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Cover Page Footnote

* J.D. Candidate, 2022, University of Georgia School of Law; B.A., 2018, University of Georgia. I would like to thank Professor Lisa Milot for her helpful guidance in writing this Note and the Editorial and Executive Board editors for their thoughtful and diligent efforts. I would further like to thank my parents, Dan and Jill Rankin, for their constant support, and my love, Rachel, for always inspiring me to be my best.

SOCIALLY DISTANT SIGNING: WHY GEORGIA SHOULD ADOPT REMOTE WILL EXECUTION IN THE POST-COVID WORLD

Jessie Daniel Rankin[*]

In the wake of the COVID-19 pandemic, Georgia Governor Brian Kemp and other state governors issued emergency executive orders authorizing the attestation and execution of wills, trusts, and other testamentary documents through the use of audio-video technology. Most states have traditionally required that such testamentary documents be signed in the physical presence of two or more witnesses to be valid. Georgia's executive order permits these witnesses to instead observe the signing via video-conferencing software, alleviating the requirement that the witnesses be physically present with the testator. This authorization, however, only exists through this executive order and could lapse or be overturned by another executive order.

The Georgia General Assembly should codify a version of the governor's executive order to permanently allow remote execution and attestation of testamentary documents. Remote execution and attestation increases access to estate planning services—particularly in Georgia's rural communities—without sacrificing the traditional safeguards of wills formalities. This Note presents the arguments for permanently adopting remote execution and attestation, explores efforts by other jurisdictions in this area, and presents a suggested set of criteria for the Georgia General Assembly as guidance when considering such legislation.

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I. INTRODUCTION

On March 11, 2020, the World Health Organization declared the novel infectious disease COVID-19 a pandemic.[1] This announcement, which came in the midst of over 118,000 infections and 4,291 deaths worldwide, called on world leaders to intervene to mitigate the spread and damage of the disease.[2] In the United States, the weeks that followed were among the most substantial societal upheavals in recent history. Then-President Donald Trump declared the pandemic a National Emergency,[3] and state governors and other local leaders began enacting shelter-in-place orders, limiting gatherings, closing "non-essential" businesses, and forcing millions to attend school or work via home computer.[4]

Georgia Governor Brian Kemp's response to the pandemic included Executive Order No. 04.09.20.01, which temporarily authorized "the use of audio-video communication technology" to satisfy the physical witness or notarization requirements for documents such as wills, trusts, and powers of attorney.[5] Georgia was neither the first nor the last state to enact such a measure; as of December 23, 2020, twenty-one states allowed for emergency remote witnessing, and forty-five allowed for emergency remote notarization.[6] In light of such authorizations, as well as the sense of

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[1] *See* Dr. Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 ("We have therefore made the assessment that COVID-19 can be characterized as a pandemic.").

[2] *See id.* ("We cannot say this loudly enough, or clearly enough, or often enough: all countries can still change the course of this pandemic.").

[3] Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

[4] *See, e.g.*, Ga. Exec. Order 03.23.20.01 (Mar. 23, 2020) (prohibiting gatherings of greater than ten people and closing bars and nightclubs for fourteen days); Ga. Exec. Order 03.26.20.02 (Mar. 26, 2020) (ordering an "extended closure of elementary, secondary, and post-secondary public schools"). For a list and timeline of school closure orders during the emergence of COVID-19 in the United States, see *Map: Coronavirus and School Closures in 2019–2020*, EDUCATIONWEEK (Oct. 13, 2021), https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html.

[5] Ga. Exec. Order 04.09.20.01 (Apr. 9, 2020) [hereinafter Ga. Remote Order].

[6] For a survey of the actions taken by each state regarding the allowance of remote witnessing and notarization, see *Emergency Remote Notarization and Remote Witnessing*

urgency many people felt to finalize an estate plan during a deadly pandemic, many estate planning attorneys and law firms maintained their practices in this remote format despite the challenges of social distancing.[7] In June of 2021, over a year after the initial order's issuance, Governor Kemp issued an additional order extending the authorization of remote will executions.[8] This authorization stands on fragile ground, though: it will expire upon lapse or termination of the relevant orders.[9]

Amidst the societal upheaval brought about by the onset of the COVID-19 pandemic, many have made predictions about the ways in which the pandemic will change American life in the future.[10] For

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Orders, AM. COLL. TR. & EST. COUNS. (Dec. 23, 2020), https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/.

[7] *See, e.g.*, Adam Osterweil, *How COVID-19 Affects Estate Planning Today*, FRANKFURT KURNIT KLEIN & SELZ PC: PRO. RESP. L. BLOG (Sept. 3, 2020), https://professionalresponsibility.fkks.com/post/102geax/how-covid-19-affects-estate-planning-today ("The pandemic has prompted many of our clients and friends to focus on their estate planning . . . with a new sense of urgency. . . . We have seamlessly replaced in-person meetings with . . . video conferencing technology . . . .").

[8] *See* Ga. Exec. Order 06.30.21.02 (June 30, 2021) (continuing permission to witness by means of "audio-video communication technology or any similar real-time means of electronic video conferencing").

[9] *See* Letter from Elizabeth Fite, President, State Bar of Georgia, to Bar Members (July 6, 2021), http://www.houstoncountybar.org/news/expiration-of-gov-kemps-pandemic-executive-orders-and-extension-of-supreme-court-of-georgias-order-on-remote-closings/ (describing the suspension of the in-person witnessing requirement for wills "until the governor terminates or ceases to renew" the executive order). Because Georgia statutory law regarding wills does not yet permit remote execution or attestation, any lapse in the executive order will disallow the practice. *See* O.C.G.A. § 53-4-20 (2021) (requiring attestation and subscription of a will in the presence of two or more witnesses but not going so far as to authorize remote attestation or subscription). Though the Georgia General Assembly considered the prospect of permanently allowing remote notarization during this year's legislative session, the bill neither passed nor included such authorization for will executions. *See* H.B. 334, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (permitting remote notarization of certain acts but excluding "the creation and execution of any will, codicil, or testamentary trust"). The bill was ultimately unsuccessful in 2021, but the General Assembly may revisit this issue in 2022. *See* Letter from Elizabeth Fite, *supra* ("Because 2021 was the first year of a two-year legislative cycle, HB 334 will still be viable next year.").

[10] *See, e.g.*, Politico Mag., *Coronavirus Will Change the World Permanently. Here's How.*, POLITICO (Mar. 19, 2020, 7:30 PM), https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579 (presenting a survey of thirty different opinions on the ways the world may change in the aftermath of COVID-19).

example, some expect increases in remote work and school arrangements, a prediction that seems reasonable considering that some businesses have already announced intentions to continue remote work arrangements indefinitely.[11] In light of the emergency remote execution orders, and with the expectation of forthcoming changes in business practices and everyday life, it is worth asking how the practice of estate planning will change. Could this area of law—which has largely clung to traditional formalities despite the technological advances of the digital age[12]—undergo an evolution in the foreseeable future?[13]

This Note argues that Georgia should consider amending existing legislation to permanently authorize the remote execution and attestation of wills and other testamentary documents. It explains why the Georgia legislature should adopt this approach, demonstrating that it would serve the fundamental aims of estate planning law, increase access to estate planning services, maintain the requisite safeguards of wills formalities,[14] and remain within the bounds of national trends. Part II provides a motivating hypothetical that highlights potential hazards of estate planning under current Georgia testamentary law. Part III then explores the ways in which remote will execution can alleviate issues regarding access to estate planning, particularly among rural clients. Part IV

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[11] *See id.* ("[I]t turns out, an awful lot of meetings (and doctors' appointments and classes) really could have been an email. And now they will be."); Joey Hadden, Laura Casado, Tyler Sonnemaker & Taylor Borden, *21 Major Companies That Have Announced Employees Can Work Remotely Long-Term*, INSIDER (Dec. 14, 2020, 10:35 AM) https://www.businessinsider.com/companies-asking-employees-to-work-from-home-due-to-coronavirus-2020 (listing major companies that have announced long-term remote work arrangements for employees).

[12] *See* Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547, 549 (2019) ("One of the last holdouts to accepting the digital world is the law of Wills.").

