difficult to identify through virtual witnessing than in person. Electronic witnesses would not be able to observe the types of details that may, in fact, be highly relevant to the testator's testamentary capacity or the presence of fraud, duress, or undue influence.

In both the United States and Australia, there are certain interactions between individuals and the legal system that are so unique that in-person presence is required or at least strongly preferred. For example, in New York, a criminal defendant must be personally present at the time of sentencing, but a court is permitted to dispense with that requirement, upon motion of the defendant, in the case of a misdemeanor or a petty offense.¹³⁰ In South Australia, a defendant to be sentenced for an "indictable offence," meaning a criminal matter where the

¹²⁷ See UEWA cmt. to § 5 ("Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for electronic wills executed with remote witnesses . . .").

¹²⁸ See *supra* note 124 and accompanying text.

¹²⁹ See UEWA cmt. to § 5 (providing that regardless of whether a witness is in the physical or electronic presence of the testator, "a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or undue influence").

¹³⁰ See N.Y. CRIM. PROC. LAW § 380.40 (McKinney 2021).

defendant has a right to a jury trial,¹³¹ must be present when the sentence is imposed.¹³² Nevertheless, the court can consent to the defendant's absence, or the defendant may appear by an audio visual link, if the defendant is in custody.¹³³ To be sure, wills are radically different than criminal matters; no deprivation of physical liberty is at stake, so in-person presence may not be an overwhelming consideration for witnesses to wills. Unlike the lifetime consequences of criminal convictions or even formal accusations of crime, even if the accused is acquitted,¹³⁴ wills are documents largely designed to effectuate postmortem distribution of assets.¹³⁵ Wills have no effect at all until the decedent dies.¹³⁶

Nevertheless, in the universe of legal documents, wills are unique. First, they are unilateral—compared to a contract, for example, which by definition has at least two parties. Second, wills suffer from a “best evidence” problem, meaning that the testator will be dead by the time the document becomes legally effective.¹³⁷ Therefore, the law treats a will with particular reverence, as the next-best evidence of a decedent's wishes.¹³⁸ The fundamental importance of property ownership and the fact that the will evidences the deceased's testamentary intentions for the distribution of their property undergird this reverence. Third, because of the primacy of testamentary freedom,¹³⁹ it is important that

¹³¹ See, e.g., *Criminal Procedure Act 1921* (SA) s 5 (providing examples of both “minor indictable offences,” such as those for which the maximum prison term is not greater than 5 years, and “major indictable offences,” which are all offences that are not defined as “minor indictable offences”); see also *Indictable Offence*, LEG. SVCS. COMM'N OF S. AUSTRALIA, <https://lawhandbook.sa.gov.au/go01.php#idm140631746848976> [https://perma.cc/8277-QEDB].

¹³² See *Sentencing Act 2017* (SA) ss 21(1), (2)(a)–(b).

¹³³ *Id.*

¹³⁴ To give just two U.S.-based examples, consider the requirement to disclose any felony charges on an application to become a registered financial advisor with the Financial Industry Regulatory Authority or on an application for admission to the bar. See David A. Weintraub, *When Does “No” Mean “Yes”? With Expungements, of Course*, 88 N.Y. ST. BAR J. 47 (2016) (discussing both examples).

¹³⁵ See, e.g., 79 Am. Jur. 2d. *Wills* § 1 (“A will is generally defined as an instrument by which a person makes a disposition of his or her property, to take effect on or after his or her death.”).

¹³⁶ See *id.*

¹³⁷ See, e.g., WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 6.1 (1988) (explaining that wills traditionally require two witnesses because “the best evidence of the testator's intent, the testator, is always dead”).

¹³⁸ See, e.g., 79 Am. Jur. 2d. *Wills* § 1 (defining a will as “the legal expression of a person's wishes as to the disposition of his or her property after death”).

