SELF-PROVING AFFIDAVITS AND FORMALISM IN WILLS ADJUDICATION

BRUCE H. MANN*

Few areas of law have resisted modernity as successfully as the law of wills. The resistance is particularly apparent in the statutory requirements for wills, where form takes clear precedence over substance. Courts routinely invalidate wills because of minor defects in execution, even when no one questions that the will represents the wishes and intent of the testator. As one observer has noted, "[p]robate courts do not speak of harmless error in the execution of wills."[1] Scholars have criticized the formalism of wills adjudication repeatedly and vigorously.[2] Yet their criticism has failed to change the way judges view the formal requirements of wills.

To be sure, when legal academics speak, judges do not necessarily listen. Nonetheless, the persistence of formalism in wills adjudication is, if not pernicious, at least curious. Neither doctrine nor function compels strict compliance with the wills act formalities. If formalism persists, as it manifestly does, it may be that we have not adequately identified the impetus behind it.

This Article makes a small effort toward an alternate explanation of formalism in wills adjudication. It is prompted by an odd and rather perverse line of cases from Texas. The cases are interesting not for their content or logic, but because they provide a rare opportunity to observe the creation, elaboration, and entrenchment of a new formality for the proper execution of wills—one that treats the use and misuse of self-

* Professor of Law, Washington University, St. Louis; A.B., A.M., 1972, Brown University; J.D., M. Phil., 1975, Ph.D., 1977, Yale University. I am grateful to John H. Langbein and Gerald P. Johnston for their careful readings of various drafts. They forced me to rethink many of my arguments, and may yet wish that I had rethought a few more. I also benefited from early discussions with William Pannill. Their assistance was collegial and does not imply endorsement. My involvement as a consultant to the executor on the final rehearing of one of the cases discussed, *Wich v. Fleming*, piqued my interest in the subject.

1. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975).

2. *See, e.g.*, Fassberg, *Form and Formalism: A Case Study*, 31 AM. J. COMP. LAW 627 (1983); Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Langbein, *supra* note 1; Maxton, *Execution of Wills: The Formalities Reconsidered*, 1 CANTERBURY L. REV. 393 (1982); Nelson & Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPPERDINE L. REV. 331 (1979).

proving affidavits.[3] That the cases are from Texas is incidental. Their value lies in their suggestion that formalism in wills adjudication may persist because of the structure of the probate process and its historical position within the legal system. As an explanation of formalism, this Article can only be partial, but it may suggest a useful way of looking at an old and intractable problem.

I

To probate a will, even an uncontested one, the proponent must offer the testimony of one or more of the attesting witnesses.[4] Their testimony, whether in person or by deposition, simply recapitulates the assertions of the standard attestation clause—that the testator signed the will freely in their presence or acknowledged his or her signature to them, that they signed the will in the testator's presence, and that the testator appeared to be of the requisite age and of sound mind. If, as often happens, the witnesses are themselves dead or otherwise unavailable, there are statutory provisions for proving the will without their testimony.[5]

A procedure that contemplates producing witnesses to answer questions about acts that may have occurred years or even decades earlier is obviously burdensome, inefficient, and unreliable. Self-proving affidavits lighten the burden by creating sworn evidence of due execution.[6] As an evidentiary device, they are elegantly simple. After signing and attesting the will, the testator and witnesses merely sign an affidavit, either at the execution ceremony or sometime later, declaring, in the words of the Uniform Probate Code version, that

> the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he exe-

3. *See* Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966); Shriners Hosp. for Crippled Children v. St. Jude Children's Research Hosp., Inc., 629 S.W.2d 767 (Tex. App. 1981); Rodgers v. Estate of King, 614 S.W.2d 896 (Tex. Civ. App. 1981); Jones v. Jones, 630 S.W.2d 645 (Tex. Civ. App. 1980); *In re* Estate of McDougal, 552 S.W.2d 587 (Tex. Civ. App. 1977); McLeroy v. Douthit, 535 S.W.2d 771 (Tex. Civ. App. 1976); Cherry v. Reed, 512 S.W.2d 705 (Tex Civ. App. 1974); *In re* Estate of Pettengill, 508 S.W.2d 463 (Tex. Civ. App. 1974); Cooper v. Liverman, 406 S.W.2d 927 (Tex. Civ. App. 1966); McGrew v. Bartlett, 387 S.W.2d 702 (Tex. Civ. App. 1965).

4. The procedural details of probate vary from jurisdiction to jurisdiction. The outline presented here comports with the general pattern.

5. *See, e.g.*, TEX. PROB. CODE ANN. §§ 84(b)(2)-(3) (Vernon 1980).

6. New York in 1923 and West Virginia in 1932 enacted the first statutes permitting self-proving affidavits. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 449 n.29 (1934).

> cuted it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.[7]

When phrased thusly, the self-proving affidavit is virtually identical to a well-drafted attestation clause.[8] In form, the affidavit differs from an attestation clause only in that it is notarized and refers to the execution of the will in the past perfect tense as having already occurred. In effect, it differs considerably. Wills with such affidavits are self-proving. Unless contested, they can be admitted to probate without summoning the attesting witnesses to reaffirm what they swore to in the affidavit and attested to in the attestation clause.

Self-proving affidavits thus simplify probate by eliminating the need to secure testimony from the attesting witnesses.[9] Moreover, they guard against the lapses in memory that can occur when witnesses try to recall a ceremony that may have taken place years earlier. They do not, of course, prevent will contests. It is doubtful whether they even discourage them. A self-proving affidavit buttresses the presumptive value of the attestation clause, but it does not make the attestation clause conclusive evidence of due execution. Nonetheless, self-proving affidavits make routine probate—a frequently cumbersome process—more efficient. It is ironic, then, that courts occasionally use self-proving affidavits to invalidate wills on formal grounds.

The formal difficulty arises when the signatures of the testator or the witnesses appear only after the self-proving affidavit rather than in their customary place after the text of the will. The technically correct form, of course, is for the testator to sign the will, then for the witnesses to sign, usually after an attestation clause, and, finally, for all of them to sign the self-proving affidavit under the watchful eye of a notary. But things sometimes go awry. There is a potential trap in the procedure that appears to stem from the exceedingly close similarity of self-proving affidavits and attestation clauses. If, for example, the will contains no attestation clause or spaces for the witnesses to sign but instead goes di-

---

7. UNIFORM PROBATE CODE § 2-504 (1983).

8. For a good model of a well-drafted attestation clause, see J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 1437-39 (2d ed. 1978).

9. The advantages are such that thirty states now permit self-proved wills. Schneider, *Self-Proved Wills—A Trap for the Unwary*, 8 N. KY. L. REV. 539, 539 n.4 (1981).

rectly to the self-proving affidavit, the witnesses have little reason to doubt that they are attesting the will by signing the affidavit. After all, the language of the affidavit reads like the language of attestation. And if there is no place else to sign, the witnesses should be forgiven for assuming that the only available space is the proper one. Moreover, the person supervising the execution ceremony—an attorney or a notary—directs the witnesses where to sign. It would be a rare witness that did not defer to the presumed expertise of the person in charge on a point of such technicality.[10] This last observation also applies to situations in which the will does contain an attestation clause, but the witnesses overlook it and sign only the self-proving affidavit. Not only are witnesses likely to defer to the apparent authority of the person in charge of the execution ceremony, they are also likely to assume that one set of signatures is legally sufficient. Two sets—especially to virtually identical clauses—may strike some people as rather like wearing a belt and suspenders.[11]

Explanations of why witnesses misplace their signatures are immaterial if the question is one of compliance with the formalities required for due execution. The pertinent question then is whether a court will accept the act of signing the self-proving affidavit as attestation. If not, the proponent is left with an unattested will and an affidavit that swears that something occurred that in fact did not.

In this context it is important to note that there has never been a required form for attestation clauses. For example, an early Virginia case, *Pollock v. Glassell*,[12] asserted that the Virginia wills act, which closely followed the Statute of Frauds, did not prescribe any form of attestation.[13] What mattered was not what the witnesses signed, but what they

10. The deference is odd given the minimal qualifications required for becoming a notary public—in Texas it takes little more than the ten-dollar fee. *See* TEX. REV. CIV. STAT. ANN. art. 5949 § 2 (Vernon 1962); *id.* art. 3914 § 1(1) (Vernon 1966).

11. The drafters of the Uniform Probate Code recognized the trap implicit in the incongruity of requiring the testator to sign twice "even though the entire execution ceremony occurred in the presence of a notary." UNIFORM PROBATE CODE § 2-504 comment (1982). In 1975 they recommended liberalizing the method of making wills self-proving by permitting the testimonial and attestation clauses to be notarized rather than demanding a separate, and seemingly redundant, affidavit with a separate set of signatures. *Id.* Wills mavens refer to the liberalized procedure as the "one-step" version and to the more cumbersome procedure as the "two-step" version. The one-step procedure eliminates the difficulties that prompted this Article. It has not swept the field, however. I will be speaking only of the two-step procedure. One should not confuse the two-step procedure with the Texas two-step, which also has been known to cause difficulties for the uninitiated.