[13] This Note seeks to offer a proposal for the future of estate planning law rather than to make a specific prediction about what it will look like. For a more specific prediction about how the practice may change post-COVID-19, see Ross E. Bruch & Justin H. Brown, *Estate Planning After the Pandemic: How the Coronavirus and Technology Will Change the Estates Practice*, PROB. & PROP., July–Aug. 2020, at 60–62.

[14] This Note does not call for an abolition of the wills formalities, nor does it advocate for adopting a less formal will regime in Georgia, such as a holographic or nuncupative will. Rather, this Note argues that the process of remote execution adequately comports with existing wills formalities by maintaining their basic functions and safeguards.

presents an overview of wills formalities and explains how remote will execution can comport with the functions of those formalities. Next, Part V looks toward advancements in testamentary laws of other jurisdictions to evaluate the feasibility of remote will execution in Georgia. Part VI then proposes statutory conditions and qualifications for the Georgia General Assembly to account for when considering the adoption of remote will executions.

II. MOTIVATING HYPOTHETICAL

The following hypothetical scenario illustrates key issues related to will execution. Lucille is an 80-year-old widowed mother of two. She is of sound mind but suffers from severe rheumatoid arthritis to the point that she is mostly confined to a wheelchair. She lives with her niece, Susan, who is her full-time caretaker. Lucille and Susan live in Butler, Georgia, a rural town roughly two-and-a-half hours south of Atlanta with a population of less than 2,000 people.[15] She is estranged from her two adult children who have not spoken with her in over twenty years. Susan is undoubtedly the only family member with whom Lucille maintains a meaningful relationship. Lucille is also the owner of a fifty-acre tract of land in Butler estimated to be worth approximately $500,000. She maintains a $500,000 savings account of funds that she and her late husband earned while managing their cattle ranching business.

Lucille wishes to divide her $1 million estate by gifting her real property to Susan and the remaining $500,000 to her local church.[16] She seeks the services of an estate planning attorney to effectuate her wishes, but the nearest attorney's office is over an hour away. Additionally, her arthritis makes it incredibly painful for her to travel long distances by car. Lucille is left in the predicament of either finding an estate planning attorney willing to drive to Butler

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[15] The most recent survey conducted estimates that the city of Butler has a population of 1,656 people. *American Community Survey Demographic and Housing Estimates*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=butler,%20georgia&tid=ACSDP5Y2019.DP05&hidePreview=false (last visited Nov. 13, 2021).

[16] In this hypothetical, Lucille—understandably upset that they have not spoken to her in years—disinherits her children. The relationship she has with Susan is more akin to a mother–daughter relationship than an aunt–niece relationship.

or facing the risks of trying to execute her will without the assistance of counsel.

Under Georgia's Executive Order No. 04.09.20.01, Lucille could contact an attorney to draft her will and arrange for a virtual execution ceremony, allowing her to sign a will with the requisite witness attestations from the comfort of her home.[17] This scenario does not even contemplate the obstacles posed by COVID-19, the emergency from which this authorization arose—particularly shelter-in-place orders and the heightened risks of health complications that elderly individuals face.[18] Rather, it contemplates different obstacles to estate planning that existed prior to the pandemic and will likely persist afterwards—namely, the challenges of living in an underserved legal market and the difficulties of traveling at an advanced age compounded by illness or other physical conditions.[19]

Further suppose that Lucille executes her will remotely and passes away shortly thereafter. Susan offers Lucille's will for probate, at which point it would be subject to challenges by interested persons.[20] Likewise, suppose that Lucille's estranged children, upon learning of their disinheritance, challenge the will's validity for improper execution. In the absence of an emergency

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[17] *See* Ga. Remote Order, *supra* note 5 (announcing that "any [witnessing] requirement under" Georgia law "may be satisfied by the use of audio-video communication technology or any similar real-time means of electronic video conferencing").

[18] *See* Ga. Exec. Order 04.02.20.01 (Apr. 2, 2020) (mandating a statewide shelter-in-place order in Georgia); *COVID-19 Risks and Vaccine Information for Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (Aug. 2, 2021) (highlighting the increased risk of coronavirus for the elderly).

[19] Many who live in rural areas in the United States lack reasonable access not only to estate planning services, but also to legal services in general. *See, e.g.*, Hillary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 MONT. L. REV. 235, 236 (2016) (noting how rural residences lack "access to advice from a resident attorney" in Montana).

[20] *See* O.C.G.A. § 53-5-2 (2021) (defining an "interested person" for probate purposes). "Probate," or the act of "probating a will," refers to the process of filing a decedent's will with the county probate court of the decedent's domicile. *See, e.g.*, *Probate of Will*, ATHENS-CLARKE CNTY. UNIFIED GOV'T, https://www.accgov.com/1107/Probate-of-Will (last visited Oct. 5, 2021) ("The process of probating a will is the formal process by which the Probate Court determines a document has been proved to be the last will and testament of the decedent and officially appoints the executor or some other person to handle distribution of the decedent's property.").

authorization or statutory amendment, Georgia law would likely invalidate the will entirely rather than protect Lucille's written testamentary intentions.[21] The probate court would deem Lucille to have died intestate, and under Georgia law her estate would be divided equally among her children.[22] This regime would prevent Susan from inheriting the property despite Lucille's genuine intention that Susan have it and the fact that their relationship was indisputably free from duress or undue influence.[23]

III. ACCESS TO ESTATE PLANNING SERVICES

Our motivating hypothetical illustrates just some of the numerous accessibility issues prevalent in estate planning. Lack of reasonably convenient access to an attorney stands out as perhaps the most fundamental issue.[24] Wills formalities[25] are undeniably complicated; therefore, the guidance of legal counsel is often crucial

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[21] *See* McCormick v. Jeffers, 637 S.E.2d 666, 669–70 (Ga. 2006) (holding the testator's will invalid when the attesting witnesses were not physically situated in the same room as the testator). For discussion about the level of perception that testators must have of their witnesses in Georgia, see *infra* Part IV.

[22] When people "die intestate," they have died without having executed a valid will, and their estate will be divided in accordance with their state's intestacy law, which designates certain family members as heirs to the estate. *See, e.g.*, O.C.G.A. § 53-2-1(c)(3) (2021) (stating that in Georgia when the decedent dies intestate without a surviving spouse, any surviving children of the decedent "shall share the estate equally"). Under Georgia intestacy law, Lucille's estate would be distributed in this fashion because when the decedent has no surviving spouse, the estate goes to any surviving children of the decedent.

[23] A probate court may find a purported will invalid if evidence is presented that the testator executed it under duress or undue influence from another person. *See, e.g.*, O.C.G.A. § 53-4-12 (2021) ("A will must be freely and voluntarily executed. A will is not valid if anything destroys the testator's freedom of volition, such as . . . duress; or undue influence whereby the will of another is substituted for the wishes of the testator.").

[24] In our motivating hypothetical, Lucille would have been able to validly execute her will if she lived closer to an attorney and was more fit to travel. *See supra* Part II; *see also* Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 100 (2018) ("Access to legal resources is vital for all Americans . . . .").

[25] The term "wills formalities" is used throughout this Note to describe the formal procedural requirements of properly executing a will. For an overview of wills formalities, see *infra* Part IV.

to the proper execution of a will.[26] This complexity could pose complications for individuals who have difficulties physically traveling to an attorney's office, particularly elderly estate planning clients with physical infirmities or other age-related limitations.[27] Additionally, even when elderly clients have caretakers consistently available to drive them to an attorney, they may nonetheless have substantial physical limitations that make traveling difficult or impracticable. In our hypothetical, Lucille's severe arthritis presented such difficulties, and requirements that testators travel to an attorney's office could present similar obstacles to other elderly or disabled individuals who wish to execute a will.

As demonstrated in our hypothetical, these types of issues may be further exacerbated for individuals living in underserved legal markets. In Georgia, most attorneys practice in the metro-Atlanta area, leaving so-called "legal deserts" throughout the state's rural counties.[28] As a result, individuals who live in such areas often must travel long distances to meet with attorneys, forcing them to experience expensive and substantial "delays for routine legal work."[29] These distances can also pose difficulties for estate planning attorneys who routinely travel to their clients' homes, particularly for attorneys with high caseloads and billable hour requirements.[30] Remote will execution would directly address these accessibility issues. By granting the authorization to carry out such execution ceremonies, Georgia would eliminate many of the substantial geographic barriers that Lucille—and countless other

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[26] *See* David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. ONLINE 18, 22 (2020) ("[B]ecause executing a formal will is so complicated, testators usually hire lawyers to shepherd them through the process.").

