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VIDEOTAPE AND THE PROBATE PROCESS:
The Nexus Grows

GERRY W. BEYER*
WILLIAM R. BUCKLEY**

The legal profession, steeped in tradition and precedent, is often leery of change. For example, the legal community utilized scriveners until three hundred years after the development of the Gutenberg flatbed printing press, and legal documents continue to ooze lawyerisms, tautologies, and other language that has little, if any, practical value. The profession's ability to serve its primary purpose of facilitating the maintenance and smooth functioning of society is hindered by its failure to avail itself of technological and societal developments. Only by embracing and developing new techniques will attorneys be equipped adequately to provide clients with competent and complete legal services.

One of the newly developed techniques readily available to attorneys is videotape recording. In 1969 a Florida appellate court became the first court to rule on the admissibility of videotaped evidence. Since then, the use of videotape in the legal setting has blossomed. This medium has been increasingly utilized in criminal cases as evidence of the defendant's statements, police


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“sting” operations,7 line-ups,6 crime scenes,9 and statements of victims of child sexual abuse.10 In the civil arena, video depositions,11 “day-in-the-life”


documents, and videotapes of accident scenes and reconstructions routinely have been admitted into the record. Moreover, entire civil and criminal trials are regularly videotaped and presented to juries in Ohio. Legal commentators have also analyzed videotape applications for tax appeals and land condemnation cases.

In the early 1980s, commentators began suggesting that videotape also has a place in the probate process. As the decade progressed, those suggestions expanded into recommendations. Since 1983, at least fifteen articles have been devoted exclusively to discussion on the potential uses of videotape in estate planning.

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15. MacHaffie, Videotaping of Property Tax Appeals, In Focus (Summer 1985), at 23.


17. See, e.g., Hurley, Taking Stock of Videotape Technology, DOCKET CALL, Fall 1982, at 5 (visual aids would help to accurately record will execution). McCrystal & Maschari, supra note 14, at 239, 249 (audio-visual aids will help clarify and correct faulty memories); Comment, Videotape As a Tool in the Florida Legal Process, 5 NOVA L.J. 243, 248 (1981) (videotaped will execution would "preserve the intent, competence and volition of the parties"). Cf. T. ATKINSON, Wills § 63, at 296 (2d ed. 1953) (possible use of phonographic record or talking moving picture).

18. Beyer, Avoiding Will Contests By Videotaping the Will Execution Ceremony, EST. PLAN. DEV. FOR TEX. PROF. (July 1984), at 1; Beyer, Video Requiem: Thy Will Be Done, TR. & EST. (July 1985), at 24; Beyer, Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes, 15 ST. MARY'S L.J. 1 (1983); Beyer, Videotaping Will Executions, 2 AUDIO EST. PLAN. 4 (Aug. 1985); Buckley, Devising Videotaped Will Statutes: A Primer, BARRISTER (Spring 1986), at 37; Buckley, Indiana's New Videotaped Will Statute: Launch-
At least 121 video companies in the United States belong to two national organizations specializing in legal videotaping. The National Shorthand Reporters Association offers a Certified Legal Video Specialist program to help preserve professional quality in the field. Progressive advertisements for videotaping firms frequently include the use of video in the probate context as one of the available services.

Despite the increasing availability and apparent popularity of videotape recordings, only a limited number of cases exist in which a videotape was used in a probate action. This does not, however, reflect poorly upon the value of probate video. Instead, the lack of reported decisions is likely due to one or more of the following factors:

19. These video businesses are members of the National Network of Legal Video Companies, Inc., in Cherry Hill, New Jersey, and the National Forensic Video Association in Richardson, Texas.


(1) A sufficient basis already exists under current law to support the admissibility of videotape in certain contexts;\(^23\)
(2) Because videotape was not used in the probate process until very recently, testators who have used video have yet to die;
(3) The existence of the videotape itself ultimately reduces litigation;\(^24\)
(4) The failure of an attorney to prepare a videotape of the will execution ceremony under circumstances where the reasonably prudent attorney would do so does not lead to malpractice liability in most jurisdictions because the lack of privity between the attorney and the intended will beneficiaries bars the action;\(^25\)
(5) Many individuals, already disturbed by the estate planning process and unpleasant thoughts about death,\(^26\) are fearful of appearing on camera and may prefer to forego using videotape techniques.

The nexus between videotape and the probate process is rapidly growing. This article will analyze this relationship by examining how videotape may be used in the probate process, the ways in which potential barriers to videotape admissibility may be overcome, and the evidentiary requirements that must be satisfied before a videotape may gain admission into evidence. This article will then discuss a survey, conducted by the authors, of probate judges and review the limited legislation, existing or proposed, concerning the use of videotape in the probate process. Finally, the authors will speculate on the future use of videotape in probate actions.

**Overview of Videotape in the Probate Process**

**Uses of Videotape**

**As Evidence**

A properly prepared videotape of the will execution ceremony may prove indispensable in discouraging will contest actions or ultimately winning them if the contestant proceeds with the suit. The videotape may serve a useful evidentiary function in demonstrating:

(1) Proper execution of a will, such as showing compliance with all will formalities under state law;

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23. See *infra* notes 92-115 and accompanying text.
24. See, e.g., Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 St. Mary's L.J. 1, 38-39 (1983); Tinsman, *Avoiding Probate Litigation in the Future in Connection with Drafting Wills and Trusts*, in State Bar of Texas Will Drafting J-8 (1989) ("most valid way to avoid a will contest ... is to do the same by means of a video").
26. See Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 Iowa L. Rev. 376, 377 (1969) ("personal death is a thought modern man will do almost anything to avoid").
(2) Testamentary capacity because the testator’s appearance, demeanor, and actions are preserved for a more accurate determination of testamentary capacity by the trier-of-fact;\(^{27}\)

(3) Testamentary intent by showing close-up views of each page of the will to assure that the document presented for probate is the same as the one present during the execution ceremony;

(4) Contents of the will because a video recording of a written will would reveal alterations, deletions, and other tampering;

(5) Absence of undue influence or fraud because the testator’s appearance and actions, as well as surrounding environment, are preserved on tape;\(^{28}\) and

(6) Correct interpretation and construction of the will through the testator’s statements made contemporaneously with the will execution which are useful to resolve ambiguities in the will.\(^{29}\)

As Testamentary Instrument

A more progressive use of videotape in the probate process is to utilize the tape itself as a testamentary instrument, as the “document” that disposes of the testator’s property.\(^{30}\) There are, of course, obstacles to such use. For example, wills normally must be in writing and contain the signatures of the testator and attesting witnesses.\(^{31}\) As discussed later in this article, these barriers may be overcome because they were erected at a time when videotape was far beyond the imaginations of those who formulated the requirements of a valid will.