12. 43 Va. (2 Gratt.) 439 (1846).

13. *Id.* at 464.

could later testify to.

A subsequent English case, *Roberts v. Phillips*,[14] took a similarly functional view of attestation. One of the witnesses to the will had signed on a different page from that on which the attestation clause and the signatures of the other two witnesses appeared. Lord Campbell dismissed the objection to the will by stating that the Statute of Frauds did not require an attestation clause or even that the witnesses be described as such. "Nothing more is required," he wrote, "than that the will should be attested by the witnesses; i.e., that they should be present as witnesses and see it signed by the testator, and that it should be subscribed by the witnesses in the presence of the testator. . . ."[15] The absence of the attestation clause "would only make a difference in the extrinsic evidence which would be required to prove that the witnesses had seen the testator execute the will, and that they signed it with the intention of attesting it at his request and in his presence."[16] Lord Campbell's remarks loomed large in America because the case turned on construction of the Statute of Frauds, which was the model for most American will acts. Moreover, he mentioned almost in passing an element that later courts made decisive—that the witnesses intend to attest the will when they affix their signatures to it. Cases and treatises sometimes refer to this element as *animo attestandi*.[17] The Latin that passes for profundity among lawyers cannot conceal the fact that the requirement is a simple functional one of attending to what people intended by their actions.

The idea that an attesting intent transcends any attestation form entered American law in 1860 through Mississippi. In *Murray v. Murphy*,[18] one of the attesting witnesses was a justice of the peace who had signed the will below his official certification that the testator had "signed, sealed, and delivered the within will and testament, for the consideration and purposes therein specified, as his own proper act and deed."[19] He testified at probate that he had used his official certificate because he believed it would "give greater validity to his signature," but that he had nonetheless intended to attest to the will.[20] The court declared that the certificate, which was superfluous, could not invalidate

14. 119 Eng. Rep. 162 (Q.B. 1855).
15. *Id.* at 164.
16. *Id.* at 165.
17. *E.g.*, 1 J. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS 675 (1917).
18. 39 Miss. 214 (1860).
19. *Id.* at 220.
20. *Id.*

the signature, which, as the evidence showed, the justice of the peace had intended as an attestation.[21]

Murray v. Murphy provided a rationale for treating the signatures of notaries, justices of the peace, and other officials as signatures of attesting witnesses even though they might be appended to official-sounding recitals that differed from the language of attestation. The leading nineteenth-century treatises on wills stated with black-letter certitude that "[n]o particular forms of words was essential to constitute an attestation."[22] After an English probate case, *Griffiths v. Griffiths*,[23] held that a man who had signed a will as an executor had also meant to attest the will,[24] American judges had all the tools they needed to treat signatures to official certificates as attestation. *Roberts v. Phillips* and *Pollock v. Glassell* stated that there was no required form for attestation. *Murray v. Murphy* placed the emphasis on the witness's intent to attest rather than on the literal content of an official certificate. And *Griffiths v. Griffiths* legitimated the argument that one could sign with a dual intent. Thus armed, courts could say, as the Supreme Court of Iowa did in accepting the signature of a notary that followed his jurat, "It cannot be that doing more than the statute requires and including all of the essentials of what it does require fails for not obeying the statute."[25]

Judges could look so leniently upon ostensibly nonconforming signatures because they were convinced that the signatures performed the functions of regular attestation. Lord Campbell, for example, took pains to observe in *Roberts v. Phillips* that "no doubt is cast on the sincerity of the transaction."[26] And when the New Hampshire Supreme Court accepted the signature of a justice of the peace, who expressly denied that he had signed as a witness, it explained that the execution ceremony had "include[d] every safeguard intended to be provided by the statute."[27]

Once convinced that the signatures served the functions of attestation, courts took the position that substance should prevail over form—at least

21. *Id.* at 220-21.

22. *See* 1 T. JARMAN, A TREATISE ON WILLS 118 (J. Perkins ed.) (2d Amer. ed. 1849); *see also* 1 I. REDFIELD, THE LAW OF WILLS 232 (2d ed. 1866).

23. 2 L.R.-P & D. 300 (1871).

24. There is, of course, no reason for an executor to sign a will unless he or she also intends to attest the will. In *Griffiths*, the witness in question and others testified that the testator had told him to sign "as executor." *Id.* at 301-02.

25. *In re* Estate of Bybee, 179 Iowa 1089, 1090, 160 N.W. 900, 902 (1917).

26. 119 Eng. Rep. 162, 166 (Q.B. 1855).

27. Tilton v. Daniels, 79 N.H. 368, 370, 109 A. 145, 146 (1920).

on the matter of signatures appended to superfluous certificates. Some courts declared their preference for substance expressly, as when a Mississippi court discussed its inclination "to make forms yield to substance, and to respect what parties really intended to do."[28] But most did so implicitly in the act of accepting such signatures as valid attestation.[29] Courts seemed to recognize that it would be unduly harsh to penalize testators whose only fault was to use more formality than the law required, at least when the problem arose because of a functionary who innocently, though mistakenly, sought to enhance the formality of the execution ceremony.

Against such an established doctrinal background, one would not think that modern courts would balk at accepting the signatures to self-proving affidavits as sufficient attestation. Yet some have, and have held that wills that the witnesses signed only after a self-proving affidavit are unattested and thus invalid. The earliest statement of this position appeared in 1965 in an intermediate appellate case from Texas, *McGrew v. Bartlett*.[30] The most authoritative statement, albeit for its provenance rather than for the force of its logic, was in a case decided by the Texas Supreme Court a year later, *Boren v. Boren*.[31]

Although other states have not always agreed with either the result or the rationale of *Boren*, the case set the terms of the debate, both in Texas and elsewhere. Moreover, it gave rise to a line of cases in Texas that reveals a process that one rarely observes in its entirety—the creation

28. Fatheree v. Lawrence, 33 Miss. 585, 625 (1857). Kentucky has a long line of cases reaffirming the proposition that "a substantial rather than a literal compliance with the statute has been demanded." Upchurch v. Upchurch, 55 Ky. (16 B. Mon.) 102, 112 (1855); *see* Madden v. Cornett, 290 Ky. 268, 273, 160 S.W.2d 607, 610 (1942); Robertson v. Robertson, 232 Ky. 572, 574, 24 S.W.2d 282, 284 (1930); Savage v. Bulger, 76 S.W. 361, 363 (1903); Porter v. Ford, 82 Ky. 191, 197 (1884); Soward v. Soward, 62 Ky. (1 Duv.) 126, 132 (1863). But there has always been the caveat that a "procedure which violates a mandatory provision can not be deemed to be in substantial compliance with the Statute." Weiss v. Hanscom, 305 Ky. 687, 687, 205 S.W.2d 485, 486 (1947). As a consequence of the caveat, the substantial compliance requirement in Kentucky appears limited to such questions as whether a witness's mark constitutes a signature, as in *Upchurch*, or whether the testator had signed before the witnesses, who could not see the signature, when there was no evidence that she had not, as in *Robertson*. This is not "substantial compliance" as scholars use the term today. *See* Langbein, *supra* note 1.

29. *See, e.g.*, Keely v. Moore, 196 U.S. 38 (1904); Payne v. Payne, 54 Ark. 415, 16 S.W. 1 (1891); Madden v. Cornett, 290 Ky. 268, 160 S.W.2d 607 (1942); Merrill v. Boal, 47 R.I. 274, 132 A. 721 (1926); Franks v. Chapman, 64 Tex. 159 (1885); Reagan v. Bailey, 626 S.W.2d 141 (Tex. App. 1982); Saathoff v. Saathoff, 101 S.W.2d 910 (Tex. Civ. App. 1937); Ferguson v. Ferguson, 187 Va. 581, 47 S.E.2d 346 (1948).

30. 387 S.W.2d 702 (Tex. Civ. App. 1965).

31. 402 S.W.2d 728 (Tex. 1966).

and entrenchment of a new formality. *Boren* and its successors thus provide an unusual opportunity to examine the persistence of formalism in wills adjudication.

II

Texas added a provision for self-proving affidavits to its wills act in 1955,[32] one of the first states to do so.[33] The wills act itself, now section 59 of the Texas Probate Code, was already quite liberal in its approach to the formalities required for due execution. In addition to the usual requirements of writing, signature, and attestation, testators only had to acknowledge their signature to the witnesses, who did not have to sign in each other's presence.[34] The amendment to permit self-proving affidavits merely continued a well-established legislative policy of fostering simplicity and efficiency in probate and administration.[35] Amid the abundant good intentions of the legislature, it perhaps seemed of little consequence that the manner chosen to authorize the affidavits was singularly awkward. Rather than add a new section to the probate code, the legislature amended the wills act itself. Section 59 now consists of one seven-line sentence that stipulates the essential requirements for due execution, followed without a paragraph break by forty lines on self-proving affidavits.[36] The conflation of the two sections underscores the close relationship between attestation and the affidavits.