[27] A 2002 study reported that each year over 600,000 individuals aged 70 or older in the United States must "stop driving and become dependent on others" for transportation. Daniel J. Foley, Harley K. Heimovitz, Jack M. Guralnik & Dwight B. Brock, *Driving Life Expectancy of Persons Aged 70 Years and Older in the United States*, 92 AM. J. PUB. HEALTH 1284, 1285–86 (2002).

[28] *See* Pruitt et al., *supra* note 24, at 63–77 (detailing the shortage of lawyers in Georgia's rural counties).

[29] April Simpson, *Wanted: Lawyers for Rural America*, DAILY YONDER (July 1, 2019), https://dailyyonder.com/wanted-lawyers-rural-america/2019/07/01/.

[30] *See* Marcel Strigberger, *Why Lawyers in Practice Have to be Mindful of Time—Especially Their Billing Time*, A.B.A. (June 10, 2021, 10:40 AM) (describing examples of stressors and complicated situations that attorneys face when under billable hour requirements).

similarly situated Georgians—may ordinarily face in trying to craft an estate plan.

Our hypothetical does not even contemplate the onset of emergency situations that may require expedited estate planning. While many individuals may be proactive in drafting their estate plans, others often do so in much more dire circumstances, such as the onset of a terminal illness or an impending natural disaster in their area.[31] In such situations, time is of the essence, and delays in the will execution process could likewise be detrimental to the effectuation of the testator's wishes.[32] Remote execution is perhaps most valuable for these types of situations. Rather than sacrificing precious time by working around the logistics of in-person meetings, testators and their attorneys could carry out the entire process remotely. The end result would likely be more efficient estate planning, and in turn, a greater number of people effectuating their testamentary wishes.

Because of these barriers to accessible estate planning, Georgia should increase the accessibility of estate planning services for its citizens so that they may avoid intestacy. Although state testamentary laws differ, they consistently reflect the position that intestacy is undesirable.[33] Intestacy presents substantial difficulties for testators who have non-traditional families or testamentary wishes.[34] In many instances, this regime can contradict the testator's intent.[35] For example, in our motivating hypothetical,

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[31] *See* Prac. L. Trs. & Ests., *Estate Planning in an Emergency: Overview*, PRAC. L. (2021), https://us.practicallaw.thomsonreuters.com/w-024-9703 ("Expedited estate planning needs may arise in many situations, including when a client: [i]s diagnosed with a life-threatening illness . . . [or] [l]ives in a region predicted to experience life-threatening medical or environmental events.").

[32] Any delays in the estate planning process that result in someone dying intestate could have damaging effects. *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877, 878 (2013) ("Most Americans cannot correctly identify their intestate heirs, so the absence of a will creates uncertainty and possibly frustrated expectations for intended beneficiaries." (footnote omitted)).

[33] *See* Horton & Weisbord, *supra* note 26, at 19 ("Courts often declare that there is an 'established public policy favoring testacy.'" (quoting Estate of Reid, 145 Cal. Rptr. 451, 454 (Cal. Ct. App. 1978))).

[34] *See id.* (providing an example of intestacy's shortcomings by noting that "intestacy is not necessarily suitable for unmarried same-sex couples and other non-traditional families").

[35] *See* Sarah Maslin Nir, *A Brownstone and the Bitter Fight to Inherit It*, N.Y. TIMES (Oct. 23, 2016), https://www.nytimes.com/2016/10/24/nyregion/a-brownstone-and-the-bitter-fight-

Lucille's children would stand to inherit her entire estate under intestacy—a result contrary to her wishes, given the children's failure to maintain a meaningful relationship with her for over twenty years.[36] Furthermore, the intestacy regime causes familial wealth to fracture, imposes additional probate complications, and takes control completely out of the testator's hands.[37] Thus, the Georgia General Assembly should capitalize on the opportunity that remote execution presents to improve overall estate planning access and thereby reduce the likelihood of intestacy.

IV. WILLS FORMALITIES

Our motivating hypothetical also brings into focus the role of wills formalities by illustrating just one of many ways that a state's legal requirements for will execution could frustrate the testator's intent.[38] Lucille's children inheriting her estate contrary to her clearly expressed intent seems perverse, but it would be the most likely outcome under current Georgia testamentary law.[39] Without lawful remote execution, Lucille's will would likely fail simply because her witnesses watched via computer screen instead of from within the same room as Lucille. If the fundamental aim of testamentary law is to effectuate the intent of the testator,[40] then why would any court invalidate a will simply due to noncompliance with the format of delivery? If the Georgia General Assembly is to consider statutory amendments that would authorize the remote execution of wills, it must do so with a thorough understanding and consideration of wills formalities and their traditional purposes, as discussed in the following subsections.

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to-inherit-it.html (explaining a situation in which New York intestacy law required that the testator's "assets go to his next of kin, two nieces and two nephews," rather than to his same-sex partner of fifty-five years, if his will was deemed invalid).

[36] *See supra* Part II.

[37] *See* Horton & Weisbord, *supra* note 26, at 19–20 (listing several drawbacks of intestacy).

[38] *Cf.* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 569 (2016) ("[A] will's validity and the ultimate disposition of the decedent's estate continue to turn upon the decedent's testamentary intent.").

[39] Current Georgia law provides that surviving children of an intestate decedent who dies without a surviving spouse "shall share the estate equally." O.C.G.A. § 53-2-1(c)(3) (2021).

[40] *See* Glover, supra note 38 ("[I]ntent, or more specifically testamentary intent, is the cornerstone of a will.").

A. THE HISTORY OF WILLS FORMALITIES

The process of writing a will is a Western legal tradition that originated in the Roman Empire.[41] The institution of testamentary control became part of English common law through the Roman occupation of Britain.[42] In their earliest forms, however, wills and will executions were not subject to the same stringent formalities that accompany them today.[43] Such a lenient system of will execution allowed for substantial risk of "frauds and forgeries,"[44] and the British Parliament addressed these issues for wills—as well as other legal documents—by passing the Statute of Frauds in 1677.[45] The Statute of Frauds included vestiges of some of the formal requirements still in place today, such as mandating that a testator's bequests of land be written and attested to by at least three witnesses.[46]

Wills formalities evolved considerably with the passage of the English Wills Act of 1837: it presented substantial changes to existing testamentary law, such as erasing the distinction between real and personal property bequests, requiring subscription by the testator, and requiring that the testator sign "in the presence of two or more witnesses present at the same time."[47] The Wills Act greatly influenced existing wills laws and formalities in the United States, with variations emerging among state laws.[48]

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[41] *See* 1 MARY F. RADFORD, REDFEARN WILLS & ADMINISTRATION IN GEORGIA § 1:2 (2020) (describing the "Roman law of wills and administration").

[42] *See id.* (discussing the history of English wills law and its emergence after the Roman conquest of Britain).

[43] *See id.* § 1:4 ("It was necessary that a will of lands . . . should be in writing, but it was not necessary to have witnesses to it. Simple notes in the handwriting of the testator, or even in the handwriting of another person, constituted a sufficient will when the testator intended such writing to be his will.").

[44] *Id.*

[45] *See id.* ("This condition finally led to the enactment of one of the most famous statutes ever passed by the English Parliament, the Statute of Frauds, which is primarily a wills act.").

[46] *See* 29 Car. II, c. 3, *reprinted in* 5 STATUTES OF THE REALM 842 (specifying that no will shall be enforced unless "committed to writeing [sic] . . . and proved to be soe [sic] done by three Wittnesses [sic] at the least").

[47] Wills Act of 1837, 7 Will. IV. and 1 Vict., c. 26. (Eng.).

[48] *See* RADFORD, *supra* note 41, § 1:4 ("Mention of this English act of 1837 is made, even though it has been enacted since the freedom of the American colonies, because of the

B. GEORGIA WILLS FORMALITIES

Georgia law requires that a will be "attested and subscribed in the presence of the testator by two or more competent witnesses."[49] With regard to remote will attestation, the term "presence" generates significant complications.[50] If, in the motivating hypothetical, Lucille's witnesses observed her executing her will in real time via a video conferencing program, would they be sufficiently within Lucille's "presence" to satisfy the requirements of the statute?