A videotaped will is more difficult to alter than a written document. Anyone with correction tape or fluid, scissors, a photocopier, and a bit of evil ingenuity can alter a written will. However, more sophisticated equipment and skills are needed to make undetectable changes to a videotaped will. Accord-

\(^{27}\) *But see Trautwein v. O’Brien*, No. 88AP-616, slip op. (Ohio Ct. App. 1989) (LEXIS, Ohio Library) (videotape of will execution ceremony “most compelling evidence presented on the issue of testamentary capacity,” with court finding lack of requisite capacity); *In re* Purported Last Will and Testament of Stotlar, CA No. 1149 (Del. Ch. 1987) (LEXIS, Del. library), aff’d without opinion, 542 A.2d 358 (Del. 1988) (videotape of will execution ceremony showed that testatrix “did not have the testamentary capacity to recollect or understand the nature of the property that she was bequeathing”).

\(^{28}\) *But see In re* Estate of Seegers, 733 P.2d 418, 421-22 (Okla. Ct. App. 1986) (videotape of will execution ceremony supported finding of undue influence).


\(^{31}\) English Statute of Wills, 32 Hen. 8, ch. 3 (1540). See, e.g., CAL. PROB. CODE § 50 (Deering 1974) (wills generally require writing); N.Y. EST. POWERS & TRUSTS LAW 3-2.2 (McKinney 1980) (writing required for valid will). See generally T. ATKINSON, *supra* note 17, § 63.
ingly, a videotaped will would strengthen the testator’s ability to place his testamentary desires beyond the reach of others, thus satisfying the ultimate purpose behind most will formalities—the protection and preservation of the testator’s intent.\(^2\)

**Advantages of Videotape**

Using a videotape as evidence of the will execution ceremony or as the will itself has tremendous advantages over the use of other evidence and types of documents. First, an unaltered videotape is highly accurate. The tape reflects the events exactly as they occurred during the execution ceremony thus eliminating the necessity of relying upon witnesses whose memories fade and impressions change as time passes.\(^3\) Likewise, the tape can serve as the testator’s statement of the disposition of his estate without the intervention of an attorney or other scrivener.

In addition, the testimony of witnesses and the reading of a written will are incomplete views of the subject under evaluation—the testator’s last wishes. A videotape of a will execution ceremony preserves valuable nonverbal evidence such as demeanor, voice tone and inflection, facial expressions, and gestures. This type of evidence may be crucial in determining such issues as testamentary capacity or freedom from undue influence. Similarly, using the videotape as the will assures a firm connection between the testator and the actual words used to effectuate his intent.

A third significant advantage of videotaped ceremonies and videotaped wills is their tendency to act as deterrents to will contest actions. The testator is the key witness in will contest actions, but of course, he is beyond the scope of judicial process at the time his testimony is needed.\(^4\) Fortunately, however, videotape can preserve this crucial testimony. This evidence is especially vital to prepare when the testator is leaving property in an unusual manner (e.g., to a friend or charity to the exclusion of the spouse or children), or when the testator has some type of disability not affecting testamentary capacity (e.g., a testator who is blind, illiterate, or paralyzed by a stroke), but which may give unhappy heirs an incentive to contest.

Finally, because “facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life,”\(^5\) probate video can help the testator, his survivors, the court, and the jury better cope with this arduous task. The testator may feel more confident that his desires will be carried

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32. See generally Nash, *The Videotape as a Will: Valid and Valuable, In Focus* (Summer 1985), at 3, 4.
33. See generally McCrystal & Maschari, *supra* note 14, at 249-52 (potential inaccuracies of human memory creates inconsistencies, bias, prejudice and inaccuracy which slow the administration of justice).
out since there is more substantial evidence of his intent than a mere written document. The survivors may gain solace from viewing the testator delivering his final message—a last memory of the testator that is preferable to that of the funeral. Finally, the court and jury are more likely to believe what they see and hear on a videotape than what is only in writing. Thus, a will disinheriting a needy spouse or child is more likely to stand when the videotape clearly shows the testator's capacity and intent.

_Barrers to Videotape Admissibility in Probate_

Videotaped wills must negotiate a treacherous gauntlet of evidentiary restrictions to be admitted either as evidence of the ceremony or, more particularly, as the will itself. Although the probate obstacles are somewhat more deeply entrenched than those applicable to visual evidence in general, the majority of these can be overcome.

_The Writing Requirement and Nuncupative Wills_

Attempts to utilize videotape as a substitute for a written will, without authorizing legislation, are doomed within the prevailing precedential framework. The writing requirement is anchored by centuries of case law, with American and English probate statutes consistently requiring a written will in all but exceptional circumstances.

Nuncupative wills are valid under many statutes, although historically disfavored by the courts due to their vulnerability to fraud and perjury during

36. Cf. Swickard, _Henry Ford's Video Asks No Fuss Over Will_, Detroit Free Press, Sept. 24, 1988, at 1, col. 1 (Henry Ford II prepared a videotape one week after executing his will and trust to explain reasons behind his distribution decisions).

37. See, e.g., Blacksher Co. v. Northrup, 176 Ala. 190, 57 So. 743, 744 (1911) (will must be in writing to be effective); _In re Carey's Estate_, 56 Colo. 77, 136 P. 1175, 1176 (1913); Hatheway v. Smith, 79 Conn. 506, 65 A. 1058, 1060-62 (1907); Noble v. Fickes, 230 Ill. 594, 82 N.E. 950, 951 (1907) (first requirement for valid will is writing); Gump v. Gowans, 226 Ill. 635, 80 N.E. 1086, 1087 (1907); Steinkuehler v. Wempner, 169 Ind. 154, 81 N.E. 482, 483 (1907); Pyle v. East, 173 Iowa 165, 155 N.W. 283, 285 (1915); Garnett v. Foston, 122 Ky. 195, 91 S.W. 668, 670 (1905); Nunn v. Ehler, 218 Mass. 471, 105 N.E. 163, 164 (1914); Horn's Estate v. Bartow, 161 Mich. 20, 125 N.W. 696, 697 (1910); Gordon v. Parker, 139 Miss. 344, 104 So. 77, 77-78 (1925); _In re Charles' Estate_, 118 Neb. 634, 225 N.W. 869, 870 (1929); Stevenson v. Earl, 65 N.J. Eq. 721, 55 A. 1091, 1093 (1903); _In re Stinson's Estate_, 228 Pa. 475, 77 A. 807, 807-09 (1910); Wilson v. Craig, 86 Wash. 465, 150 P. 1179, 1180 (1915).