¹³⁹ See, e.g., RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (“The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.”); *Goodsell v Wellington* [2011] NSWSC 1232 (4 November 2011) (Austl.) (Honorable Justice Phillip Hallen describing in dicta that testamentary freedom is “prominent feature of the Australian legal system. Its significance is both practical and symbolic and should not be underestimated.”). In both the United States and Australia, testamentary freedom nevertheless is curtailed by a variety of doctrines including the surviving spouse's right of election in the United States. See

the will is an authentic expression of the *decedent's* wishes and not anyone else's. Through the imposition of statutory formalities, including the traditional requirement of in-person presence of two witnesses, the law has attempted to create conditions that minimize, but certainly do not eliminate, the possibility of fraud, undue influence, and the like.¹⁴⁰

Pandemic-era wills legislation was not subject to the usual oversight mechanisms, such as public consultation.¹⁴¹ Typical legislative processes were either fast-tracked or dispensed with entirely. The fact that the UEWA may have served at least partially as a model for executing pandemic-era wills in the United States provides little comfort to some critics. The drafters prepared the UEWA on an accelerated timetable that was not consistent with the standard practices of the Uniform Law Commission.¹⁴² In the case of the UEWA, contrary to the usual process, there was no study committee investigation or report on the feasibility of developing a uniform law before the drafting committee began its work.¹⁴³ Furthermore, the Uniform Law Commission's own guidelines state that drafters should avoid subject areas that are "controversial because of disparities of policies among the states" as well as areas that are "entirely novel and with regard to which neither legislative nor administrative experience is available."¹⁴⁴ The members of the Drafting Committee for the UEWA have publicly acknowledged that the subject of electronic wills is controversial.¹⁴⁵ Accordingly, the UEWA may not be the most well-tested model.

Now, however, many jurisdictions do have experience with remote, real-time witnessing because of pandemic-era rules issued in the form of executive or emergency orders. Attorneys and clients who otherwise might never have conducted remote will executions may wish to have the option of continuing the practice, once the public health crisis is

UNIF. PROB. CODE art. II, pt. 2; *supra* Part II.B.2 (providing an overview of Australia's family provision law).

¹⁴⁰ See *supra* Part I.B.2.

¹⁴¹ Purser et al., *supra* note 35.

¹⁴² See Hirsch, *supra* note 6, at 868–70 (describing irregular procedures that led to the formation of the UEWA's drafting committee).

¹⁴³ *Id.*

¹⁴⁴ *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts*, UNIF. L. COMM., <https://www.uniformlaws.org/projects/overview/newprojectcriteria> [<https://perma.cc/A8M4-LEVD>]; see also Hirsch & Kelety, *supra* note 6, at 45 (noting inconsistency between the Uniform Law Commission's stated policies and the creation of a drafting committee for a Uniform Electronic Wills Act).

¹⁴⁵ See Turney Berry & Suzanne Walsh, *Ready or Not, Here They Come: Electronic Wills are Coming to a Probate Code Near You*, 33 PROB. & PROP. 62, 63 (2019) ("This controversy [over electronic wills] is widespread, evidenced among drafting committee members, members of our advisors, and lawyers in audiences whom we have addressed about this topic during the last several years.").

over.¹⁴⁶ One commentator has suggested that the “technological bell on remote witnessing and remote notarization has rung, and it is going to be very difficult to unring.”¹⁴⁷ For that reason, we suggest careful evaluation before making permanent pandemic-era relaxed witnessing requirements.¹⁴⁸ Anecdotal evidence suggests that online will-making companies experienced an uptick in business during the pandemic,¹⁴⁹ and these companies almost certainly will support making permanent the pandemic-era remote witnessing laws. Indeed, Professor Adam Hirsch has identified commercial forces, not consumer preferences or governmental policy to expand access to will-making, as the primary driver of pre-pandemic electronic wills legislation in the United States.¹⁵⁰ Given this context, the next Part outlines a research agenda that can inform a forward-thinking approach to the witnessing of wills, while resisting corporate influence and maintaining due regard for vulnerable testators.