Georgia precedent on the issue of "presence" provides some clues. In evaluating whether a witness signed the will within the testator's presence, Georgia courts apply the so-called "line-of-vision" standard.[51] Under this standard, testators must be physically situated relative to their attesting witnesses so that they are "able to see the witnesses sign . . . without changing [their] place."[52] For the witnesses to be within the testator's line of vision, the testator need not have actually "watched the witnesses sign, as long as the testator could have watched them sign" if the testator had so desired.[53] Likewise, if a wall or other obstruction blocked the

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influence it has exerted over legislation as to wills in the various states of the Union."). No federal law exists regarding the execution of wills, making it exclusively a matter of state law. Though each state has different standards for will execution requirements, the vestiges of the Wills Act largely remain in some form for each state. *See, e.g.*, O.C.G.A. § 53-4-20 (2021) (mandating that a will "shall be in writing and shall be signed by the testator" as well as "attested and subscribed in the presence of the testator by two or more competent witnesses"); OHIO REV. CODE ANN. § 2107.03 (West 2021) ("The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.").

[49] O.C.G.A. § 53-4-20(b) (2021). Georgia law further presumes that anyone aged fourteen or older is competent to be a witness and allows for interested witnesses—i.e., witnesses who are also beneficiaries under the terms of the will—to inherit so long as two disinterested witnesses also sign the document. *Id.* §§ 53-4-22 to -23.

[50] *See, e.g.*, McCormick v. Jeffers, 637 S.E.2d 666, 669 (Ga. 2006) ("The question is whether . . . the witnesses can be said to have signed the will 'in the presence of the testator' within the meaning of O.C.G.A. § 53-4-20(b) . . . .").

[51] *See id.* (defining the line-of-vision standard as requiring that the testator be able to see the witnesses sign the will from her position).

[52] *Id.*

[53] *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 (AM. L. INST. 1999)).

testator's view of the witnesses' physical acts of signing, the court would likely invalidate the will due to improper attestation.[54]

While this standard adds a degree of flexibility by not requiring testators to personally observe the physical act of witnessing, its requirement that the witness be situated in a highly specific position relative to the testator imposes rigidity on the estate planning process. This is especially true in comparison to other less stringent approaches. For example, the Restatement of Property adopts the "conscious-presence test," which finds an attestation valid as long as the witness is "within earshot" of the testator "so that the testator knows what is occurring."[55] And the Uniform Probate Code allows for witnesses to sign "within a reasonable time" after seeing the testator sign.[56] Nonetheless, Georgia courts continue to adhere to the line-of-vision standard, causing complications for many wills in the state.[57] In *McCormick v. Jeffers*, the Supreme Court of Georgia even addressed the merits of the Restatement's "less rigid test" but nonetheless held that it lacked "authority to adopt it."[58] Thus, the court invalidated the testator's will because her witnesses left her room to sign, bringing them outside the testator's line of vision during their subscriptions.[59] In

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[54] *See id.* at 669–70 ("Because the evidence unequivocally establishes that [the testator] could not [see the witnesses sign], any presumption of proper execution . . . has been rebutted by clear proof that the will was not properly executed . . . . ").

[55] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 (AM. L. INST. 1999).

[56] UNIF. PROB. CODE § 2-502 (UNIF. L. COMM'N 2019).

[57] *See, e.g.*, Reed v. Roberts, 26 Ga. 294, 301 (1858) (holding a will invalid because it was signed beyond the possible "scope of the [immobile] testator's vision"); Glenn v. Mann, 214 S.E.2d 911, 916 (Ga. 1975) (detailing how an attestation would be invalid if a testator, "by reason of an obstruction to the view," could not have seen the witnesses sign by looking in their direction (quoting Gordon v. Gilmer, 80 S.E. 1007, 1008 (Ga. 1914))); Chester v. Smith, 677 S.E.2d 128, 130 (Ga. 2009) (holding a will invalid because the witnesses signed it in a bank while the testator remained sitting in a car in the bank's parking lot and thus "was unable to see the witnesses sign").

[58] *See McCormick*, 637 S.E.2d at 669 ("Whatever the merits of this less rigid test, we do not have the authority to adopt it.").

[59] *Id.*

the absence of a statutory amendment, Georgia courts are unlikely to allow greater flexibility beyond this rigid standard.[60]

C. THE FUNCTIONS OF WILLS FORMALITIES

The formalities for will execution that persist in Georgia and other states unquestionably impose rigidity upon estate planning.[61] Just as in our hypothetical, the attestation requirement is a frequent source of complications and litigation.[62] Though courts recognize that enforcing these formalities may undermine testamentary intent, they are nonetheless reluctant to excuse wills formalities due to the various functions that formalities serve in protecting that intent.[63]

Scholars classify the functions of wills formalities into four categories: a "cautionary" or "ritual" function, "a protective function," "an evidentiary function," and "a channeling function."[64] First, the ritual function primarily seeks to impart upon the testator the gravity of the testamentary act in order to ensure the genuineness of the bequests contained within the will.[65] The

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[60] *See id.* ("The language of a revised Code section such as OCGA § 53-4-20 must be construed to be consistent with existing law unless a contrary intent is clear from the language of the new Code section.").

[61] If estate planning could be done without any of the formalities described in Part IV, it would certainly be a less rigid and less secure procedure. *See* RADFORD, *supra* note 41, § 5:4 ("If no witnesses were required, so many frauds and forgeries would be perpetrated that doubt would be cast on all instruments presented for probate, even though no contest arose.").

[62] *See, e.g.*, Parker v. Melican, 684 S.E.2d 654, 656 (Ga. 2009) (holding the testator's codicil to be improperly witnessed when the witnesses merely signed the document upon request rather than observing the testator sign it). Failing to meet the law's requisite number of witnesses may also cause issues, even where the testamentary intent seems clear. For example, before his death, a decedent in New York had difficulty bequeathing his $7 million home to his same-sex partner of fifty-five years on the basis that only one witness signed his will. Nir, *supra* note 35.

[63] *See In re* Bryen's Estate, 195 A. 17, 20 (Pa. 1937) ("While decedent's mistake [in execution] is regrettable, it cannot be judicially corrected; the situation thus created must be accepted as it exists.").

[64] Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269, 271.

[65] *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941) ("Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value, since the general ceremonial

rationale behind this function is that requiring the testator to undergo the formal, strict ritual of signing a will in the presence of witnesses effectively puts the testator on notice that the document, by virtue of the signatures and attestation, will be legally binding upon the testator's death.[66] The law seeks to demonstrate the finality of the testator's actions through the ceremonial form of the execution procedure.[67]

Second, the requirement that wills be written and witnessed serves the evidentiary function by ensuring that some evidence of the testator's intent remains.[68] Because disputes over a will arise after the testator's death, the written will is crucial to a court's determination of the testator's intentions.[69] Third, wills formalities serve a channeling function by requiring a standardized format for the will, making it readily interpretable by a court.[70] Finally, the attestation requirement serves a protective function by decreasing the testator's susceptibility to fraud, duress, or undue influence.[71] Certain testators, through the onset of infirmities such as advanced age or diminished mental capacity, may risk falling victim to the

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precludes the possibility that the testator was acting in a casual or haphazard fashion." (footnote omitted)).

[66] *See* Banta, *supra* note 12, at 557 ("Will[s] formalities also seek to caution a testator that a document signed and attested will have legal effect when she dies.").

[67] *See* Jeffrey A. Dorman, Note, *Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule*, 30 QUINNIPIAC PROB. L.J. 36, 40–41 (2016) (suggesting that "some ceremonial performance [of execution and signature] is necessary to impress upon the testator the significance of the event").

[68] *See id.* at 41 ("[T]he evidentiary function is necessary to establish testamentary intent.").

[69] *See id.* ("The court can use the document to ascertain what the testator wanted, which is important since the deceased testator will be unable to testify about his or her wishes."). Of course, every will contest could be settled efficiently if a court could simply hear the testator's own testimony regarding intent. One could think of the formal will as the testator's proactively given testimony. *See* Banta, *supra* note 12, at 557 (outlining the importance of the evidentiary function served by formalities because wills have no effect "until after a testator has died and can no longer testify as to her intent.").