For ten years there was no indication that self-proving affidavits were anything other than the "great step forward" that one of the draftsmen of the probate code proclaimed them to be.[37] Texas continued to follow the position that where the witnesses sign on the will is immaterial, so long as they sign "with the purpose of attesting [the will] as subscribing witnesses."[38] Like other jurisdictions, Texas had extended this reasoning to include signatures that followed official certificates.[39] Then came the

32. Act of Jan. 1, 1956, ch. 55, 1955 TEX. GEN. LAWS 88.

33. *See* Schneider, *supra* note 9, at 539.

34. These remain the basic requirements. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

35. For example, Texas facilitates the administration of small estates, TEX. PROB. CODE ANN. § 137 (Vernon 1980), and has a device known as independent administration, which greatly simplifies the administration of estates of any size, *id.* § 145.

36. *Id.* § 59.

37. Anthony, *The Story of the Texas Probate Code,* 2 S. TEX. L.J. 1, 42 (1955).

38. Fowler v. Stagner, 55 Tex. 393, 400 (1881) (citations omitted).

39. *See, e.g.,* Franks v. Chapman, 64 Tex. 159 (1885); Saathoff v. Saathoff, 101 S.W.2d 910 (Tex. Civ. App. 1937); *see also supra* notes 18-21 and accompanying text.

qualification stated in *McGrew*[40] and its elevation to a general principle in *Boren*.[41]

The will in *Boren* consisted of one typewritten page, signed at the bottom by the testator, O.K. Boren, and a separate sheet on which appeared a self-proving affidavit signed by Boren and two witnesses.[42] The only ground of contest was the formal objection that the will was not attested. The supreme court drew an uncompromising distinction between wills and self-proving affidavits: "The self-proving provisions . . . are not a part of the will but concern the matter of proof only . . . . The execution of a valid will is a condition precedent to the self-proving provisions of Section 59."[43] The court declared that "[a] testamentary document to be self-proved, must first be a will."[44] It then observed that "[m]any reasons support that rule as the true legislative purpose," although it neglected to mention any.[45] In fact, the only thing that approached a reason for the rule was the limited statutory construction offered in *McGrew*. The court in *McGrew* had thought it significant that the artless statutory conflation of section 59 introduced self-proving affidavits with the words, "Such a will or testament may . . . be made self-proved . . . ."[46] On the strength of the opening words, "Such a will," the *McGrew* court concluded that the phrase "clearly imports" that the will must be signed and attested "before the self-proving affidavit can be executed."[47]

The creation and application of what has become known as the *Boren* rule are curious. In *McGrew*, the court at least parsed the statute, if only woodenly. The court in *Boren* did not do that much. It cited dictum in one case on the purpose of self-proving affidavits and approved of the judgment and opinion in *McGrew*. Beyond that, the *Boren* court cited no authority and did not engage in anything that could properly be called statutory analysis.[48] It simply asserted that wills and self-proving affida-

40. McGrew v. Bartlett, 387 S.W.2d 702 (Tex. Civ. App. 1965); *see supra* note 30 and accompanying text.

41. Boren v. Boren, 402 S.W.2d 728 (Tex. 1966); *see supra* note 31 and accompanying text.

42. *Id.* at 728-29.

43. *Id.* at 729.

44. *Id.*

45. *Id.*

46. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

47. McGrew v. Bartlett, 387 S.W.2d 702, 705 (Tex. 1965).

48. The parties did not give the court much help. The petitioner, who as contestant had lost at the previous stages, cited only two cases to the court—Fowler v. Stagner, 55 Tex. 393 (1881), for purposes of distinguishing it, and another case on the presumptions pertaining to lost wills. Hardly a

vits, although linked in the statute, are separate and distinct instruments. As the case law under *Boren* developed, it became clear that self-proving affidavits could have consequences that were rather different from those intended by the people who signed them. Even when judges conceded that the witnesses thought or were told that they were performing a valid attestation, they insisted that the gap between a will and a self-proving affidavit was unbridgeable and that signatures missing from one could not be supplied from the other.[49] It was thus possible to execute a will defectively after *Boren* in a way that had not been possible before.

On the facts of *Boren*, the court had good reason not to avail itself of established principles to save the will. According to the court of civil appeals, the witnesses who signed the self-proving affidavit "could not positively identify the testamentary page of the instrument."[50] The necessary connection between the witnesses and the will was supplied by the attorney who drafted the will and notarized the affidavit. However, he had also claimed that there was "a lost 'witnessing sheet,' " an assertion that the trial court had rejected.[51] The will in *Boren* thus gave no assurance of its authenticity, which is a primary function of the formalities of due execution. There was no evidence to connect the act of the witnesses in signing the affidavit to the will itself other than the testimony of a lawyer whose credibility the court had already questioned and who might be exposed to a malpractice action if the will failed. As a matter of integration, the gap between the testamentary page and the affidavit was too large to rule out the possibility that the testamentary page offered for probate might not have been the one that the witnesses had thought they were attesting. The finding of the trial court that the will "was in substantial compliance with law"[52] was well-meaning but fundamentally flawed.

On facts such as these, it is difficult to quarrel with the refusal of the supreme court to accept the will. The problem with *Boren*, however, is

thorough legal argument. Petitioner's Application for Writ of Error, Boren v. Boren, 402 S.W.2d 728 (1966).

49. *See* Wich v. Fleming, 652 S.W.2d 353, 355 (Tex. 1983); Jones v. Jones, 630 S.W.2d 645, 648 (Tex. Civ. App. 1980); *In re* Estate of McDougal, 552 S.W.2d 587, 588 (Tex. Civ. App. 1977).

50. Boren v. Boren, 394 S.W.2d 704, 706 (Tex Civ. App. 1965), *rev'd*, 402 S.W.2d 728 (Tex. 1966).

51. *Id.* It is difficult to see how the trial court could have accepted the lawyer's testimony on the attestation while rejecting his claim that there had been a sheet of paper on which the attestation clause had appeared.

52. *Id.* at 704.

not that the court rejected a suspect will, but that it chose not to discuss the facts that made the will suspect. The court could have disposed of the will on the narrow and proper grounds of lack of integration. Instead, it rested its decision on an unqualified and unsubstantiated assertion of a new formality. Such unthinking formalism is objectionable on several grounds.

First, *Boren* and the cases subsequently decided under it all turned on the purely formal question of whether the signatures to the self-proving affidavit constituted attestation of the will. In most of these cases, there was little or no question that the testator had intended the instrument to be a will, that it accurately represented his or her testamentary wishes, that the witnesses believed that they were attesting the will by signing the affidavit, and that the purposes of the wills act formalities had been adequately served. It is difficult to see what interests are served by invalidating wills in such circumstances. The principal justification for attestation is that it performs a "protective" function.[53] The presence of disinterested witnesses at the execution ceremony supposedly guards the testator against various nefarious acts, such as substitution of a false will or imposition through fraud or undue influence. Yet attestation is an anachronism, a remnant from a time when will-making commonly was a deathbed enterprise rife with opportunities for preying upon a weakened and frightened testator.[54] Testators now tend to sign their wills in the fullness of life in a lawyer's office. Moreover, attesting witnesses are likely to be strangers to the testator who, unfamiliar with the testator or the circumstances or terms of the will, are hardly in a position to "protect" the testator from any modestly competent scam.[55] It thus seems presumptuous for a court to act as though it needs to save the testator from himself or from others by invalidating his testamentary plan.

Moreover, slavish attention to form on matters of attestation is anomalous in a jurisdiction that accepts, as Texas does, holographic wills.[56]

53. *See* Gulliver & Tilson, *supra* note 2, at 9-13.

54. *See* Langbein, *supra* note 1, at 496-97.

55. The existence of the attestation requirement has not hindered either the development or use of separate remedies for fraud or undue influence in the execution of a will. Such remedies are always available, no matter how perfectly the will appears to comply with the formality of attestation. The drafters of the Uniform Probate Code recognized the protective inadequacy of attestation and eliminated the presence and competency requirements for witnesses altogether. UNIFORM PROBATE CODE §§ 2-502, 2-505 (1982).

56. TEX. PROB. CODE ANN. § 60 (Vernon 1980). *See* Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A.J. 1192, 1195 (1979) [hereinafter cited as Langbein, *Australians*]; Langbein, *supra* note 1, at 498.