IV. A RESEARCH AGENDA FOR WILLS FORMALITIES IN THE POST-PANDEMIC WORLD

Overall, we are enthusiastic about any laws that make it easier for people to execute wills because wills allow people to plan for their future, reduce administrative costs, and preserve wealth in even modest estates.¹⁵¹ Electronic wills and remote witnessing services, whether offered by estate planning lawyers or large commercial enterprises *may*, in fact, lead to an increase in national testacy rates, which would be a salutary consequence.¹⁵² Evidence of will-making practices would be

¹⁴⁶ In the analogous profession of medicine, the increase in the number of doctors offering telehealth services may inspire some physicians to consider offering continuing care to patients in this manner, and patients may demand it. *See, e.g.*, Len Strazewski, *Telehealth's Post-Pandemic Future: Where Do We Go from Here?*, AM. MED. ASS'N (Sept. 7, 2020), <https://www.ama-assn.org/practice-management/digital/telehealth-s-post-pandemic-future-where-do-we-go-here> [<https://perma.cc/2B5Y-EDA8>] (suggesting that physicians' experiences of delivering effective telehealth services during the pandemic may lead to the lifting or easing of pre-pandemic federal and state restrictions on the place of delivery of services).

¹⁴⁷ Ross E. Bruch, *Estate Planning After the Pandemic: How the Coronavirus and Technology Will Change the Estates Practice*, 34 PROB. & PROP. 60, 60–61 (2021).

¹⁴⁸ *See* Horton & Weisbord, *supra* note 1.

¹⁴⁹ *See, e.g.*, Sullivan, *supra* note 113 (describing multiple companies that facilitate will drafting and socially-distanced will executions).

¹⁵⁰ *See* Hirsch & Kelety, *supra* note 6, at 43 (“The driving force behind e-will legislation is not private citizens but commercial firms hoping to *create* demand by advertising and marketing e-wills. With mixed success, these firms have been lobbying for the enactment of e-will legislation. Voting within state legislatures on this non-ideological measure has been breaking down along party lines—a symptom of strategic lobbying.”).

¹⁵¹ *See supra* Part II.A (describing the multiple benefits of will-making).

¹⁵² *See supra* notes 43–44 and accompanying text.

useful in exploring whether this is true. Nevertheless, because common law jurisdictions have similar laws governing wills, other experiences with relaxed wills formalities—such as holographic wills and the harmless error doctrine in some U.S. states and the dispensing power in Queensland, Australia¹⁵³—suggest that witnesses may not always be necessary, and thus extending pandemic-era remote-witnessing rules *may* be reasonable. Apart from the exceptional sensational case (such as the recognition of an unsent text message as a man’s will),¹⁵⁴ there does not appear to be any great public outcry in Australia, for example, about false positives (mistaken determinations that a writing is the decedent’s will) or false negatives (mistaken failures to recognize a particular writing as the decedent’s will). Relaxing wills formalities does not necessarily lead to disastrous consequences. However, in the case of the Queensland dispensing power, there is court oversight in the absence of compliance with the traditional formalities; that is a factor that should be considered in any potential relaxation of wills formalities.

At the same time, the COVID-19 crisis makes equally clear that there are many people who are vulnerable, by virtue of their personal circumstances, to possible abuse by unscrupulous others. Admittedly, in-person witnesses are no guarantee against undue influence or fraud or even the lack of testamentary capacity. There is indeed a long line of will contests in both the United States and Australia alleging precisely those types of problems.¹⁵⁵ Nevertheless, the presence of live witnesses likely deters some wrongdoing. Whether remote witnesses can serve that same function as in person witnesses is not yet known; the pandemic is the only experience most jurisdictions have had with remote witnessing.

Before permanently embracing the pandemic-era provisions for remote witnessing of wills, and thus relaxed wills formalities generally, multiple studies are necessary. We outline them here.

¹⁵³ See *supra* Part I.B.1.

¹⁵⁴ See, e.g., Michaela Whitbourn, *Unsent Text Message with a Smiley Face Counted as a Will, Court Rules*, SYDNEY MORNING HERALD (Oct. 11, 2017), <https://www.smh.com.au/national/unsent-text-message-with-a-smiley-face-counted-as-a-will-court-rules-20171010-gyxzsf.html> [<https://perma.cc/R6ST-BEAP>]; Dani Deahl, *Australian Court Says Man’s Unsent Text Message Counts as Valid Will*, THE VERGE (Oct. 11, 2017), <https://www.theverge.com/2017/10/11/16458484/australian-supreme-court-rules-unsent-text-message-valid-will> [<https://perma.cc/6UUK-XKEM>].