[70] *See* Crawford, *supra* note 64, at 287 (noting that wills formalities force "the transactor to take actions in a format that would be interpretable easily by a deciding judge, because the form of the transaction resembled similar transactions of that nature").

[71] *See* Banta, *supra* note 12, at 557–58 (explaining that "formalities are in place to ensure a testator is of sound mind and not under duress or undue influence when executing her will").

coercions of unscrupulous friends or family.[72] Likewise, the requirement that multiple witnesses be present with the testator during the will's execution essentially allows proponents of the will to present corroborating testimony that the testator freely exercised genuine intent.[73]

D. REMOTE EXECUTION COMPORTS WITH WILLS FORMALITIES

The Georgia General Assembly should consider permanent adoption of remote will executions because these executions can comport with Georgia's codified wills formalities while simultaneously furthering the objectives underlying the traditional functions. Most notably, the remote execution standard authorized by Executive Order No. 04.09.20.01 is a logical extension of the preexisting "line-of-vision" standard because the order requires that all remote executions be carried out via "real-time audio-video communication technology."[74] This satisfies the traditional functions by requiring that the witnesses and the testator can simultaneously communicate with and see one another, substituting virtual communication for "physical presence."[75]

Compared to video conferencing, a witness who is physically in the same room as the testator may be better equipped to see the rest of the room and to guard against externalities that may threaten

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[72] *See* RADFORD, *supra* note 41, § 4:8 (noting how testators' diminished "mental and physical state" can increase their dependence and make them susceptible to undue influence).

[73] *See* Gulliver & Tilson, *supra* note 65, at 8 ("[Witness attestation] affords some opportunity to secure proof of the facts of execution, which may have occurred long before probate . . . ."). Estate planners can also require witnesses to sign attestation clauses as further corroboration that the will was witnessed and executed properly. *See* Lamb v. Bryan, 223 S.E.2d 122, 124 (Ga. 1976) (holding that an attestation clause "creates a presumption that" a will "was executed in accordance with law"). Though the attestation clause creates this presumption, Georgia courts will not invalidate a will simply because it lacks such a clause or because the clause's execution had procedural deficiencies. *See* Glaze v. Lemaster, 613 S.E.2d 617, 619 (Ga. 2005) (holding that "deviation from the procedure set forth in the attestation clause does not serve in itself to invalidate the execution of the will").

[74] Ga. Remote Order, *supra* note 5.

[75] *Id.* The order explicitly pertains to any actions that, by Georgia law, are to "be signed, subscribed, executed, witnessed, attested, acknowledged, or affirmed *in the physical presence* of another individual." *Id.* (emphasis added).

the testator with fraud, duress, or undue influence.[76] Remote execution, however, can resolve this issue; for instance, prior to the commencement of the ceremony, presiding attorneys could direct the testators to pan their cameras around their room to demonstrate that they are acting free of coercion.[77] Guidance for this practice within the legal profession may already exist: similar premise-securing measures were implemented for the socially distant LSAT and Bar examinations during the COVID-19 pandemic.[78]

Implementing certain safeguards for remote will execution would render the distinctions between physical and virtual line-of-vision insignificant based on relevant Georgia precedent.[79] In a remote execution ceremony—unlike in *McCormick*, *Reed*, *Chester*, or *Glenn*[80]—the testator would maintain sight of the witnesses throughout the event, largely eliminating any uncertainties about attestation for witnesses who do not sign immediately after the will's execution. Additionally, traditional formalities

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[76] In many senses, the law favors attestations done in the same room as the testator. *See, e.g.*, *In re* Will of Jefferson, 349 So. 2d 1032, 1034 (Miss. 1977) ("An attestation made in the same room with the testator is prima facie good.").

[77] For a discussion of potential safeguards in remote will executions, see *infra* Part VI.

[78] ProctorU, a third-party company, proctored the remotely administered LSAT. *See Getting Ready for Your LSAT Exam*, LSAC, https://www.lsac.org/lsat/taking-lsat/getting-ready-your-lsat-exam (last visited Nov. 12, 2021) ("The LSAT is administered online through LSAC's LawHub site and proctored remotely by ProctorU.") ProctorU's guidelines required test takers to display their full rooms on camera prior to testing. *See* Jerankin, *Exam Day: What to Expect*, PROCTORU, https://support.proctoru.com/hc/en-us/articles/360043565051-Exam-Day-What-to-Expect- (last visited Nov. 12, 2021) ("Your proctor will ask you to show the 4 walls of your room as well as your desk space via your webcam."). *See also Testing Conditions for Remote Bar Exam – February 22–24, 2021*, PA. BD. L. EXAM'RS, https://www.pabarexam.org/pdf/203_205/221%20Exam%20Testing%20Conditions.pdf (last visited Nov. 12, 2021) (detailing the use of remote proctoring mechanisms for the Pennsylvania Bar Exam).

[79] The Georgia remote execution procedure allows the parties to maintain one another in their line of vision. *See* Ga. Remote Order, *supra* note 5 (allowing physical presence requirements to be met through the use of conferencing software "that allows the parties to communicate with each other simultaneously by sight and sound"). Despite its virtual nature, this requirement appears to meet the standard set forth by the Georgia Supreme Court in *McCormick*. McCormick v. Jeffers, 637 S.E.2d 666, 669 (Ga. 2006) ("[The testator] must be able to see the witnesses sign the will if she desired to do so without changing her place.").

[80] *See supra* notes 57–60 and accompanying text (discussing relevant Georgia cases in which testators and witnesses were physically near each other, but the testators were unable to view the witnesses directly).

notwithstanding, as law firms and other businesses carry on their operations via video-conferencing software,[81] the idea of staunchly mandating physical presence for the attestation of wills seems anachronistic and arbitrary. In this digital age, technology provides people with the capabilities to stay connected in ways that were unimaginable during the early age of wills formalities.[82] Such technology allows parties to recreate line-of-vision communication with those who may not be physically present for the signing. It is the legislature's responsibility to consider this capability when it reevaluates testamentary laws.

Remote execution comports with both existing Georgia standards and traditional wills formalities by furthering the functions that they serve. Regarding the ritual function, Executive Order No. 04.09.20.01 does not require an estate planner or testator to forfeit any of the solemnities that typically accompany the will's execution.[83] Because this function seeks to impart upon testators the legal significance of their actions, this function is typically fulfilled whenever testators are aware of the finality of their will.[84] Additionally, the greater ease and efficiency that remote will executions provide do not necessarily mean that the testator will fail to understand the gravity of the situation.[85] Rather, by requiring testators to demonstrate that their premises are secure and by maintaining the traditional routine components of the will

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[81] *See, e.g.*, David A. Lowe, *Trial by Zoom: A Strange but True Story of How One Lawyer Prepared for Court*, A.B.A. (June 24, 2020, 2:10 PM), https://www.abajournal.com/voice/article/the-strange-but-true-story-preparing-for-a-trial-by-zoom (detailing one attorney's preparations to try a case via video conference).

[82] *See* RADFORD, *supra* note 41, § 1:4 (detailing the history of statutes of wills that required in-person witnessing).

[83] *See* Ga. Remote Order, *supra* note 5 (requiring that all parties be able to communicate with each other "simultaneously by sight and sound," thus serving the ritual function in similar fashion to ordinary will execution); Gulliver & Tilson, *supra* note 65, at 5–6 (describing the ritual function of wills formalities meant to impress a sense of ceremony and finality on testators through specific procedures).

[84] *See* Gulliver & Tilson, *supra* note 65, at 6 (indicating how wills formalities allow the testator to "indicate finality of intention").

[85] *See* Banta, *supra* note 12, at 597 ("Just because something is easy and efficient does not mean that people cannot understand the legal significance of the act."). *But see* Horton & Weisbord, *supra* note 26, at 26 (suggesting that less formal, digital means of will executions "lack[] the gravitas necessary to impress upon the testator the legal significance of creating a will").

execution ceremony, the remote will execution procedure will likely succeed in conveying the significance of the situation.