Holographs are, by definition, unattested. As statutory creations, they represent a legislative judgment, albeit a tacit one, that attestation is a dispensable requirement, at least when the document meets other requirements. Those other requirements—that the instrument be handwritten, signed, and sometimes dated by the testator—are sufficiently minimal that the cases on holographs are often ludicrous. Alongside the perfectly serious, well-considered holographic wills, courts have accepted suicide notes,[57] chili recipes,[58] and inscribed tractor fenders.[59] Although courts have drawn the line at wills written on eggshells,[60] one nonetheless must question the "logic" of accepting such informal "wills" while rejecting on formal grounds the wills of testators who tried to follow the directives of the wills act but whose lawyers botched the job. The key inquiry in virtually all holograph litigation is whether the testator wrote the document with testamentary intent. If the court finds that the testator did, and if the holograph satisfies the statutory requirements, then the instrument is a will, however bizarre its form. Courts thus routinely inquire into the testator's intent in holographic wills, where there is no attestation, while they refuse to make the same inquiry into formal wills where there is substantively adequate, but formally imperfect, attestation.

Lastly, the nearly identical structure and language of self-proving affidavits and attestation clauses argue for treating the affidavits as the functional equivalent of attestation, at least when the proponent can establish the connection between the affidavit and the will. In this connection, it is important to note that the particular formal defect of an unattested will with a self-proving affidavit occurs only in wills drafted by attorneys. People who are not lawyers do not use self-proving affidavits.[61] None of

57. *In re* Button's Estate, 209 Cal. 325, 287 P. 964 (1930). The note was to the decedent's former husband. It began "Dear, dear Daddy" and closed 'Love from Muddy.' " *Id.* at 326-27, 287 P. at 965.

58. "4 quarts of ripe tomates, 4 small onions, 4 green peppers, 2 teacups of sugar, 2 quarts of cider vinegar, 2 ounces ground allspice, 2 ounces cloves, 2 ounces cinnamon, 12 teaspoonfuls salt. Chop tomatoes, onions and peppers fine, add the rest mixed together and bottle cold. Measure tomatoes when peeled. In case I die before my husband I leave everything to him—(signed) Maggie Nothe." Gest, *Some Jolly Testators,* 8 TEMP. L.Q. 297, 301 (1934).

59. *See* Comment, *Wills—Writing Scratched on Tractor Fender—Granting of Probate,* 26 CAN. B. REV. 1242 (1948). On order of the surrogate court, the tractor fender was cut off and filed with the court. *Id.* at 1243.

60. Hodson v. Barnes, 43 T.L.R. 71 (1926). The proponent offered the eggshell for probate not as a holographic will, but as a seaman's will.

61. There is some question as to how frequently attorneys use self-proving affidavits, even when they have statutory authorization. Gerald P. Johnston has noted the surprisingly low incidence of

the printed forms commonly used by people who draft their own wills contain anything more than a standard attestation clause. Unlike other formal defects, the *Boren* mistake is almost always the fault of a lawyer. If it is true, as I suspect it is, that most witnesses would not think of questioning an attorney who told them that they were attesting the will when they were in fact signing the self-proving affidavit, it seems a bit harsh to treat the wills as unattested. It hardly reflects well on the legal system to offer a client (or, in this case, the client's intended beneficiaries) who sought its assistance only the tenuous hope of a malpractice recovery against the attorney whom the client naively trusted to perform the job competently.

It is easy for courts to fall into the trap of invoking an available formal ground to reach a desired result without considering the consequences. It was particularly easy in *Boren*, where no one had argued that competing principles in other Texas cases offered a basis for accepting the will or that there were other, narrower grounds for invalidating the will. What is curious is not that the court decided *Boren* as it did, but that the case took root and made it possible to execute a will defectively where it had not been possible before.

III

At first, probate courts in Texas did not follow *Boren*. Between 1966 and 1976, four reported appellate cases invoked *Boren* to invalidate wills or codicils.[62] In three of them, the probate judge had initially accepted the document for probate as validly executed, only to reconsider or be reversed on appeal.[63] The first case, *Cooper v. Liverman*,[64] was an odd amalgam of the old and the new. In *Cooper*, the validity of an unattested, typewritten codicil to a holographic will turned on whether the notary's signature from a self-proving affidavit executed eight days after the codi-

self-proving affidavits in wills filed for probate in two Kentucky counties. His evidence suggests that the omission is an intentional one designed to generate probate business for the attorney that drafted the will. *See* Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 137-39 & nn.511, 522 (1984). It may be unethical for attorneys to draft wills without self-proving affidavits. *See* Tex. St. Bar Comm. on Professional Ethics, Op. 360, *reprinted in* 35 TEX. B.J. 408 (1972).

62. McLeroy v. Douthit, 535 S.W.2d 771 (Tex. Civ. App. 1976); Cherry v. Reed, 512 S.W.2d 705 (Tex. Civ. App. 1974); *In re* Estate of Pettengill, 508 S.W.2d 463 (Tex. Civ. App. 1974); Cooper v. Liverman, 406 S.W.2d 927 (Tex. Civ. App. 1966).

63. McLeroy v. Douthit, 535 S.W.2d 771 (Tex Civ. App. 1976); *In re* Estate of Pettengill, 508 S.W.2d 463 (Tex. Civ. App. 1974); Cooper v. Liverman, 406 S.W.2d 927 (Tex. Civ. App. 1966).

64. 406 S.W.2d 927 (Tex. Civ. App. 1966).

cil could be used in place of the signature of a witness who had not signed the codicil in the testator's presence. Oddly enough, the county court admitted the codicil to probate and the district court affirmed.[65] The two courts may have had in mind cases that accepted signatures to official certificates as attestation.[66] However, those cases would not apply to the codicil in *Cooper* if the courts treated the instrument not as a codicil executed on one date and an affidavit executed on another, but rather as a single, integrated document, all pages of which had been together at the signing of the affidavit. If that is how the county and district courts rationalized their acceptance of the codicil—and nothing indicates that it is—the court of civil appeals appears not to have considered the argument at all. Instead, the court simply quoted at length from *Boren* and rejected the codicil as unattested.[67]

Eight years passed before the next two cases arose. The second case, *In re Estate of Pettengill*,[68] raised no new questions. The county court admitted to probate—then reconsidered and reversed itself—a will of three testamentary pages signed only by the testator, accompanied by a properly executed self-proving affidavit numbered pages four and five. The court of civil appeals rejected the will with the explanation that "[i]n light of the *McGrew* and *Boren* cases, the self-proving clause is not, by law, a portion of the will even though attached thereto, for a will not witnessed on its body can be of no force and effect as a matter of law."[69] The third case, *Cherry v. Reed*,[70] posed a somewhat nicer question. The will in *Cherry* consisted of two pages. The last two lines of the final testamentary paragraph carried over to the second page, followed immediately by a self-proving affidavit, with no place for the testator and witnesses to sign except after the affidavit. The proponents of the will seem to have taken a functional approach in their effort to limit the scope of *Boren*. They argued that the placement of the affidavit on the last page of the will provided "less opportunity for fraud than if the affidavit had been separately attached."[71] The court thought the argument "persua-

65. 406 S.W.2d at 929-30.

66. *See, e.g.*, Franks v. Chapman, 64 Tex. 159 (1885); Saathoff v. Saathoff, 101 S.W.2d 910 (Tex. Civ. App. 1937).

67. 406 S.W.2d at 932-33.

68. 508 S.W.2d 463 (Tex. Civ. App. 1974).

69. *Id.* at 465.

70. 512 S.W.2d 705 (Tex. Civ. App. 1974).

71. *Id.* at 707.

sive" but nonetheless foreclosed by *Boren*.[72]

The fourth case, *McLeroy v. Douthit*,[73] may also be the most egregious. Although only the testator had signed the will, he and the two witnesses had at the same time executed a self-proving affidavit on a separate sheet—six weeks before the effective date of the statute that authorized the affidavits. The probate court admitted the will to probate, but the court of civil appeals reversed on the strength of *McGrew* and *Boren*.[74] The date of the affidavit might have provided the court a way to avoid *Boren*, had it been so inclined. The court observed—erroneously—that because the testator executed the affidavit before it was legally effective, "it would constitute nothing of any consequence as applied to the transaction."[75] If, however, the affidavit truly was of no consequence as an affidavit, the court could have followed long-established Texas authority and accepted the signatures to the affidavit as attestation of the will.[76] That it did not suggests the growing strength of the formalism of *Boren*.

The next decision in the line, *In re Estate of McDougal*,[77] marked what in retrospect proved to be the last step in securing the unquestioned authority of *Boren*. Only then, eleven years after the Texas Supreme Court first announced the rule that signatures to self-proving affidavits did not constitute attestation, could a court refer to "[t]he well-settled law in regard to Section 59."[78] The probate court in *McDougal* denied probate to a three-page codicil that the testator had signed at the bottom of the second page. The third page was a self-proving affidavit signed by the testator and the two witnesses. At the application for probate of the codicil, the witnesses identified the three-page document as the one they had signed. They testified that they "considered the three fastened, consecutively numbered pages to be one document" and that in signing the third page they "intended to—and believed they did—witness and attest" to the execution of the codicil.[79] The proponent also argued that the three-page instrument "constituted a single integrated document."[80] All

72. *Id.*
73. 535 S.W.2d 771 (Tex. Civ. App. 1976).
74. *Id.* at 774.
75. *Id.* at 773.
76. *See supra* text accompanying notes 38-39.
77. 552 S.W.2d 587 (Tex. Civ. App. 1977).
78. *Id.* at 588.
79. *Id.*
80. *Id.* at 587.

to no avail. The court denied probate and the court of civil appeals affirmed.