¹⁵⁵ See, e.g., *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) (Austl.) (finding lack of testamentary capacity and some undue influence in the case of an elderly testator who made substantial gifts to her caregivers); Barbara Hamilton, *The Doctrine of Unconscionable Bargains in Equity: Potent Sword for Estate Lawyers*, 27 QUEENSL. L. 180 (2007) (describing, among other things, the difference between the equitable doctrine of undue influence and undue influence as applied in estate contestation, recommending the application of the equitable doctrine in estate cases); Cockburn, *supra* note 68.

A. Study One: Will Contests

One study should identify wills executed during the pandemic with remote witnesses and compare the rates at which those wills are contested vis-à-vis wills executed with in-person witnesses. Are remotely witnessed wills more likely to be challenged? If so, on what grounds? The difficulty with conducting this type of study will be sifting through multiple years of probate records to compile a large enough study sample. In a jurisdiction where probate records are accessible electronically, this may be less onerous than in a jurisdiction where only paper records are kept. Even so, because it is neither certain when people who executed wills during the pandemic era will die, nor that they will not alter their wills before death, it may be years before a large enough sample can be assembled.

B. Study Two: Demographics, Behaviors, and Attitudes of Pandemic-Era Testators

A second study should focus on the pandemic-era testators themselves. It would be possible to issue a call for participation in a study of those who executed a will remotely during the pandemic. Once eligible participants are identified, surveys can gather demographic data, and one-on-one interviews can elicit information about the participants' practices, behaviors, and attitudes. Were the individuals who availed themselves of the ability to execute a will with remote witnesses persons who would have executed wills in the traditional manner had the pandemic not occurred? Or were participants spurred to make a will by either the pandemic or the apparent ease associated with remote witnessing? Answers to these questions might reveal whether remote-witnessing rules "created" a new population of testators, so to speak.

Furthermore, did pandemic-era testators use the services of a lawyer or an online will-making service? If the latter, did the clients of will-making services feel that they received advice tailored to their unique situations? This data could reveal preferences for traditional person-to-person versus technology-enabled legal services and any perceived differences in the quality of the estate planning advice testators received in each mode.

Relatedly, what impact did the making of a will during the pandemic have on the participants' sense of preparedness for the future? Did the participants re-execute wills after the easing of restrictions in their jurisdictions? Given the option, would testators like to have the option of executing a remotely witnessed will in the future? Answers to these questions could reveal how making a will impacts testators' sense

of well-being, how much testators (and their advisors) “trust” legal documents executed during the pandemic, and what participants’ stated preferences might suggest for the future expansion of online will-making services.

Likewise, it would be useful to collect data in relation to both the accessibility and use of the relevant technologies—did testators find the process easy to navigate? Was the technology reliable? What role, if any, did technology play in the person’s decision to make a will? Answers to these questions may identify future challenges to the widespread ability of electronic wills and provide useful data about digital literacy and the digital divide.

C. Study Three: Attorneys’ and Witnesses’ Perceptions

A third study should focus on the attorneys and witnesses involved in remote will executions during the pandemic. Through either surveys or qualitative interviews, questions could elicit a variety of information. How well did these parties feel that they could assess the testator’s capacity and personal circumstances, including the potential presence of elder abuse or undue influence, for example? When serving as a remote witness or supervisor of a will execution ceremony, did the study participants have any concerns about the testator’s testamentary capacity or any other issues? If yes, did the participants voice those concerns or not? Answers could suggest whether pandemic-era rules contain adequate safeguards or whether additional protections for testators are necessary.