Allowing remote execution also would not threaten the channeling function of wills formalities because it chiefly concerns the procedural acts of witnessing, not the actual form of the substantive bequests.[86] Though Georgia's executive order allows remote execution, it stops short of abrogating the statutory requirements that the will be written and subscribed (i.e., physically signed).[87] In fact, remotely executed wills can remain in the tangible paper form that probate courts are accustomed to receiving.[88] For example, during the video conference execution, the testator could send the witnesses copies of the signed will via fax or other electronic means, watch them physically write their signatures on the printed forms through video conferencing software, and then receive the fully executed documents back shortly thereafter.[89] Upon the testator's death, the probate court would receive the same hard copy will as they would have after an in-person will execution. In this sense, the document's attestation procedure would not compromise its ability to serve as an interpretable channel of testamentary intent.

Remote execution can also satisfy both the evidentiary and protective functions, and likely even improve these functions, in some respects. This satisfaction largely stems from the relative ease

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[86] The channeling function of formalities focuses on the channel or form that carries the substantive content of the document, rather than the substance of the document itself. *See* Crawford, *supra* note 64, at 287 (describing the channeling function as one that "forc[es] the transactor to take actions in a format that would be interpretable easily by a deciding judge, because the form of the transaction resembled similar transactions of that nature").

[87] *See* Ga. Remote Order, *supra* note 5 (requiring that the witnesses still "witness the signature" in remote executions).

[88] *See, e.g.*, *General Instructions Applicable to All Georgia Probate Court Standard Forms*, SUP. CT. OF GA. (July 2021), https://www.gasupreme.us/wp-content/uploads/2021/07/GPCSF1_0721.pdf ("To the extent practical, all material presented for filing in any probate court shall be typed, legibly written, or printed in black ink suitable for reproduction on opaque white paper. The paper shall measure 8½ inches x 11 inches, and be of a good quality, grade, and weight.").

[89] *See, e.g.*, Kan. Exec. Order No. 20-20 (Apr. 9, 2020), https://governor.kansas.gov/wp-content/uploads/2020/04/EO-20-20-Executed.pdf ("The signatory must transmit by fax or electronic means a legible copy of the entire signed document directly to the witness no later than the day after the document is signed."); *see also infra* Part VI (outlining potential best practices for remote execution).

with which video-conferencing software can record meetings.[90] With just the push of a button, a presiding attorney can record an entire will execution ceremony done through video conferencing, preserving it as evidence of the relevant parties' actions at the time of execution.[91] Through these video recordings, testators—in their own words—could establish that they had the requisite capacity,[92] that the contents of the will contained their testamentary intent, and that their actions were not subject to fraud, duress, or undue influence.[93] These recordings would improve upon the evidentiary function by eliminating a great deal of the uncertainty that courts often face when discerning the intent of deceased testators.[94] Recordings would also further the protective function in a similar fashion by creating a record of the interactions that took place over the course of the meeting, allowing courts to identify foul play with greater accuracy.

Some commentators have concerns about the idea of this recording practice, most notably that "camera-shy" testators may commit gaffes during a recorded execution that could cast doubt on a testator's capacity, and thus on the will's validity.[95] But with the

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[90] *See, e.g.*, *Starting a Local Recording*, ZOOM, https://support.zoom.us/hc/en-us/articles/201362473-Local-recording (last visited Nov. 12, 2021) (explaining how to start a local recording of a video conference on Zoom software).

[91] *See* Gerry Wayne Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 5–6 (1983) ("Proof of the due execution of the testator's will becomes more certain when substantiated by a video recording. For example, the videotape would show the testator declaring the instrument to be his last will and testament, the testator affixing his signature or mark upon the document, the required number of witnesses observing the will execution and their signing in the conscious presence of the testator.").

[92] *See* RADFORD, *supra* note 41, § 4:2 ("In order to have testamentary capacity, an individual must be capable of framing a decided and rational desire as to the disposition of his or her property.").

[93] *See* Beyer, *supra* note 91, at 27–28 (describing "potential uses" of a will execution videotape).

[94] *See id.* at 6–7 ("The videotape [of the will execution ceremony] would show not only the testator but also the document itself. This would be practically irrebuttable evidence that the writing claimed to be the testator's will was the very writing held in his hand during the will execution ceremony.").

[95] *See* Daniel S. Ebner, *Are Your Remote Signings Camera Ready?*, 108 ILL. BAR J. 14, 14 (2020) ("Perfectly competent and physically able clients get flustered during signings . . . . Meaningless on-camera gaffes like these may create substantial doubt about a deceased client's capacity.").

emergence of remote work in the United States on a major scale, these concerns may be overstated.[96] The probative value of video evidence of a will execution could outweigh the potential complications that may arise from taking such a recording. Additionally, in the interest of implementing safeguards, an authorizing statute could require video recordings of all remotely administered execution ceremonies by default, substantially reducing the likelihood that courts will scrutinize wills with execution videos.[97]

V. DEPARTURES FROM FORMALITY AND GUIDANCE FROM OTHER JURISDICTIONS

A. OTHER STATES' DEPARTURES FROM FORMALITY

In light of many states departing from traditional wills formalities, a Georgia statute authorizing remote will execution would not be a new or radical occurrence. For example, over half of the states allow for the use of holographic wills—wholly handwritten wills that may be admitted for probate, even without any witnesses' signatures.[98] Other states have adopted doctrines such as "harmless error," which allows courts to overlook execution errors to probate wills upon showings of "clear and convincing evidence of [testamentary] intent."[99] Furthermore, the law is slowly trending toward implementation of wholly electronic wills—wills memorialized entirely via digital media rather than the traditional,

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[96] *See, e.g.*, May Wong, *Stanford Research Provides a Snapshot of a New Working-from-Home-Economy*, STAN. NEWS (June 29, 2020), https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy/ ("We see an incredible 42 percent of the U.S. labor force now working from home full-time.").

[97] *See* Ebner, *supra* note 95, at 14 ("Should Illinois ever adopt a permanent law allowing remote . . . witnessing of estate planning documents, it likely will require signings to be video recorded."). For proposed conditions of a potential new statute, see *infra* Part VI.

[98] *See* Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 93 (2006) ("In just over half of the states, a will that qualifies as a holographic will can be admitted to probate without attestation." (footnote omitted)). Georgia is not one of these states; Georgia requires that all wills be witnessed by two or more competent witnesses. O.C.G.A. § 53-4-20 (2021).

[99] *See* Banta, *supra* note 12, at 560 ("[E]leven states have adopted the Harmless Error Rule . . . .").

tangible paper form.[100] In 2019, the Uniform Law Commission drafted a model Electronic Wills Act for state legislatures to consider,[101] and at present, multiple states have already enacted laws recognizing electronic wills.[102]

The existing regimes and ongoing changes in other jurisdictions are arguably far more substantial than this Note's proposed authorization of remote execution. They also increase the possibility of more substantial complications. Holographic wills, for instance, present a range of issues that traditionally attested wills do not face, a distinction that likely results from the absence of the traditional wills formalities' functions in holographic will execution.[103] Harmless error statutes, in their efforts to relieve some of the rigidities of the Wills Act, may eliminate bright-line standards to the point of promoting litigation or increasing the likelihood of fraud.[104] And despite the growing popularity of electronic wills, these documents face questions about security and substantially relaxed formalities.[105] Remote execution, on the other hand, need not sacrifice the established safeguards that formalities provide under Georgia's current testamentary statutes. Rather, it would

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[100] *See* Bridget J. Crawford, *Blockchain Wills*, 95 IND. L.J. 735, 755 (2020) ("The law is moving (and must continue to move) in the direction of recognizing wills that are 'written' in electronic form only.").

[101] UNIF. ELEC. WILLS ACT (UNIF. L. COMM'N 2019), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3b74160d-1525-2fe5-f3e5-6ee5dc416d3c.

[102] *See* Crawford, *supra* note 100, at 755 ("Four jurisdictions—Nevada, Arizona, Indiana, and Florida—have enacted laws that specifically recognize electronic wills."). The law in this area is developing rapidly; since Crawford's publication, Colorado and Utah have passed their own versions of the Uniform Electronic Wills Act, and other states are considering such legislation at the time of this writing. *See* Patrick Hicks, *E-Will: Everything You Should Know About Electronic Wills*, TR. & WILL (last visited Nov. 20, 2021), https://trustandwill.com/learn/e-will ("Utah and Colorado have also recently adopted the Uniform Electronic Wills Act . . . . Although e-wills are not yet valid in all 50 states, these first few early adopters are setting a trend for others to follow suit in the near future.").