Most states recognize nuncupative wills as an exception to the writing requirement if certain criteria are met. See, e.g., _Cal. Prob. Code_ § 54 (Deering 1974) (oral will may be made by one in active military service or in peril of death); _N.Y. Est. Powers & Tr. Law_ § 3-2.2 (McKinney 1981) (nuncupative will valid if specified requirements satisfied); _Tex. Prob. Code_ § 65 (Vernon 1980) (nuncupative will valid if made in last sickness).
probate. Nuncupative wills have most frequently been used by soldiers or sailors who become fatally wounded or injured during active duty. Generally, nuncupative wills have been accepted when the testator suffered from a final illness from which he did not recover. The malady, according to some rules, must have placed the testator in extreme distress, such that death appeared imminent. The better rule would permit nuncupation if the testator reasonably anticipated that his affliction was fatal and death was imminent, although the testator need not have been suffering severely at the time the testamentary words were spoken. In any event, death must actually occur as a result of the sickness, and the oral testament must be reduced to writing within the statutorily prescribed period (normally a matter of days).

Most nuncupative will statutes limit the use of oral wills to dispose of personal property. This limitation arises from the common law under which real property passes only by written will, but personalty may be bequeathed

39. Dorsey v. Sheppard, 12 G. & J. 192, 198 (Md. 1841); In re Yarnall, 4 Rawle 46, 62 (Pa. 1833); Godfrey v. Smith, 73 Neb. 756, 103 N.W. 450, 454 (1905) (nuncupative wills suspect and subject to strict statutory compliance); In re Miller's Estate, 47 Wash. 253, 91 P. 967, 968 (1907) (nuncupative dispositions not favored and must comply with statutory construction)


41. In re Dreyfus' Estate, 175 Cal. 417, 165 P. 941, 941 (1917); Harrington v. Stees, 82 Ill. 50, 53 (1876); Irwin v. Rogers, 91 Wash. 284, 157 P. 690, 691 (1916). See also IND. CODE ANN. § 29-1-5-4(a) (Burns 1972); MODEL EXECUTION OF WILLS ACT § 6.

42. IND. CODE ANN. § 29-1-5-4(a) (Burns 1972) ("imminent peril of death"). See also Sykes v. Sykes, 2 Stew. 364, 369 (Ala. 1830); Scaife v. Emmons, 84 Ga. 619, 10 S.E. 1097, 1097-98 (1890) (nuncupation must be made when testator "in extremis" with no opportunity to write will); Carroll v. Bonhan, 42 N.J. Eq. 625, 9 A. 371, 371 (1887) (oral will must be made in last sickness as necessity); Prince v. Hazzleton, 20 Johns. 502, 514 (N.Y. 1822); In re Shover's Estate, 258 Pa. 70, 101 A. 862, 862-63 (1917) (where under circumstances testator capable of dictating will to writing, oral will held invalid); In re Rutt's Estate, 200 Pa. 549, 50 A. 171, 173-74 (1901); In re Yarnall, 4 Rawle 46, 65 (Pa. 1833); Jones v. Norton, 10 Tex. 120, 121-22 (1853); Winn v. Bob, 30 Va. 140 (1931). Cf. Harrington v. Stees, 82 Ill. 50, 53-54 (1876); Baird v. Baird, 70 Kan. 564, 79 P. 163, 166-67 (1905) (noting "last sickness" not required for valid oral will at common law); Godfrey v. Smith, 73 Neb. 756, 103 N.W. 450, 454-55 (1905) (oral will valid if made in last sickness even if testator had ability or time to make or dictate written will); In re Miller's Estate, 47 Wash. 253, 91 P. 967, 968 (1907) (additional requirements for valid oral will imposed by caselaw not necessary if statute satisfied).

43. Baird v. Baird, 70 Kan. 564, 79 P. 163, 166-67 (1905) (last sickness need not be testator's "last breath" or prevent him from making written will); In re Miller's Estate, 47 Wash. 253, 91 P. 967, 968 (1907).

44. Baird v. Baird, 70 Kan. 564, 79 P. 163, 166 (1905) (last sickness only requires that nuncupation occur during illness from which death ultimately results); In re Miller's Estate, 47 Wash. 253, 91 P. 967, 968 (1907) (quoting Baird). See also IND. CODE ANN. § 29-1-5-4(a) (Burns 1972).

45. Baird v. Baird, 70 Kan. 564, 79 P. 163, 165 (1905) (ten days in accordance with statute); Kellner v. Hagood, 39 Ohio App. 351, 177 N.E. 637, 638 (1930) (ten days in compliance with statute). See also IND. CODE ANN. § 29-1-5-4(a)(2) (Burns 1972) (30 days); MODEL EXECUTION OF WILLS ACT § 6(i)(b) (30 days).

46. See, e.g., IND. CODE ANN. § 29-1-5-4(3)(b) (Burns 1972) (only personal property up to one thousand dollars in value may be disposed of by nuncupative will); MODEL EXECUTION OF WILLS ACT § 6(2).

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orally. Dollar limitations also apply under most nuncupative will statutes. Nuncupative wills are subject to the most stringent documentary requirements, and strict compliance with statutory precepts is mandated.

Videotaped wills arguably qualify as nuncupative wills because the recording is verbal as well as visual. Under appropriate circumstances, especially if the testator is too ill to execute a written document, the videotape provides excellent corroboration of a subsequently transcribed writing. Testamentary capacity and intent apparent in the recorded images and soundtrack might easily dispel a will contestant’s allegations that a severe, ultimately terminal affliction had substantially impaired the testator’s mental faculties. The recording of the oral testament as actually spoken to the witnesses would facilitate probate of nuncupative wills much more effectively than the questionable memories of witnesses hastily gathered to hear the testator’s final words. Because the objective of the current transcription requirement is to render an accurate representation of the testator’s intentions and oral statements, a videotape undeniably would be more reliable.