McDougal is significant because, unlike the four previous cases decided under *Boren*, no one had contested the application for probate of the codicil. When there are no contestants, the probate judge who finds a formal defect in the will does so on his or her own initiative. Although there is no empirical evidence on the point other than of the unsystematic war-story variety, probate judges will on occasion overlook or construe away formal defects that they deem harmless when they are not faced with a contestant who stands on formality. By the time the will in *McDougal* was offered for probate, however, at least one probate judge believed that *Boren* had become sufficiently all-encompassing to make lenience impossible, even in uncontested cases. After *McDougal*, the law truly was "well-settled." The few cases that followed were all rather desultory appeals from denials of probate that the courts disposed of with perfunctory citations to *Boren*.[81] The formalism of *Boren* reigned supreme.

How supreme can be seen in the most recent challenge to *Boren*, *Wich v. Fleming*.[82] *Fleming* was the first case in which anyone argued that *Boren* was a departure from previous principles rather than the continuation of them it purported to be. The will in *Fleming* consisted of three testamentary pages and a self-proving affidavit that was entirely contained on the remainder of the third page with the exception of the notary's jurat. The will, executed in December 1979, was that of Mabel Giddings Wilkin, who was the first, and for many years the only, female psychoanalyst in Texas. The only spaces for the witnesses' signatures were after the self-proving affidavit. Wilkin signed her name once after the body of the will and again with the two witnesses on the bottom of the same page at the end of the affidavit.[83] The witnesses, who were the attorney who drafted the will and an employee of the bank where the signing took place, testified that they believed they were attesting the will.[84] The attorney had drafted three earlier wills for Wilkin, each of

81. Jones v. Jones, 630 S.W.2d 645 (Tex. Civ. App. 1980); Rodgers v. Estate of King, 614 S.W.2d 896 (Tex. Civ. App. 1981); Shriners Hosp. for Crippled Children v. St. Jude Children's Research Hosp., Inc., 629 S.W.2d 767 (Tex. App. 1981).

82. 652 S.W.2d 353 (Tex. 1983).

83. Wilkin also signed her name at the bottom of the first page, evidently for purposes of identification.

84. Deposition of William Harvey Betts, at 75, 79, 82; Deposition of Florence Lucille Bentke at

which also omitted the attestation clause.[85]

Wilkin died at the age of eighty-three in April 1980, survived by three nieces and two nephews. The will named the three nieces co-executors of the estate and co-trustees of a small trust created by the will to establish a memorial to her grandparents and other early settlers of Washington County, Texas. Wilkin gave nothing to her nephews, divided the shares in the family ranch equally among her nieces, and gave one niece, Marian Fleming, all of her oil and gas properties, which were substantial. Fleming offered the will for probate. Not surprisingly, her cousins contested. The only surprise was that the court of appeals reversed the district court's summary denial of probate and admitted the will despite *Boren*.[86] The court of appeals distinguished *Boren* on the ground that the signatures to Wilkin's will, unlike those to Boren's, appeared on the same page as the will itself. On that basis, the court concluded that "[w]here, as here, the witnesses sign on the face of the will and testify that they did so with the purpose of witnessing the will, we think the language of the self-proving affidavit is superfluous."[87] It noted that other Texas cases held that the witnesses need not sign in a particular place and that the circumstances of the signing may provide evidence of their intent to act as witnesses. Under that authority, the witnesses had in fact "subscribe[d] their names" to the will within the meaning of the statute.[88] The court asserted that none of the previous cases decided under *Boren* were "on point with the fact situation before us" and specifically declined to follow *Boren*—"to apply the *Boren* rule to the facts before us would be to exalt form over substance. The *Boren* rule should not be blindly applied to defeat the right of the testatrix to dispose of her estate as she desired."[89]

---

18. Moreover, all parties agreed that the testator and witnesses believed they were executing the will in proper fashion. Fleming v. Wich, 638 S.W.2d 31, 36 n.1 (Tex. App. 1982).

85. When the executor asked the attorney, who had never heard of *Boren*, why he had omitted the attestation clause, he replied, "I don't know any reason for it [the omission], except maybe the Lord had something to do with it. Maybe the Lord had some part in it." Deposition of Betts, *supra* note 84, at 84. The attorney's apparent belief in immaculate attestation would, of course, be relevant in any subsequent malpractice action.

86. Fleming v. Wich, 638 S.W.2d 31 (Tex. App. 1982).

87. *Id.* at 35.

88. *Id.*

89. *Id.* at 35-36. In overruling the contestants' motion for rehearing, the court of appeals noted a further reason to admit the will. Fleming had not rested her application for probate of the will on the affidavit. Instead, she produced the sworn testimony of the witnesses, just as one would to prove a will that had not been made self-proving. The court of appeals reasoned that:

> We do not believe the legislature . . . intended that statute [i.e., Section 59] to deny a testatrix her right to dispose of her property through a technicality; rather, as we see it, the

The decision attracted considerable attention. It was, after all, the first appellate resistance to *Boren* in sixteen years. The victory, however, was short-lived. Eleven months later the supreme court reversed, albeit over a spirited dissent.[90]

The supreme court initially reversed the court of appeals in a per curiam opinion without hearing oral argument.[91] The court cited *Boren* and the two most recent cases decided under it and simply declared without discussion or explanation that "[t]he decision of the Court of Appeals conflicts with *Boren v. Boren*."[92] The court, however, granted the proponent's motion for a rehearing and set the case for oral argument.[93] Yet despite its apparent willingness to reconsider the case—and perhaps *Boren*—the court in its final decision repeated the basic *Boren* arguments and did not address the questions Fleming had raised. Except in the dissent, there was no mention of *Fowler v. Stagner, Franks v. Chapman*, or any of the other cases that had held that where the witnesses sign is immaterial and that signatures after a certificate are proper attestation.[94] Instead, the reflexive application of *Boren* to Wilkin's will suggests that the formalism of *Boren* had become so deeply embedded in the way judges thought about the problem that they could not view self-proving affidavits in any other light. Three reasons that the court offered for its decision strengthen that impression.

The court began by stating that it had held in *Boren* "that a will was not admissible to probate if the witnesses had signed only the self-proving affidavit attached to the will."[95] It then gave the first explanation ever offered for that holding: "The premise of this holding was that the will and the self-proving affidavit require different types of intent on the part of the witness and serve different purposes."[96] The different types of intent were the "present intent to act as a witness" and "swearing to the validity of an act already performed."[97] And the different purposes were

---

purpose of the self-proving affidavit is to provide an alternative way of proving the will. Appellants have not used the self-proving affidavit in such proof. They have provided the witnesses.

Id. at 36. Post-mortem conduct, however, cannot cure a defect in execution.

90. Wich v. Fleming, 652 S.W.2d 353, 356 (Tex. 1983).

91. 26 Tex. Sup. Ct. J. 48 (Oct. 13, 1982).

92. *Id.* at 49.

93. 26 Tex. Sup. Ct. J. 105 (Nov. 24, 1982).

94. *See supra* text accompanying notes 38-39.

95. 652 S.W.2d at 354.

96. *Id.*

97. *Id.*

to "validate[] an otherwise properly executed will" and "to eliminate the necessity for the testimony of the subscribing witnesses."[98] In truth, nothing in *Boren* suggests that this "premise" was anything more than a rationalization fashioned long after the fact. By ignoring the uncontroverted evidence that the witnesses had intended to attest the will when they signed the affidavit and in fact believed that they were attesting the will, the *Fleming* court made the rather remarkable assumption that intent is a question of law rather than of fact, at least for determining the adequacy of attestation.

Second, the court took the position that the will and the self-proving affadavit were separate instruments, even though they appeared on the same page.[99] It thus dismissed Fleming's suggestion that the signatures qualified as attestation because they were in fact subscribed below the testator's signature, as the statute requires.[100] The court declared acerbically that "[w]e cannot assume the parties signing the affidavit, one of whom was an attorney, did not read and were unaware of the language of the affidavit and its import."[101] Yet, as the witnesses testified, the affidavit was read aloud at the execution ceremony, and they both thought they were attesting the will.[102] Moreover, section 59 expressly states that "[a] self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self-proved."[103] Even the *Boren* court had recognized that "[i]t was not the purpose of the Legislature to amend or repeal the requirement that the will itself must meet the requirements of the law."[104] Those requirements, as consistently interpreted in Texas since 1881, had permitted the witnesses to sign anywhere as long as they did so with the intent to attest the will, even if they signed after an official certificate.