[103] *See* Brown, *supra* note 98, at 124 ("[T]he chronic problems that beset holographic wills result, in large part, because [the ritual, evidentiary, protective, and channeling] functions have not been met.").

[104] *See* Horton & Weisbord, *supra* note 26, at 25 (describing the issues with the harmless error approach).

[105] *See id.* at 26 (describing electronic wills' shortcomings in the area of formalities and how their ability to be "created, altered, and deleted by someone other than the testator" presents fraud concerns).

add nuance to the current standards, offering increased estate planning accessibility without compromising safeguards to the extents that other jurisdictions arguably have.

B. REMOTE EXECUTION IN OTHER JURISDICTIONS

Prior to the onset of COVID-19, some state courts already grappled with loose concepts of remote execution. For example, in 2012 an Ohio appellate court had to determine whether a testator signed the will in question in the conscious presence of witnesses who watched her sign from another room via video monitor.[106] The court invalidated the will, finding that the plain language of Ohio's testamentary code precluded the use of "sights and sounds relayed through electronic means."[107] The court added that the witnesses were not in the "conscious presence" of the testator because, although they could see her sign via video recording, she could neither see nor hear them and thus did not understand their role in the will's execution.[108] Similarly, other courts have invalidated wills where the attesting witnesses merely heard the testator acknowledge their wills via telephone, reaffirming the importance of visual observation by witnesses.[109]

Like Georgia, most states passed some form of emergency authorization for either document notarization or will execution in the midst of the pandemic.[110] Just as testamentary codes vary from state to state, so too do their emergency orders; some states require the testator to display photo identification to their witnesses in

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[106] Whitacre v. Crowe, 972 N.E.2d 659, 661 (Ohio Ct. App. 2012).

[107] *Id.* at 662. For an overview of the relevant Ohio statute, see *infra* note 121.

[108] *See Whitacre*, 972 N.E.2d at 664 ("The plaintiffs presented evidence that the witnesses were not in [the testator's] range of vision when they subscribed and attested the will . . . and further that she could not hear what they were doing and, therefore, had no understanding that the witnesses were signing the will.").

[109] *See, e.g.*, *In re* Estate of McGurrin, 743 P.2d 994, 1002 (Idaho Ct. App. 1987) ("Accordingly, a telephonic acknowledgement by the testator, without more, will not suffice."); *see also In re* Will of Jefferson, 349 So. 2d 1032, 1036 (Miss. 1977) (rejecting the "conclusion that a witness may attest a will out of the presence of the testator by ascertaining by telephone conversation with the testator, that he had signed that same will").

[110] *See Emergency Remote Notarization and Remote Witnessing Orders*, *supra* note 6 (providing a list of emergency remote witnessing orders by state).

certain instances, and others require attorney supervision.[111] Remote execution's earliest forms, however, were not exclusively COVID-19-related solutions; both Nevada and Florida had already passed remote execution legislation prior to the onset of the pandemic.[112] Nevada's statute deems witnesses to be "in the presence" of the testator if they are either in the "same physical location" or "[d]ifferent physical locations but can communicate with each other by means of audio-video communication."[113] In comparison, Florida's statute allows for electronic signatures "by means of audio-video communication technology" when a notary public supervises the witnessing, subject to certain criteria.[114]

These legislative reforms are not without complication or controversy, though. Estate planners, particularly those practicing in states without remote execution authorization, expressed concern over Nevada's statute.[115] Florida's early endeavors to pass will act reforms were initially unsuccessful, ending when Governor Rick Scott vetoed the proposed bill in 2017.[116] In vetoing the legislation, Governor Scott suggested that the bill had promise but needed "to strike the proper balance 'between providing safeguards'" and "incorporating technological options that make wills financially accessible."[117] In 2018, the Florida legislature revisited the matter, and in 2019, presented a new bill with criteria

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[111] *See, e.g.*, Horton & Weisbord, *supra* note 26, at 27 (describing the additional requirements for remote execution in New York, Kansas, and Connecticut).

[112] NEV. REV. STAT. § 133.088 (2019); FLA. STAT. § 732.522 (2019).

[113] NEV. REV. STAT. § 133.088.

[114] FLA. STAT. § 732.522.

[115] *See generally* Kyle B. Gee, *The "Electronic Wills Revolution: An Overview of Nevada's New Statute, The Uniform Law Commission's Work, and Other Recent Developments*, 28 PROB. L.J. OHIO 126 (2018) (detailing the controversies of Nevada's law). The article was more concerned with the law's broad definition of probate jurisdiction, which was incompatible with Ohio law at the time, rather than its remote execution allowance. *See id.* at 128 ("The third and perhaps most controversial aspect of Nevada's law is its broad stake on choice of law and original probate jurisdiction.").

[116] *See* Crawford, *supra* note 100, at 767–68 (detailing Governor Scott's reasons for vetoing the 2017 bill, including the governor's shared concerns with the Florida Bar Association that the bill lacked safeguards against fraud and lacked a mechanism for ensuring the identities of the witnesses, among others.).

[117] *Id.* (quoting Letter from Rick Scott, Governor, to Ken Detzner, Sec'y of State (June 26, 2018), https://www.flgov.com/wp-content/uploads/2017/06/HB-277-Veto-Letter.pdf).

for the remote witnessing requirement.[118] Most notably, these criteria included supervision by a notary public, authentication as part of a notarial session, and the testator's acknowledgement of a valid signature to the witnesses.[119]

Florida's revisitation of remote will legislation demonstrates that legislatures can strike a proper balance between accessibility and security, which suggests that concerns about this regime may be overstated. Additionally, following the pandemic's compelled revolution of technology use in the legal profession, the idea of remote execution seems far less controversial, particularly given the situation's urgency and the widespread passage of similar emergency authorizations.[120] As a result, a growing number of states may begin exploring the option of remote execution. For example, in Ohio—a state with laws expressly disallowing remote execution[121]—some attorneys and judges called for the adoption of remote execution legislation during the pandemic.[122] As some states reexamine the role of formalities in the post-COVID-19 digital age, similar proposals in other states may become a trend. Therefore, the Georgia General Assembly should monitor developments in other states with great attention, for Georgia has an opportunity to be at the forefront of modernizing testamentary law to meet the demands of the digital age.

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[118] See *id.* at 769 (describing the legislative process of the Florida wills statute and its imposed conditions for remote execution).

[119] FLA. STAT. § 732.522.

[120] *See Emergency Remote Notarization and Remote Witnessing Orders, supra* note 6 (listing emergency remote witnessing orders by state).

[121] *See* OHIO REV. CODE ANN. § 2107.03 (West 2021) ("'[C]onscious presence' means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.").

[122] *See* John F. Furniss III, *Emergency Legislation to Facilitate Execution of Estate Planning Documents: Efforts Are On-Going*, 30 OHIO PROB. L.J. (2020), https://us.practicallaw.thomsonreuters.com/Document/I59c63052dae811eaa19184726a7f86e7/View/FullText.html (detailing the proposal presented by a committee of Ohio state bar association members and state probate judges for an emergency act allowing remote execution so long as the software used allowed for the testator and the witness to "verbally communicate and visually observe one another contemporaneously").

VI. PROPOSED LEGISLATIVE AMENDMENT CONDITIONS

Using the current requirements of Executive Order No. 04.09.20.01, Georgia's wills formalities, and the approaches taken by other jurisdictions, Georgia legislators can craft a model amendment that would balance the flexibility available in remote execution with the interest in safeguarding the testator's intent. In April 2020, the State Bar of Georgia's Fiduciary Law Section committee released a suggested list of best practices to help attorneys abide by the executive order authorizing remote execution.[123] This list of best practices includes various conditions for the remote execution ceremony, including simultaneous audio-video communication technology, supervision by a notary public, and personal identification of all involved parties, among other criteria.[124] The following proposed conditions will incorporate some of the committee's suggested practices.[125]

As already prescribed in Georgia's executive order, any software used should allow for contemporaneous audio-video communication so that the testator and all relevant parties can see, hear, and communicate with one another.[126] As a condition to this, the law should require that any execution carried out over such software be recorded. Video recording done through software can serve the traditional evidentiary function by providing a tangible record for the court that the will was in fact executed before attesting

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[123] *See* RADFORD, *supra* note 41, § 1:8 ("At the request of the State Bar of Georgia, the Fiduciary Law Section ad hoc committee produced a set of 'Suggested Procedures for Remote Notarization and Attestation of Estate Planning Documents in Georgia.'").