As a corollary, to the extent that the participants in this study had experience supervising will executions or witnessing wills before the pandemic, how did their experiences compare? Did they feel more or less confident in their assessments in the remote context, or in the traditional in-person context? This data might inform the development or updating of “best practice” guidelines for remote witnessing, in the event that the emergency provisions become permanent.

Prospectively, would attorneys like to consider offering remote will executions to their clients in non-pandemic times? Would witnesses feel comfortable doing so? Answers to these questions might reveal the likely direction of future legal practice, i.e., whether lawyers are inclined to use remote witnessing as standard professional practice when it is no longer necessary for public health reasons. The data might also provide insight into lawyers’ attitudes about delivering technology-enabled legal services more generally, allowing a more accurate assessment of the ways that legal practice may change in the future.

D. Study Four: Would-Be Testators

A fourth study should elicit information from adults who wanted to but did not execute wills during the pandemic. What were the reasons that the study participants did not execute a will? Were they aware of the availability of remote witnessing rules, if any, in their jurisdiction? If yes, how did the study participants become aware of the possibility of remote witnessing? If no, would information about remote witnessing have made them more likely to execute a will? Answers to these questions could reveal what the general public understands about will-making generally and whether and how the general public became aware of changes that impacted how legal documents, including wills, could be executed in a pandemic. The answers might also reveal how well legal service providers communicated (or failed to communicate) to existing and potential clients during a time of crisis.

In a similar vein, if the study participants would be interested in principle in remotely executing a will, would it matter to them if the document and signatures were entirely electronic, or would they prefer a traditional paper will that they could hold up in front of a computer and then forward to the witnesses for signing, with the same audiovisual technology to be used at each stage of signing (i.e., the testator's signing of the will, the first witness's attestation of the will, and the second witness's attestation of the will)? This data could also inform the development of "best practice" guidelines for remote witnessing and the extent to which clients (as opposed to lawyers) are comfortable with electronic documents.

Next, to what extent did this population of study participants execute wills after the easing of restrictions in their jurisdictions? If they did not, what are their reasons? Given the relatively thin data about will-making and will contestation, answers to these questions could reveal attitudes towards will-making generally and how well people understand the benefits of testacy over intestacy. The data might also identify the extent to which pandemic-inspired mortality concerns led to action after the easing of restrictions, or whether will-making, which once seemed like an urgent priority, no longer seemed that way after a period of time.

Through these preliminary sketches of four potential studies of pandemic-era will-making, we highlight how little is known about the experience and effectiveness of will-making generally, let alone remote-witnessing rules developed largely in response to a public health emergency. Before rushing to embrace remote witnessing and other relaxations of traditional wills formalities, law reformers, policymakers, and legal scholars need to understand, from future research such as that

which we have outlined here, what practical impact temporary measures had or did not have. Ultimately, the integrity of the will-making process—whether traditional or remote—depends on procedural rules that facilitate the creation of a document that is an authentic expression of the decedent’s testamentary wishes.

CONCLUSION

Studies of estate records and surveys of living individuals can reveal extraordinary amounts of useful information. By looking at court records, one can identify the problems that arise in testate and intestate estates, the types of claims that are made, who brings them, and with what results. With the possibility that pandemic-era remote witnessing rules will be extended in some form, there is a need to better understand how relaxed requirements functioned in practice during the COVID-19 crisis. In ascertaining the answers to a variety of questions, it will be possible to identify and address various problems with remote witnessing with a view to facilitating access to will-making. Priority research areas include whether in-person or remote witnesses make a difference to the rate of will contests; whether testators, attorneys, and witnesses alike perceive advantages or disadvantages to remotely witnessed wills; and how the availability of remote witnessing did or did not increase will-making—by whom and for what reasons.

Prior empirical studies in the United States and Australia indicate an appetite for knowing more about who makes what types of wills, what types of cases reach the courts and how those cases are decided. The advent of remotely witnessed wills, accelerated by the COVID-19 pandemic and likely to continue in the future, has generated a new set of questions that require exploration. Empirical data should inform future legislation, especially if emergency measures become permanent without the usual law reform studies and debates. We invite interested stakeholders to take up, improve, and enrich the research agenda we have outlined in this essay.