Finally, the supreme court claimed tacit legislative approval for its position. "It is significant to note," it declared, that "the Legislature has amended section 59 of the Probate Code twice since the date of the *Boren* decision, but has not modified the statutory requirements at issue here."[105] The court neglected to mention that the two amendments

98. *Id.*
99. *Id.* at 355.
100. *Id.*
101. *Id.*
102. *See supra* note 84 and accompanying text.
103. TEX. PROB. CODE ANN. § 59 (Vernon 1980).
104. 402 S.W.2d 728, 729 (Tex. 1966).
105. 652 S.W.2d at 355.

hardly represented substantive considerations of either attestation or the affidavits. The first amendment, in 1969, simply lowered the minimum age for testators to eighteen as part of a general reduction in the age of majority in the state.[106] The legislature in fact paid so little attention to section 59 that, when it reenacted the section with the age adjustment, it neglected to reenact part of the statute. To redress its oversight, the legislature amended section 59 for the second time at its next session in 1971—for the sole purpose of restoring the omitted paragraph.[107] Moreover, in 1971 the legislature had no reason to rethink how courts had applied section 59 because no court had extended *Boren* beyond its facts. It is thus difficult to believe that the legislature approved of *Boren*, when it in fact never considered either the case or its implications.

Fleming represents a triumph of formalism in wills adjudication. It is curious that after eighty years of ignoring the literal form of official certificates and treating them substantively as attestation, the Texas supreme court would draw the line at a device that the legislature had adopted to simplify probate. It is more curious because, even after *Boren*, courts in Texas apparently remained willing to accept the signature of a notary to his jurat as attestation.[108] Odd as it may seem, the rule in Texas appears to be that a superfluous certificate of acknowledgment will suffice as attestation unless it is a self-proving affidavit—the one form of certificate that recites everything to which attesting witnesses are supposed to testify.

Some states have found this position too uncompromising. Oklahoma, for example, which some people might argue would never knowingly follow Texas on anything, has a wills act that closely resembles section 59 of the Texas Probate Code, even to the authorization of self-proving affidavits that begins, "Such a will or testament . . ."[109] Yet, two years after

106. Act of June 12, 1969, ch. 641, 1969 Tex. Gen. Laws 1923-24.

107. Act of Jan. 1, 1972, ch. 173, 1971 Tex. Gen. Laws 974. *See also* Bill Analysis to S.B. 225, at 4 (available at Texas State Library, Austin).

108. In 1981, a division of the court of appeals, which included Justice Massey, who wrote the opinion in *McLeroy v. Douthit, see supra* text accompanying notes 73-76, accepted the signature of a notary below his jurat as attestation of a codicil. Reagan v. Bailey, 626 S.W.2d 141 (Tex. App. 1981). As authority, the court cited Franks v. Chapman, 64 Tex. 159 (1885) and Saathoff v. Saathoff, 101 S.W.2d 910 (Tex. Civ. App. 1937)—the two cases that had long stood for the proposition that courts may treat signatures after official certificates as attestation. 626 S.W.2d at 142-43. The court did not refer to *Boren* or any of its progeny by name, but simply stated: "Contestant cites cases in support of the argument in will cases involving self-proving affidavits. It is our opinion that those cases are not authority in this case." *Id.* at 142.

109. OKLA. STAT. ANN. tit. 84 § 55 (West 1970).

Boren, the Oklahoma Supreme Court declared that since attestation clauses do not have to be in any particular form, they are not invalid merely because they look like self-proving affidavits, at least when the proponent produces the witnesses at probate and does not rely on the affidavit to establish the will.[110] The court dismissed *Boren* and *McGrew* with the remark that it "need express no opinion as to the courts' reasoning" in the two cases.[111] Faced with the same question ten years later, a Florida court was more blunt: "The Texas view places form above substance and we decline to follow it."[112] The Supreme Court of Kansas delivered perhaps the most telling rejection in 1980 when it ignored *Boren* altogether in holding that "[t]he mere fact that the attestation, in form, resemble[s] an affidavit, does not destroy its validity."[113] On the other hand, *Boren* has made a mark, notably in Montana, which has accepted it unquestioningly,[114] and Arizona, which has commented on it favorably, but on equivocal facts.[115]

The primary interest of *Boren* and the line of cases culminating in *Fleming* is that they force us to ask why formalism persists in wills adjudication. Formalism is not, of course, necessarily evil. The statutory requirements for formal wills ease the transfer of property at death by taking the vast array of testamentary things and channeling them into a form that is easily recognizable as a will.[116] The requirements of writing, signature, and attestation impose a standard form on testamentary instruments that permits probate courts to identify documents as wills solely on the basis of readily ascertainable formal criteria.[117] The formalities thus routinize probate in the large majority of cases.[118]

---

110. *In re* Estate of Cutsinger, 445 P.2d 778 (Okla. 1968).

111. *Id.* at 782. Perhaps as interesting as its rejection of *Boren* is the fact that the court held that the attestation in question "was in substantial compliance with the provisions of sec. 55." *Id.*

112. *In re* Estate of Charry, 359 So. 2d 544, 545 (Fla. Dist. Ct. App. 1978).

113. *In re* Estate of Petty, 227 Kan. 697, 702, 608 P.2d 987, 992 (Kan. 1980).

114. *In re* Estate of Sample, 175 Mont. 93, 97, 572 P.2d 1232, 1234 (Mont. 1977).

115. *In re* Estate of Mackaben, 126 Ariz. 599, 601, 617 P.2d 765, 767 (Ariz. Ct. App. 1980). *See* Effland, *Self-Proved Wills*, 16 ARIZ. B.J. 31 (Feb. 1981).

116. *See* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941); Langbein, *supra* note 1, at 493-94.

117. American wills acts are a diverse lot. Some consist of only a single sentence. Others are intricate prescriptions that cover as many pages as they do contingencies. They are collected in 1 WILLS EST. & TR. (P-H) ¶ 1005.

118. Lawrence M. Friedman noted the relationship between the formalities and efficient administration of probate when he observed that:

> [F]ormalities of execution, rule, and administration in the law of succession standardize and guide the process of transmitting billions of dollars of assets from generation to genera-

The problem lies not with the formalities, but with judicial insistence on literal compliance with them. The only legitimacy of the formalities is that they signify that functions deemed essential to the process have been fulfilled.[119] Whether or not the functions have been served is, or at least should be, a separate question from whether the formalities have been met. The latter is only evidence, albeit presumptive evidence, of the former. Since the presumption is not conclusive, it seems a rather shaky foundation upon which to rest a judicial requirement of strict compliance with the formalities. Courts, however, routinely invalidate wills on formal grounds despite ample evidence that the document offered for probate accurately represents the testator's intent.[120]

Scholars have roundly and persistently criticized such formalism.[121] The most forceful recent critic is John H. Langbein, who has argued that judges should accept substantial compliance with the wills act formalities in appropriate circumstances.[122] Rather than invalidating formally defective wills automatically, Langbein contends, courts should inquire into whether the erring document nonetheless expresses the decedent's testamentary intent and whether its form, however imprecise, gives sufficient assurance that the purposes of the wills act formalities have been served. If a proponent, unaided by the usual presumptions, can satisfy a court on

---

tion . . . The substance of wills (what they actually say) cannot be standardized. It may be all the more important that the documents be standardized in form.

Friedman, *The Law of the Living, the Law of the Dead: Property, Succession and Society,* 1966 WIS. L. REV. 340, 368.

119. *See* Gulliver & Tilson, *supra* note 2, at 9-13; Langbein, *supra* note 1, at 491-98.

120. In their deference to rules in this area, American judges behave like their English counterparts. *See* Atiyah, *Lawyers and Rules: Some Anglo-American Comparisons,* 37 SW. L.J. 545 (1983).

121. *See* authorities cited *supra* note 2. In fact, all of the major trusts and estates casebooks but one reprint excerpts from the Gulliver and Tilson article or from Langbein's article or from both. *See* E. CLARK, L. LUSKY, & A. MURPHY, CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS AND FUTURE INTERESTS 271-77 (2d ed. 1977); J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 183-86 (3rd ed. 1984); S. KURTZ, PROBLEMS, CASES AND OTHER MATERIALS ON FAMILY ESTATE PLANNING 57-62 (1983); W. MCGOVERN, JR., WILLS, TRUSTS AND FUTURE INTERESTS: AN INTRODUCTION TO ESTATE PLANNING, CASES AND MATERIALS 105-06, 119-21 (1983); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 112-15 (3d ed. 1981); L. SOLOMON, TRUSTS AND ESTATES: A BASIC COURSE, PROBLEMS, PLANNING AND POLICY 201-04, 215, 233-39 (1981); R. WELLMAN, L. WAGGONER, & O. BROWDER, JR., PALMER'S CASES AND MATERIALS ON TRUSTS AND SUCCESSION 129-32 (4th ed. 1983); H. WILLIAMS, DECEDENTS' ESTATES AND TRUSTS: CASES AND MATERIALS 131-32 (1968). The one nonconforming casebook treats the functional schemes in textual form, with occasional citation to Gulliver and Tilson and to Langbein. J. RITCHIE, N. ALFORD, JR., & R. EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 192-202 (6th ed. 1982).