[124] *Id.*

[125] The committee's list concludes with a suggestion that the documents be re-executed using traditional procedures when possible. *See id.* ("When feasible, a document signed pursuant to these procedures should be re-executed under ordinary procedures at a later time."). For the reasons previously mentioned in this Note, Georgia testamentary law should be amended to accept remote executions as routine, rather than to require in-person re-executions.

[126] *See* Ga. Remote Order, *supra* note 5 (allowing only software that enables the parties to "communicate with each other simultaneously by sight and sound"); *see also* RADFORD, *supra* note 41, § 1:8 ("The [suggested procedures] are as follows: . . . the audio-video communication technology . . . must allow for simultaneous (realtime) communication among the individual signing the document ('the signer') and the witness(es) and/or notary public ('the witness(es)') by sight and sound.").

witnesses.[127] Such records could have the positive effect of lessening frivolous probate challenges by decreasing the ambiguity surrounding the circumstances of execution. Making the practice routine could also reduce the likelihood of courts drawing adverse inferences from harmless miscues that may ordinarily accompany video recordings.[128]

The Georgia General Assembly should also require a degree of supervision by an attorney or notary public, as is required in Georgia's Suggested Procedures and by other states.[129] On camera, these individuals should attest that they are physically located within the state of Georgia and then should provide identification and proof that they are authorized to carry out their respective certifying roles within the state of Georgia.[130] This step would serve the dual purposes of lessening the likelihood of fraud while also firmly establishing Georgia as the state of original probate jurisdiction, alleviating some of the concerns arising from other states' wills law reforms.[131] After self-identifying, the attorney or notary public should next be required to assess the capacity of the testator at the time of the execution by asking the testator a series of identifying questions before proceeding to confirm the testator's personal identity and the types of documents to be signed.[132] Upon

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[127] *See supra* notes 90–94 and accompanying text.

[128] *See* Ebner, *supra* note 95, at 14 (describing the complications that on-camera gaffes by testators could present for proving the validity of wills).

[129] *See* RADFORD, *supra* note 41, § 1:8 ("For notarization, the notary public must be an attorney licensed to practice law in Georgia or be operating under the supervision of an attorney licensed to practice law in Georgia."); Conn. Exec. Order No. 7Q (Mar. 30, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7Q.pdf?la=en ("[O]nly an attorney admitted to practice law in the state of Connecticut and in good standing may remotely administer a self-proving affidavit to a Last Will and Testament . . . ."). For Florida's notarial requirements, see *supra* note 114.

[130] *See* RADFORD, *supra* note 41, § 1:8 ("The signer should be physically located in Georgia during the [execution] session.").

[131] *See* Gee, *supra* note 115, at 129 (noting the controversy behind Nevada's claims of original probate jurisdiction "regardless of whether the decedent testator had any nexus at all to [the state]").

[132] *See, e.g.*, Kan. Exec. Order, *supra* note 89 ("The signatory must affirmatively state on the two-way audio-video communication what document the signatory is signing."). Other questions may be appropriate at this time as well. *See* Crawford, *supra* note 100, at 770 (highlighting that Florida's statute requires the notary public to ask the testator certain questions to determine their capacity, including whether the person is under the influence of

verifying the testator's identity and capacity to create a will, the attorney or notary public should then ask the testator to show 360-degree footage of the room in which they are executing the will to demonstrate that there are no individuals in the room who could be covertly coercing the testator.[133] At this point, the attorney or notary public should have the attesting witnesses carry out a similar process, requiring them to identify themselves, attest to their location within the state of Georgia, and acknowledge their understanding of what types of documents the testator is signing. By requiring that the execution be supervised by individuals trained in the proper procedures of execution, the new law would maintain the security safeguards sought after in wills formalities while also improving efficiency in the meeting.

The new law should also clarify the requisite form of the will document. In the absence of a statute expressly authorizing electronic wills in Georgia—which this Note does not call for—the will itself must retain its traditional paper form. This requirement should not be problematic, though, because the presiding attorney or law firm could arrange to have the signed copies of the will faxed or scanned to the relevant parties for all to add their signatures to the central document.[134] To ensure that the testator observes the witnesses and notary public sign and acknowledge the documents, the law should require that this be done with all relevant parties on camera to satisfy Georgia's line-of-vision standard.[135] Alternatively, signing could be accomplished by mail if the documents are sent and received by all relevant parties prior to the execution, signed and witnessed on camera, and then mailed back to the testator for safekeeping.[136] Provided that the witnesses and notary public have

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alcohol or drugs, has any physical or mental conditions, or requires assistance with daily care).

[133] This practice should work similarly to the LSAT practice described above. *See supra* note 78.

[134] The Georgia Suggested Procedures call for this approach. *See* RADFORD, *supra* note 41, § 1:8 ("After signing, the signer should transmit (by electronic communication, fax, or courier) a legible copy of the entire signed document directly to the witness(es) on the same calendar day that the signer signs.").

[135] *See supra* notes 51–54 and accompanying text.

[136] If using physical mail, it is suggested best practice that the attorney include sticky notes indicating where parties are to sign and a cover letter explaining the process in detail to mitigate the possibilities of the testator and witnesses getting confused, Ebner, *supra* note

possession of the physical documents at the time of execution and that the testator and witnesses can observe each other signing the document on camera, the process would arguably comport with Georgia's existing standards.[137]

Furthermore, it may be best practice (though perhaps not necessary to be codified into law) to have the witnesses sign attestation clauses affirming their understanding of the remote execution procedures and the valid execution of the will.[138] Although a video recording preserves a verbal acknowledgment from the witnesses at the time of the execution, the signed attestation clause provides further evidence that the witnesses understand the nature of the document, a requirement for valid attestation.[139] Upon the conclusion of the execution ceremony, the attorney could then keep an electronic record of the testator's executed documents and will execution ceremony video and could send the video to the testator for safekeeping as well. This recordkeeping practice would ensure that, upon the probate of the will, the testator's family would have sufficient proof to demonstrate the valid execution and attestation of the will.

VII. CONCLUSION

The COVID-19 pandemic forced our society to adapt in previously unimaginable ways. The use of remote will execution is but one example of these adaptations. Widespread remote will execution arose in the face of tragedy and adversity to provide a safe option for people to effectuate their testamentary intent in times of

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95, at 14–15, though this practice could also "lead to accusations that [the attorney] encouraged [the] client not to read the document and to just 'sign here,'" *id.* at 15. Additionally, attorneys and their staffs should plan ahead and be familiar with all aspects of the execution. *Id.*

[137] *See supra* Section IV.B.

[138] At present, Georgia does not require the use of attestation clauses to validate a will with clear testamentary intent, but attestation clauses do have their advantages for estate planners. *See* Miles v. Bryant, 589 S.E.2d 86, 87 (Ga. 2003) ("[P]roper attestation requires no particular form and proper attestation is not dependent upon the existence of an attestation clause . . . ."). For further discussion of attestation clauses, see *supra* note 73.

[139] *See, e.g.*, *In re* Estate of Griffith, 30 So. 3d 1190, 1194 (Miss. 2010) ("[W]e find that an attesting witness must have some knowledge that the document being signed is, in fact, the testator's last will and testament.").

uncertainty and fear. Although remote will execution largely emerged within the specific context of the pandemic, it should continue to be an option after the immediate effects of the pandemic subside.

Given the inherent nature of wills disputes, remote will executions carried out under emergency authorization may pose unforeseen issues that could materialize years from now,[140] but their viability for individuals needing greater flexibility in will execution should not be overlooked. The option of remote execution would provide an alternative for Georgians who may otherwise lack the ability to execute their wills in person. With the proper conditions and safeguards in place, permanent authorization of such a regime would help Georgians avoid intestacy. Whether in unprecedented times or not, it would be a worthy endeavor for the Georgia General Assembly to take advantage of modern technological capabilities to protect the testamentary freedom of its constituents.

[140] Courts necessarily do not become aware of will deficiencies until the will is offered for probate when the testator dies, which may come many years after a will's execution. *See, e.g.*, Martina v. Elrod, 748 S.E.2d 412, 413 (Ga. 2013) (determining the validity of a will that had been executed nearly fifteen years earlier).