From a practical perspective, however, most wills offered for probate are formulated when the testator was healthy. Few wills result from “deathbed declarations,” although historically testamentary disposition occurred predominantly in this fashion. Most fatally afflicted individuals as well as the majority of persons, die intestate. Usually, those who make wills are sufficiently robust to sign the written version. Thus, videotape would rarely be applied to nuncupative practice, and its use would remain limited to evidentiary functions.

At least one court has specifically addressed the use of magnetic tape to establish a valid will. In In re Estate of Reed, the Wyoming Supreme Court ruled that an audio recording of the decedent discussing the disposition of his property could not function as a will under state law.

Some state legislatures are considering amending their probate codes to permit video recordings to operate as valid wills. Other legislatures have

47. Maurer v. Reifsneider, 89 Neb. 673, 132 N.W. 197, 198 (1911); Lewis v. Aylott, 45 Tex. 190, 199 (1876); Irwin v. Rogers, 91 Wash. 284, 157 P. 690, 691-92 (1916); In re Davis’ Will, 103 Wis. 455, 79 N.W. 761, 762 (1899).
48. See, e.g., IND. CODE ANN. § 29-1-5-43(b) (Burns 1972) (one-thousand-dollar limitation); TEX. PROP. CODE § 65 (Vernon 1980) (thirty-dollar limitation unless three witnesses available); MODEL EXECUTION OF WILLS ACT § 62.
51. In re Estate of Reed, 672 P.2d 829 (Wyo. 1983).
52. Id. at 833. For a discussion of In re Estate of Reed, see Note, Probate—The Enforcement of Unwritten Wills, 20 LAND & WATER L. REV. 279 (1985).
examined more narrowly drawn resolutions allowing video recordings to serve merely evidentiary functions in the probate of a written will."\textsuperscript{44}

**Testamentary Intent**

The intentions of the testator are usually determined from the complete will construed in its entirety.\textsuperscript{55} This rule is often called the "four-corners doctrine" because intent is determined from the language as expressed within the four corners of the instrument.\textsuperscript{56}

Ambiguities may arise within the written declaration, and often intent must be clarified by extrinsic evidence. When intent is unclear in the will, circumstances surrounding the drafting\textsuperscript{57} and execution\textsuperscript{58} may be considered. This


\textsuperscript{56} Park v. Powledge, 198 Ala. 172, 73 So. 483, 484 (1916) (testator's intent determined from four corners of instrument); Bennett v. Bennett, 217 Ill. 434, 75 N.E. 339, 341 (1905) (intent drawn from all parts of document); Leyter v. Vestal, 355 Mo. 457, 196 S.W.2d 769, 771 (1946); Jacobsen v. Farnham, 155 Neb. 776, 53 N.W.2d 917, 920 (1952) (in construing will, intent determined from face or four corners of instrument); Christ's Home v. Mattson, 140 N.J. Eq. 433, 55 A.2d 14, 17 (1947); Williams v. Rand, 223 N.C. 734, 28 S.E.2d 247, 248 (1943); Gildersleeve v. Lee, 100 Or. 578, 198 P. 246, 248 (1921).

\textsuperscript{57} Adams v. Cowen, 177 U.S. 471, 476 (1900); Cleveland Clinic Found. v. Humphrys, 97 F.2d 849, 855 (6th Cir.), cert. denied, 305 U.S. 628 (1938); Rufty v. Brantly, 204 Ark. 32, 161 S.W.2d 11, 13 (1942); In re Wolf's Estate, 128 Cal. App. 305, 17 P.2d 1052, 1054 (1932) (extrinsic evidence of house number and name of street admissible to supplement property description); Caracci v. Lillard, 7 Ill. 2d 382, 130 N.E.2d 514, 516-17 (1955) (extrinsic evidence showing nature
process may require an examination of separate written documents.\textsuperscript{59} A videotape recording of the testator reciting the written will, as well as addressing his desires to the camera (and future audience), counsel or witnesses, would not be admissible to elaborate upon or alter lucidly detailed expressions of intent in the will. Videotape would be accepted only to eliminate ambiguities in the writing, just as other forms of extrinsic evidence may be examined.

The superiority of videotape exists in its ability to present to the trier-of-fact an accurate depiction of the testator's objectives. Other evidence may consist of the testimony of relatives, friends, or perhaps witnesses to the execution, all of whom may have conversed with the decedent regarding his wishes. Writings alleged to be the testator's may be offered to elucidate matters. Much of this evidence may be contradictory, depending upon the interests of the party offering the proof. This evidence presents, at best, second-hand accounts of testamentary intent that may not accurately reflect the true wishes of the decedent. A video recording of the testator actually elaborating on intent would be much more persuasive and compelling than other forms of extrinsic proof. Regarding issues of intent, the trier-of-fact may be satisfied solely upon presentation of such video corroboration.

\textit{Testamentary Capacity}

Extrinsic evidence is most frequently employed in cases in which the testator's mental faculties are questioned. Courts routinely admit evidence concerning the testator's state of mind immediately before and after the will execution.\textsuperscript{60} Such proof is intended to suggest the testator's mental fitness during execu-

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\textsuperscript{60} O'Donnell v. Rodiger, 76 Ala. 222, 227 (1884); In re Klopstock's Estate, 31 Cal. App. 2d 569, 88 P.2d 722, 724 (1939) (contestant must offer proof of insanity affecting testator's ultimate execution); Terry v. Buffington, 11 Ga. 337, 342 (1852); Griffith v. Thrall, 109 Ind. App. 141, 29 N.E.2d 345, 349 (1940); Arbogast v. MacMillan, 221 Md. 516, 158 A.2d 97, 102 (1960); Davis v. Calvert, 5 G. & J. 269, 300 (Md. 1833); In re Haslick's Will, 195 Mich. 432, 161 N.W. 965, 968 (1917) (numerous witnesses testified as to opinion of testator's competency when made will); In re Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19, 25 (1946); Surface v. Bentz, 228 Pa. 610, 77 A. 922, 924 (1910).}
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tion, although this may only be inferred, especially where testamentary capacity fluctuated from moment to moment. Ideal documentation focuses upon soundness of mind at the instant of execution. Statements by the testator prior or subsequent to execution can be especially probative, if they are not too far removed in time from the event. Visual documentation of the testator's physical health may infer mental fitness or lack thereof. In one early case, a photograph was admitted to demonstrate the testator's physical condition at the time of execution which, in turn, reflected his mental abilities.