122. *See* Langbein, *supra* note 1.

these points, the court should find the will in substantial compliance with the formal requirements of the wills act and admit it to probate.[123]

Whether one views the question of the effect probate courts should give signatures to self-proving affidavits as one of literal compliance, as Langbein would, or as one of substantial compliance, the problem remains of why formalism persists in wills adjudication. It is tempting simply to explain the phenomenon in terms of unenlightened, dogmatic judges. The same judges, however, often show far greater flexibility in other areas of law, such as contracts or commercial law, where they do not feel constrained to stay within the four corners of the document.[124]

A more traditional explanation is that courts have a deep and abiding anxiety about attempting to divine the intent of people now dead.[125] If the frequent inquiries into the testator's intent in holographic will cases are any indication, the divination is not one that requires resort to occult aids such as tea leaves or entrails.[126] Moreover, the widespread repeal of

123. Langbein's proposal is both elegantly simple and eminently sensible. Unfortunately, except for a single Pennsylvania case, *Kajut Will*, 2 Pa. Fiduc. 2d 197 (Orphans' Ct. 1981), it has found legal favor only outside the United States—notably in Australia. *See* Wills Act, § 12(2) S. Austl. Sess. Stat. 1936-1975, *discussed in* Langbein, *Australians, supra* note 56, and Palk, *Informal Wills: From Soldiers to Citizens*, 5 ADEL. L. REV. 383 (1976); Succession Act § 9(a) 1981 Queensl. Stat. No. 69.

There have been other statutory proposals of a substantial compliance standard, as well as application of it in Israel and West Germany. See the discussions and citations in Langbein, *Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine, reprinted in* American Bar Association, AMERICAN/AUSTRALIAN/NEW ZEALAND LAW: PARALLELS AND CONTRASTS 59 (1980); J. RITCHIE, N. ALFORD, JR. & R. EFFLAND, *supra* note 121, at 199; Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 570 n.188 (1982).

124. For example, as Langbein has noted, courts use the main purpose and part performance rules to sustain transactions that do not comply with the requirements of the Statute of Frauds. *See* Langbein, *supra* note 1, at 498-99.

125. *See* Gulliver & Tilson, *supra* note 2, at 3; Langbein, *supra* note 1, at 492, 501-02. One might argue, only half-facetiously, that discovering the intent of people after their deaths should be no more difficult than the searches for legislative intent or the "intent of the Framers" that courts undertake as a matter of course.

126. The inquiry into testamentary intent is also a central part of "sham will" cases, where the contestant argues that the testator never intended the document to be a will, even though it meets the formal requirements. For example, Masonic initiation rites required members who did not have wills to make one as part of the ceremony. Some members complied solely for purposes of the initiation without intending the documents to be their wills. *See, e.g.*, Vickery v. Vickery, 126 Fla. 294, 170 So. 745 (1936); Shiels v. Shiels, 109 S.W.2d 1112 (Tex. Civ. App. 1937); *In re* Estate of Watkins, 116 Wash. 190, 198 P. 721 (1921). Then there is the case of Francis M. Butterfield, who told the attorney who drafted his will that it "was a 'fake' will" made to induce the sole legatee to sleep with him. Fleming v. Morrison, 187 Mass. 120, 72 N.E. 499 (1904). *See* Langbein, *supra* note 1, at 514; Langbein & Waggoner, *supra* note 123, at 541-43.

"dead man" statutes in the law of evidence makes continued deference on the point in the law of wills anomalous.[127]

The conventional explanations for the persistence of formalism—convenience, custom, qualms about communicating with the dead—all have superficial appeal, and they all may in some part contribute to the result. Yet none of them taken alone is compelling, and even considered together they are unsatisfactory. They do not explain why courts would go out of their way to create what amounts to a new formality, as the Texas courts did in *Boren* and *Fleming*. If doctrinal or functional analyses explained formalism completely, formalism should have yielded to the doctrinal and functional criticism it has received. That it has not suggests that we have not identified all of its sources. To this end, we might gain a better perspective if we consider the traditional structure of the probate process.

IV

Probate courts in most states customarily were courts of inferior status and limited jurisdiction.[128] The office of probate judge was often a part-time one that required little, if any, professional training.[129] The responsibilities of the probate judge tended to be ministerial, and any contested questions went to trial courts of general jurisdiction without a hearing in the probate court. The functions of probate courts in wills matters were essentially administrative—to determine whether or not to accept the will for probate, issue the necessary letters, approve the final accounting, and similar tasks.[130]

To be sure, much of this has changed. The small but growing number of jurisdictions that have adopted the Uniform Probate Code have consolidated the probate court as a division of the trial court of general juris-

127. *See* Langbein, *supra* note 1, at 501-02. When the transfer is a nonprobate one, death of the transferor does not prevent a court from intervening to reform the document to conform with the transferor's presumed intent. *See* Langbein & Waggoner, *supra* note 123, at 524-28.

128. *See generally* Simes & Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965 (1944).

129. Simes & Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 137-40 (1944). Several years ago, the author had occasion to call the telephone number listed for a small probate district in Connecticut. The person who answered the telephone said, "Joe's Auto Body." The probate judge, Joe, was performing surgery on a Volkswagen.

130. Of course, probate judges often had other responsibilities, even when their probate jurisdiction was limited. Many were also charged with guardianship of minors, civil commitment authority, supervision of testamentary trusts, and, on occasion, marriages and adoptions. Simes & Basye, *supra* note 129, at 130-36.

diction with full adjudicative power.[131] Other states have given the probate court the powers of a court of general jurisdiction over probate matters.[132] These changes, however, are relatively recent, and they have not always applied to all probate districts within a state.[133] Probate courts and judges in many states still follow the traditional model of limited jurisdiction and inferior status to at least some degree. More importantly, formalism became embedded in wills adjudication when the traditional structure of probate was all but universal. Reforms in probate jurisdiction, particularly reforms that are so recent, would not necessarily root out formalism unless they removed the stigma of inferiority from the probate process itself, which they have not.[134]

To the extent that probate courts remain courts of limited jurisdiction staffed by nonprofessional judges, the division of competence between probate bodies that perform largely ministerial tasks and trial courts of general jurisdiction is sensible. After all, few probate matters require litigation. The vast majority of estates present only routine questions that can be handled ministerially according to formal rules. There is no reason to burden the dockets of trial courts with probate business that does not require discretionary adjudication and that inferior probate courts can handle more routinely.

For all their potential convenience, however, courts of limited jurisdiction presided over by lay judges raise problems of control that courts of general jurisdiction do not. The underlying question is how to limit the discretion of judges that are not chosen or trained to perform general adjudicatory functions. The most obvious restriction is the initial limitation of jurisdiction, which defines the competence of probate courts. A related restriction is to deny probate courts powers that would otherwise be incident to probate jurisdiction.[135] Still another means of control is to

131. *See* UNIFORM PROBATE CODE § 1-302 (1982); *see also id.* §§ 1-306, 308, 309 (1982).

132. This has long been the practice in New York. *See* N.Y. SURR. CT. PROC. ACT (SBA) §§ 201, 209 (McKinney 1967).

133. In Texas, for example, except for a handful of so-called "statutory probate courts," *see* TEX. PROB. CODE ANN. § 3(ii) (Vernon 1980), the process of consolidation did not begin until 1973. *See* Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323 (1975). Even then, the legislature made substantial distinctions in jurisdiction and authority according to whether probate matters would fall to county court judges, who did not have to be attorneys, or district court judges, who did. *See* 17 M. WOODWARD & E. SMITH, PROBATE AND DECEDENTS' ESTATES § 1 (Texas Practice 1971).

134. In an analogous area, recent reforms in bankruptcy jurisdiction have not made bankruptcy judges, *née* referees, equal in the eyes of their Article III brethren.

135. For example, until 1973 county courts in Texas had constitutional and statutory authority

prevent probate courts of limited jurisdiction from hearing contested matters fully, either by removing such matters to a court of general jurisdiction or by empowering the superior court to try the case again on the merits rather than limit its review to the questions appealed.[136]

These are the commonly recognized means of controlling the discretion of probate judges that sit in courts of limited jurisdiction. Still another means of control operates, rather paradoxically, at once more subtly and yet also more heavy-handedly than the structural limitations just noted. The requirement of strict compliance with the wills act formalities limits discretionary interpretation of the formalities by discouraging anything other than mechanical, literal application of them. To be sure, a rule of literal compliance occasions silly and sometimes dishonest litigation to determine whether particular conduct constitutes compliance with the relevant formality.[137] But this does not limit the utility of the rule in providing a measure of control over probate courts of limited jurisdiction. The control persists, however, only so long as supervisory courts adhere to the requirement of strict compliance. If they relaxed their guard and accepted anything less than literal compliance, they would lose much of their ability to correct probate courts that followed suit. In this respect, the requirement of strict compliance with the formalities is another dimension of the channeling function of the formalities themselves. The formalities of due execution provide, as Lon Fuller observed in a different context, "channels for the legally effective expression of intention."[138] They routinize probate by allowing probate courts to concern themselves only with documents that comply with them. If this is true, then a rule of literal compliance makes it simpler for supervisory courts to assure that probate courts in fact limit themselves to such documents. For probate courts of limited jurisdiction staffed by lay judges, such assurance may be useful.