Videotape is clearly superior to any secondary source of information regarding capacity inquiries. When videotape is used, the court need not rely upon witnesses, who may be unavailable years after execution, to testify during probate proceedings about a brief and perhaps single encounter with the testator. Relatives or friends on both sides of a will contest provide suspect proof because conflicting interests may color their recollections. Even the self-proving affidavit, generally regarded as being of high evidentiary value, is an easily executed writing routinely signed by witnesses and testators. As an evidentiary device for establishing testamentary capacity, the self-proving document simply creates a hollow presumption which, once contravened by will opponents, crumbles uselessly into mere surplusage. A video recording of the testator's will recitation, colloquy with attorney and witnesses, and execution of the document allows judges and juries to evaluate the testator's mental condition. In most cases, more convincing evidence is not likely to be uncovered.

Videotaped presentations are often criticized because they are allegedly subject to manipulation. Arguably, the testator may appear mentally capable when, in fact, he is wandering aimlessly in the distant recesses of his mind. Such contentions overlook the trier-of-fact's ability to discern possible distortions. Usually, judges and juries are composed of intelligent persons who can spot

61. In re Alexander's Estate, 111 Cal. App. 1, 295 P. 53, 56 (1931); Pardue v. Pardue, 312 Ky. 370, 227 S.W.2d 403, 405 (1950); Ergang v. Anderson, 378 Ill. 312, 38 N.E.2d 26, 27 (1941); In re Bullard's Estate, 124 Minn. 27, 144 N.W. 412, 413 (1913).


63. Lipphard v. Humphrey, 209 U.S. 264, 273 (1908) (statements made more than three years after execution too remote); Mason v. Bowen, 122 Ark. 407, 183 S.W. 973, 975-76 (1916); In re Lenci's Estate, 106 Cal. App. 171, 288 P. 841, 844 (1930); Morgan v. Morgan, 30 App. D.C. 436, 447 (1908); Credille v. Credille, 123 Ga. 673, 51 S.E. 628, 630 (1905); Ravenscroft v. Stull, 280 Ill. 406, 117 N.E. 602, 603 (1917) (declarations made four or five years before death held too remote); Ipsen v. Russ, 239 Iowa 1376, 35 N.W.2d 82, 92 (1948); Lane v. Moore, 151 Mass. 87, 3 N.E. 288, 288 (1890); Robinson v. Adams, 62 Me. 369, 412 (1870); O'Dell v. Goff, 149 Mich. 152, 112 N.W. 736, 739 (1907); In re Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19, 25 (1946); Sheehan v. Kearney, 82 Miss. 688, 21 So. 41, 45 (1896); Waterman v. Whitney, 11 N.Y. 157, 168 (1854); Executors of Reel v. Reel, 8 N.C. 248, 268 (1821).

a scam as easily as lawyers can invent them. Where a testator faces a barrage of leading questions during the execution ceremony, or is reduced to nodding assent at the direction of counsel, admission of the video recording, as proof of capacity, may ultimately benefit the will contestans.65

Unless the testator can demonstrate mental capacity through dialogue, soliloquy, or conduct, the videotape will not likely be utilized as evidence. Conversely, if mental capacity is evident on video, the trier-of-fact may decide its validity along with contrary or supplemental proof. The risk that video evidence may be deceptive is present in all evidence: witnesses perjure, documents are falsified, and exhibits can be crafted to prejudice interpretations. A certain degree of faith must be afforded the trier-of-fact in detecting irregularities in evidence.

**Will Execution**

Written wills submitted for probate are typically presumed to have been executed pursuant to state statute, unless defects can be readily detected in the attestation or acknowledgment provisions.66 The presumption is, of course, rebuttable. Parol evidence may be introduced to bolster the validity of the document;67 for instance, samples of the decedent’s or witnesses’ handwriting may be presented.68

The simplest use of videotape in probate proceedings is to establish satisfactory execution of the written will. No evidence is superior to videotape’s ability to document the presence and proximity of the testator and witnesses, or to prove that the signatures on the paper are genuine. The ceremony is preserved exactly as it transpired. If improper execution is alleged, a video recording of the event would instantly rebut the allegation.

65. See, e.g., *In re Purposed Last Will and Testament of Stotlar*, CA No. 1149 (Del. Ch. 1987) (LEXIS, Del. library), aff’d without opinion, 542 A.2d 358 (Del. 1988) (videotape of will execution ceremony supported finding of lack of testamentary capacity). See also Letter from Steven M. Prye to William R. Buckley (June 3, 1988) (regarding New York Senate Resolution No. 5098).

66. *In re Pitcairn’s Estate*, 6 Cal. 2d 730, 59 P.2d 90, 92-93 (1936) (prima facie case of proper execution when attestation clause appears proper); Gillis v. Gillis, 96 Ga. 1, 23 S.E. 107, 111 (1895); Martin v. Martin, 334 Ill. 115, 165 N.E. 644, 647 (1929) (all presumptions in favor of proper execution and attestation); Burkland v. Starry, 361 Mo. 348, 234 S.W.2d 608, 610 (1950); *In re McCarthy’s Estate*, 265 Wis. 548, 61 N.W.2d 819, 822-23 (1953).

67. Adams v. Norris, 64 U.S. 355, 368 (1860); Reed v. Hendrix’ Ex’r, 180 Ky. 57, 201 S.W. 482, 487 (1918); Ferris v. Neville, 127 Mich. 444, 86 N.W. 960, 962 (1901); German Evangelical Bethel Church v. Reith, 327 Mo. 1098, 39 S.W.2d 1057, 1061 (1931); *In re Bragg’s Estate*, 106 Mont. 132, 76 P.2d 57, 63 (1938).

68. Woodruff v. Hundley, 127 Ala. 640, 29 So. 98, 101 (1900); Noblit v. Noblit, 223 Ark. 220, 265 S.W.2d 520, 520 (1954); *In re Tyler’s Estate*, 121 Cal. 405, 53 P. 928, 929 (1898); Hobart v. Hobart, 154 Ill. 610, 39 N.E. 581, 582 (1895); German Evangelical Bethel Church v. Reith, 327 Mo. 1098, 39 S.W.2d 1057, 1061 (1931); *In re Claffin’s Will*, 73 Vt. 129, 50 A. 815, 816 (1910); *In re Marsh’s Will*, 177 Wis. 194, 187 N.W. 1009, 1010 (1922). See also Thompson v. Freeman, 149 So. 740 (Fla. 1933) (photograph admissible to prove testator’s signature as seen by witness on lost will).
The General Assembly of Indiana, impressed with videotape's value in demonstrating proper will execution, enacted legislation in 1985 authorizing video evidence on this issue. More extensive applications of videotape were also suggested to the Assembly, but these have yet to become law.

Occasionally, in contests raising doubts about proper execution, the integrity of the will itself is assailed. The presence of loose sheets or nonsequential pages of the will may undermine confidence in the original document. Because courts allow parol evidence to link separate pages, videotape could provide the definitive nexus between pages of the instrument. By recording close-up shots of the written will page by page during the execution ceremony, videotape eliminates any uncertainty that the document presented at probate is defective. Similarly, writings incorporated into the will by reference may be videotaped to facilitate accurate identification.

**Fraud and Undue Influence**

When discussing the problem of undue influence, attorneys occasionally allude to the image of unscrupulous relatives holding a gun to the testator’s head. That image, albeit exaggerated for its comic value, is not without truth. Surreptitiously, those wielding coercive forces may influence the testator toward a disposition of his assets to their benefit. Influenced by their affected care and concern, the testator drafts or modifies his will to reward his “loving” relations or friends.

Such “behind-the-scenes” machinations are commonplace in the arena of undue influence, but the pressures are rarely exerted at the execution ceremony or during the attorney’s drafting of the document. Counsel, in fact, often knows nothing of these lobbyists. The testator enthusiastically signs the will, and only upon probate does the forgotten family or acquaintances object.

Apart from the written will, considerable evidence is admissible to demonstrate fraud and undue influence. Indirect proof may reveal the mysterious threads that are alleged to constitute improper prompting or manipulation. Because undue influence must have infected the testator’s judg-

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69. **Ind. Code Ann.** § 29-1-5-3(d) (Burns Supp. 1988).
71. In re Swenden's Estate, 43 Cal. App. 2d 551, 111 P.2d 408, 410 (1941); Palmer v. Owen, 229 Ill. 115, 82 N.E. 275, 276 (1907); Cole v. Webb, 220 Ky. 817, 295 S.W. 1035, 1037 (1927); Appeal of Sleeper, 129 Me. 194, 151 A. 150, 153 (1930); In re Swaim's Will, 162 N.C. 213, 78 S.E. 72, 73 (1913); In re Kaiser's Estate, 150 Neb. 295, 34 N.W.2d 366, 369 (1948); In re Johnson's Will, 80 N.J. Eq. 525, 85 A. 254, 256-57 (1912); In re Allen's Will, 282 N.Y. 492, 27 N.E.2d 22, 24 (1940).
73. In re Newhall's Estate, 190 Cal. 709, 214 P. 231, 236 (1923) (evidence of undue influence primarily circumstantial); In re Bucher's Estate, 48 Cal. App. 2d 465, 120 P.2d 44, 48 (1941); In re Shell's Estate, 28 Colo. 167, 63 P. 413, 414 (1900); Aldrich v. Aldrich, 215 Mass. 164,
ment at the time of execution, the court will accept evidence prior or subsequent to will execution so long as it is not too remote from the date of execution. Since the influencer may have been present for lengthy periods, the issue of remoteness is best left to the court. Proof of the testator's age or health (and thus, resistance to outside influences) has been considered, along with proof of certain relatives' access to the testator, the peculiarity of devises or beneficiaries named in the will, prior wills, and testamentary declarations made outside the will but contemporaneous to execution. Testimony

102 N.E. 487, 489 (1913) (evidence of particular circumstances show undue influence); Haines v. Hayden, 95 Mich. 332, 54 N.W. 911, 915 (1893); Meier v. Buchtet, 197 Mo. 68, 94 S.W. 883, 889 (1906); In re Bowman's Estate, 143 Neb. 440, 9 N.W.2d 801, 805 (1943); In re Noren's Estate, 119 Neb. 653, 230 N.W. 495, 498 (1930); Culpepper v. Robie, 155 Va. 64, 154 S.E. 687, 696 (1930).

74. Knox v. Knox, 95 Ala. 495, 11 So. 125, 128 (1891); In re Kaufman's Estate, 117 Cal. 288, 49 P. 192, 194 (1897); In re Shell's Estate, 28 Colo. 167, 63 P. 413, 414 (1900); Brownlie v. Brownlie, 357 Ill. 117, 191 N.E. 268, 273 (1934); Madden v. Cornett, 290 Ky. 265, 160 S.W.2d 607, 611 (1942); Texada v. Spence, 166 La. 1020, 118 So. 120, 121 (1928); Minturn v. Conception Abbey, 227 Mo. App. 1179, 61 S.W.2d 352, 361 (1933); Hale v. Smith, 73 Mont. 481, 237 P. 214, 216 (1925); In re Will of Goodson, 4 N.C. App. 257, 166 S.E.2d 447, 450 (1969); In re Miller's Estate, 179 Pa. 645, 36 A. 139, 142 (1897); Harmon v. Ketchum, 299 S.W. 682, 886 (Tex. Ct. App. 1927); In re Burt's Estate, 122 Vt. 260, 169 A.2d 32, 35 (1961); In re Yahin's Estate, 258 Wis. 280, 45 N.W.2d 702, 703 (1951).