---

to transact all business "appertaining to estates," but they could not try title to land or construe wills. *See* Schwartzel & Wilshusen, *supra* note 133, at 335-36, 343.

136. Texas had the latter procedure until 1973. Its effect was to turn trial in the county court into little more than a discovery proceeding. *See* Schwartzel & Wilshusen, *supra* note 133, at 326, 334. In probate courts of limited jurisdiction staffed by nonprofessional judges, contested questions are beyond the minimal training and skills that probate courts require to function smoothly and routinely.

137. *See* Langbein, *supra* note 1, at 525-26. For a sampling of some of the litigation, on such questions as whether a grunt or a wave of the hand constitutes acknowledgment, *see* Annot., 7 A.L.R.3d 317 (1966); Annot., 75 A.L.R.2d 318 (1961); Annot., 60 A.L.R.2d 124 (1958); Annot., 125 A.L.R. 414 (1940); Annot., 115 A.L.R. 689 (1938).

138. Fuller *supra* note 116, at 801.

Formalism in wills adjudication may thus provide a means of integrating an administrative process into an adjudicatory framework. For the integration to succeed, the functions of probate judges must be clearly delimited. For example, the administrative decision of what constitutes a will is guided solely by whether or not the document meets the stipulated requirements of form. Those requirements—the wills act formalities—are a set of formally rational criteria for determining what constitutes a will. The rationality of the rules is formal, not logical. It is not the function of traditionally limited probate courts to discern the legally relevant characteristics of the facts of execution through logical analysis of their meaning. That process is appropriate for adjudication. Rather, it is their function to adhere to the external characteristics of those facts.[139] If the document is in writing, signed by the testator, and attested by two or more competent witnesses, it is presumptively a will. If a contestant wishes to argue that, formal compliance notwithstanding, it is not a will, he or she may litigate the issue. But it is essential to maintaining the routine of probate for the overwhelming majority of documents that are not questioned that the contest takes place in a different forum. Deciding whether an instrument is a will according to formal criteria requires a fundamentally different mode of analysis from deciding whether a document that appears to be a will by formal criteria is in fact not a will because of substantive considerations such as fraud, undue influence, or mental incompetence. The latter requires discretionary adjudication; the former does not.

Perhaps it is in this context that we should view the imposition of *Boren* on the probate system. The rule in *Boren* may have been harsh and extreme, but it was a rule nonetheless. Quite apart from its merits, if indeed it had any, as a rule it would keep the ministerial functions of probate clear and easily administered.[140] It also sharply limited the discretion of inferior judges in determining matters of attestation—a limitation that probate courts at first resisted.[141] The victory, if one can call it

139. My analysis here rests on Max Weber's taxonomy of decision-making in adjudication and administration. *See* 2 M. WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 653-57 (G. Roth & C. Wittich eds. 1978). For a good recent discussion of Weber's concept of formal legal rationality, see A. KRONMAN, MAX WEBER 72-95 (1983).

140. The utility of formal rules is well-known. *See* Friedman, *supra* note 118, at 365-78; *see generally* Friedman, *Law, Rules, and the Interpretation of Written Documents,* 59 NW. U.L. REV. 751 (1965). As Weber noted, "Juridical formalism enables the legal system to operate like a technically rational machine." 2 M. WEBER, *supra* note 139, at 811.

141. That is, if we can infer resistance (or perhaps simply ignorance) from the fact that it may

that, of *Boren* and the formalism it represented may illustrate how supervisory courts control probate courts of limited jurisdiction—by establishing rules that are easily administered and from which no deviation will be tolerated. That the rules sometimes may be harsh or even unjust is, from the impersonal standpoint of administrative efficiency, irrelevant.

By way of contrast, it is useful to note that contests based on lack of testamentary capacity—a decidedly nonformal ground—do not provide similar opportunities to control the probate process. When appellate courts inquire into the testator's intent or mental capacity, they do so within a framework of procedural controls that removes the question from probate courts of limited jurisdiction in the first place. Their decisions thus do not interfere with the ministerial functioning of probate courts, which already will have performed the routine administrative task of determining the formal validity of the will. Allegations of testamentary incapacity do not attack that determination, but rather the rebuttable presumptions that follow from it. An appellate finding that the testator lacked the requisite mental capacity is a substantive decision. It has no impact on how probate courts apply the wills act formalities in future cases. That is not the case, however, when an appellate court decides questions of compliance with the formalities. Those questions are initially the province of probate courts. When an appellate court determines them, it necessarily redefines the standards by which probate courts make similar decisions in the future.

Strictly applied formal rules thus permit appellate courts to oversee the administrative functions of probate and limit the discretion of probate courts to ministerial matters. Yet it seems anomalous for appellate judges to decide cases as though they were subject to the same constraints as probate judges, especially probate judges of inferior status. After all, courts that have appellate review of administrative decisions in nonprobate matters apply judicial standards rather than bureaucratic ones. For example, federal judges do not normally act as Internal Revenue Service examiners when they decide tax cases. They apply techniques of judicial reasoning and statutory interpretation with little regard to the effect of their decisions on the administrative functioning of the IRS. They can do so both because the IRS operates within limits prescribed by Congress and, more significantly, because the IRS has its own

---

have taken as long as eleven years for probate judges to invalidate uncontested wills for *Boren* violations. *See supra* text accompanying notes 62-81.

administration, independent of the judicial system, which can adjust internally to the administrative burden of judicial decisions. In wills adjudication, however, the traditional structure of the probate process has meant that doctrinal consistency is not the only concern of supervisory courts. They have also had to control the discretion of a class of judges that includes many who are not trained to exercise it or whom the supervisory courts perceive as not qualified to exercise it.

The problem of controlling administrative discretion by adjudicatory means may explain excessive formalism of the kind applied to self-proving affidavits in Texas. An explanation is not, of course, a justification. Formalism of the degree evidenced in *Boren* and *Fleming* is as unforgivable as it is unforgiving.[142] It does not distinguish between formal defects that compromise the integrity of the document and those that are harmless in terms of their effect on the underlying functions.

To the extent that formalism in wills adjudication is structural in origin rather than doctrinal or functional, it has behind it the force of judicial inertia.[143] Reforms such as those of the Uniform Probate Code that enhance the jurisdiction and authority of probate courts are undoubtedly

142. This is true even though the estate of a testator whose will is found invalid will pass by intestate succession rather than escheat to the state. Langbein has discussed this "backstopping" effect of intestate distribution statutes. *See* Langbein, *supra* note 1, at 499-501. The various state intestate succession schemes represent legislative judgments on what should be done with the property of people who fail to decide the matter themselves. In fact, the statutory distributions tend to follow what most testators do in their wills anyway—provide for their immediate families. Whether the statutes distribute the estates in the same proportion as testators would or as people would expect is another question altogether—one that empirical studies usually answer negatively. *See, e.g.*, M. SUSSMAN, J. CATES, & D. SMITH, THE FAMILY AND INHERITANCE 83-120 (1970); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Fellows, Simon, & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RESEARCH J. 319; Fellows, Simon, Snapp, & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717; Note, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253 (1976).

The existence of intestate succession doubtless makes it easier for courts to invalidate wills. The Supreme Court of California once declared when it invalidated a will for defective attestation that "[i]n the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all is often gravely questioned." *In re* Walker's Estate, 110 Cal. 387, 391, 42 P. 815, 818 (1895). On rehearing, the court modified its opinion by deleting that sentence and a similar one. *In re* Walker's Estate, 42 P. 1082 (1896) (per curiam). Nonetheless, we should not lose sight of the fact that people who write wills intend to die testate and would probably find the presumptive fairness of intestate distribution irrelevant.

143. Sometimes it is tempting to speculate on the source of the inertia. For example, the author of the *Boren* opinion voted with the majority in *Fleming* seventeen years later. It will be interesting to see if his recent retirement has any effect on future wills cases.

useful, but the probate process will not lose its stigma of inferiority merely by legislative fiat. The habits and perceptions fostered by controlling ministerial discretion by adjudicatory means run too deep. Functional and doctrinal analyses of formalism are necessary and worthwhile, but they are inevitably incomplete. A structural analysis such as the one offered here may enhance our understanding of formalism in wills adjudication. If it does, it may, in time, help lessen the punctiliousness that produces injustice.

WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 63 NUMBER 1 1985