77. Cheney v. Goldy, 225 Ill. 394, 80 N.E. 289, 291 (1907); Goodbar v. Lidikey, 136 Ind. 1, 35 N.E. 691, 692 (1893); Griffith v. Benzinger, 144 Md. 575, 125 A. 512, 517 (1924); Harvey v. Sullens, 46 Mo. 147, 151 (1870); McDonald v. McLendon, 173 N.C. 172, 91 S.E. 1017, 1019 (1917); In re Dunlap's Estate, 471 Pa. 303, 370 A.2d 314, 317 (1977); Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774, 778 (1937). See also Pritchard v. Austin, 69 N.H. 367, 46 A. 188 (1899) (photograph admissible to show testator's "character, vigor, temperament, and disposition...as touching the question of undue influence").


81. Mason v. Bowen, 122 Ark. 407, 183 S.W. 973, 975 (1916); Credille v. Credille, 123 Ga. 673, 51 S.E. 628, 630 (1905); Waters v. Waters, 222 Ill. 26, 78 N.E. 1, 4 (1906); Westfall v. Wait, 165 Ind. 353, 73 N.E. 1089, 1091 (1905); In re Kennedy's Will, 159 Mich. 548, 124 N.W. 516, 520 (1910); Schierbaum v. Schemme, 157 Mo. 1, 57 S.W. 526, 531-32 (1900); In re Putnam's Will, 257 N.Y. 140, 177 N.E. 399, 401 (1931); Van Demark v. Tompkins, 121 Ohio St. 129, 167 N.E. 370, 372 (1929); In re Wayne's Estate, 134 Or. 464, 291 P. 356, 365 (1930); Hobson v. Moorman, 115 Tenn. 73, 90 S.W. 152, 158 (1905).
of witnesses or counsel concerning the use of coercion during the execution ceremony has also been admitted.82 

Videotape could dispel accusations of undue influence employed during the will execution. The video recording of the testator's recitation, conversation with his attorney or witnesses, demeanor on camera, and attitude toward the written will may provide excellent and timely evidence that the testator voluntarily signed the instrument as his last testament.83 Conversely, the undue influence may be so subtle that the videotape mirrors the façade, in which case the videotape may actually assist in the probate of an invalid will.

Case law relating to undue influence commonly includes fraud arising in the execution or preparation of the writing. A videotape is valuable extrinsic evidence of the absence of fraud in the execution or drafting stages. By having the testator or a designated speaker read the will aloud before the camera, any opportunity to insert a surprise provision or falsified page at the last moment without the testator's knowledge would be eliminated.

Lost or Destroyed Wills

Proof of lost or destroyed wills is most often governed by statute, but case law exists interpreting the codes. When the original written will is misplaced or destroyed, executed duplicates or exact copies are admissible in place of the missing version, provided the substitute is genuine.84 If the testator did not intend to revoke a will accidentally lost or destroyed, proof of the instrument's contents may be allowed under the appropriate statutory provisions.85 Some statutes, however, require that the will be fraudulently destroyed or lost during the testator's lifetime before proof of the instrument's contents is allowed.86 The lost or destroyed original will must have been in compliance


84. Stiles v. Brown, 380 So. 2d 792, 794-95 (Ala. 1980); Estate of Schultz, 54 Cal. 2d 513, 6 Cal. Rptr. 281, 353 P.2d 921, 923 (1960); In re Parker's Estate, 382 So. 2d 652, 653-54 (Fla. 1980); In re Maynard's Estate, 253 So. 2d 923, 924 (Fla. App. 1971); In re Walsh's Estate, 196 Mich. 42, 163 N.W. 70, 78 (1917); Menzi v. White, 360 Mo. 319, 228 S.W.2d 700, 702, 705 (1950); McClellan v. Owens, 335 Mo. 884, 74 S.W.2d 570, 573 (1934); Managle v. Parker, 75 N.H. 139, 71 A. 637, 638-39 (1908); In re Woodley's Will, 73 N.Y.S.2d 141 (N.Y. Sup. Ct. 1947); In re Bates' Estate, 286 Pa. 583, 134 A. 513, 513 (1926); In re Dawson's Estate, 277 Pa. 168, 120 A. 828, 828-29 (1923); In re Auritt's Estate, 175 Wash. 303, 27 P.2d 713, 715 (1933) (carbon copy).

85. Gaines v. Hennen, 65 U.S. (24 How.) 553, 559 (1860); In re Arbuckle's Estate, 98 Cal. App. 2d 562, 220 P.2d 950, 954 (1950); In re Maynard's Estate, 253 So. 2d 923, 924 (Fla. App. 1971); In re Thorman's Estate, 162 Iowa 237, 144 N.W. 7, 8-9 (1913); Appeal of Thompson, 114 Me. 338, 96 A. 238, 239 (1915); In re Havel's Estate, 156 Minn. 253, 194 N.W. 633, 634-35 (1923); Dickey v. Malech, 6 Mo. 177, 183-84 (1839).


with all testamentary requirements necessary to create a valid and properly executed will. 88

Parol evidence is regularly admissible to establish the contents of a missing will, 89 assuming it can be shown that the will is missing despite a diligent search. 90 Courts also accept comments made by the testator concerning the will's dispositive scheme. 91

In this area, a videotape of the execution and oral publication of the will (through the testamentary soliloquy) would provide ideal corroboration of the missing document's contents as well as the authenticity of duplicates. This would be particularly true if an unexecuted copy is the only available evidence to support the will proponent's contentions.

Videotape Evidentiary Requirements

Most rules of evidence equate videotape with photographs and apply identical admissibility standards. 92 California's statute suggests that videotape could be considered a writing, 93 and this novel proposition is supported by case law. Although audio recordings and motion pictures have been considered writings, 94 most courts restrict videotape to a visual evidentiary role.


91. Griffith v. Higinbothom, 262 Ill. 126, 104 N.E. 233, 235 (1914); Page v. Maxwell, 118 Ill. 576, 8 N.E. 852, 853 (1886); Ferguson v. Billups, 244 Ky. 85, 50 S.W.2d 35, 35 (1932); Lane v. Hill, 68 N.C. 75, 44 A. 393, 397 (1895); In re Miller's Will, 49 Or. 452, 90 P. 1002, 1009 (1907); Glockner v. Glockner, 263 Pa. 393, 106 A. 731, 732 (1919); Clark v. Morton, 5 Rawle 235, 242 (Pa. 1835).

92. See, e.g., Fed. R. Evid. 1001(2); ALASKA R. EVID. 1001(2); ARIZ. R. EVID. 1001(2); ARK. R. EVID. 1001(2); COLO. R. EVID. 1001(2); DEL. R. EVID. 1001(2); FLA. STAT. ANN. § 90.951(2) (West 1979); HAW. R. EVID. 1001(2); IDAHO R. EVID. 1001(2); IOWA R. EVID. 1001(2); ME. R. EVID. 1001(2); MICH. R. EVID. 1001(2); MINN. R. EVID. 1001(2); MISS. R. EVID. 1001(2); MONT. R. EVID. 1001(2); N.H.R. EVID. 1001(2); N.M. R. EVID. 1001(2); N.C. R. EVID. 1001(2); N.D. R. EVID. 1001(2); OHIO R. EVID. 1001(2); TEX. R. EVID. 1001(2); TX. R. CRIM. EVID. 1001(2); UTAH R. EVID. 1001(2); VT. R. EVID. 1001(2); WASH. R. EVID. 1001(2); W. VA. R. EVID. 1001(2); WYO. R. EVID. 1001(2). The Federal Rules also contain the following definition: "'writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by . . . photographing, magnetic impulse, mechanical or electronic recording, . . ." Fed. R. Evid. 1001(1). The Uniform Rules of Evidence, Rule 1(13), employs essentially identical language. McCormick's Law of Evidence 70 n.22 (E. Cleary 2d ed. Supp. 1978).

93. CAL. EVID. CODE § 250 (West 1966) (writings include "every . . . means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof").

94. See, e.g., Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854 (5th
The common law standards for the admissibility of audio recordings, motion pictures, or photographs\textsuperscript{95} are equally applicable to videotape. Videotape is usually introduced as demonstrative evidence that must be authenticated by a "live" witness on the stand.\textsuperscript{96} Naturally, the videotape must be relevant; the tape must establish that it is more or less probable that a fact in issue has occurred as alleged.\textsuperscript{97} If an object depicted on videotape is itself admissible, or if evidence of the events represented therein could be heard, then the videotape would be sufficiently relevant to enter the record.\textsuperscript{98}

A few courts have structured an admissibility formula under which the following elements must be demonstrated: (1) the videotape recorder was technically capable of recording testimony; (2) the video machine operator was competent; (3) the recording was not altered; (4) the videotape was appropriately preserved; (5) the recording was both visually and audibly clear so as not to be unintelligible or misleading; (6) the recorded testimony was voluntary; and (7) the speakers on the videotape can be identified.\textsuperscript{99} Not all

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Many of the precedents cited in this footnote involved the introduction of photographs, motion pictures, and audio recordings. Since identical evidentiary standards most often apply to videotape, these cases provide guidelines for videotape admissibility.


97. FED. R. EVID. 401. See also G. JOSEPH, supra note 6, § 4.02[3][a], at 4-5; McCormick's LAW OF EVIDENCE § 185, at 437 (E. Cleary 2d ed. 1972).

98. See, e.g., Quigley v. Snoddy, 102 Ill. App. 2d 232, 242 N.E.2d 775, 777 (1968) (admissibility of photo subject to same rules of relevancy as other evidence); State v. Giles, 253 La. 533, 218 So. 2d 585, 588 (1969). See generally G. JOSEPH, supra note 6, § 4.02[3][a], at 4-5 (videotape admissible on same grounds as other evidence).

judges insist upon satisfying each of these elements, but most courts require a showing of unaltered recording, of visual and audio clarity, and of sufficient identification of the speakers. To be admissible, the determinative factor appears to be that the videotape must be established as a true and accurate representation of the events portrayed. 100

Those opposed to videotape usage in this setting argue that the medium is inherently dangerous because of the potential for distorting facts through Hollywood-like productions susceptible to sophisticated technological manipulations. Peculiar lighting or camera angles, for example, can influence viewers’ impressions about the speakers. Similarly, audio and visual editing can remove unfavorable sequences, slanting viewer emotions toward the desired result.

These contentions, however, do not present insurmountable obstacles for courts, which may exclude any evidence that is unduly prejudicial or inflammatory, 101 confusing or misleading to the jury, 102 cumulative, 103 or unnecessarily time-consuming. 104 If these “fairness factors” substantially outweigh the pro-

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These standards were originally established for audio tape recordings. See, e.g., State v. Williams, 49 Wash. 2d 354, 301 P.2d 769, 772-73 (1956). However, at least one court has ruled that the Williams sound-recording elements do not control videotape or photographs. State v. Newman, 4 Wash. App. 588, 484 P.2d 473, 476-77 (1971).

A formula comparable to the seven precepts listed above has been employed when videotaped evidence is utilized for substantive rather than demonstrative purposes. See, e.g., Torres v. State, 442 N.E.2d 1021, 1024-25 (Ind. 1982); Bergner v. State, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979).


104. See, e.g., Fed. R. Evid. 403; G. Joseph, supra note 6, § 4.02[3][b], at 4-6.
bative value of the videotape,\textsuperscript{105} the court will exclude. This may prevent the entire videotape from entering the record; however, in certain cases the objectionable segments may be edited, allowing the remainder to be admitted.\textsuperscript{106}

Videotape may encounter a gauntlet of hearsay objections through which the advocate must negotiate. As a mechanical reproduction of an out-of-court statement offered for the truth of the matters asserted, the videotape itself denies the opportunity for cross-examination and is, \textit{arguendo}, hearsay.\textsuperscript{107} The contents of the videotape may also constitute hearsay. For example, "voice-overs" of narration and question/answer exchanges on videotape have been held to be hearsay if the tape is presented to demonstrate the truth of the speech therein.\textsuperscript{108} The simple solution is to utilize videotape as proof of something \textit{other} than the truth of the assertions contained therein.

Hurdles to admissibility presented by hearsay objections are easily circumvented by asserting the traditional exceptions to the hearsay rule. "Disembodied voices" and the appurtenant details discussed on the videotape may be verified by the direct testimony of a witness.\textsuperscript{109} A videotaped walk falls within several hearsay exceptions, including \textit{res gestae},\textsuperscript{110} present-sense impression,\textsuperscript{111} then existing mental, emotional, or physical condition,\textsuperscript{112} recorded

105. \textit{See}, \textit{e.g.}, \textit{Fed. R. Evid.} 403.


108. \textit{See}, \textit{e.g.}, Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1117 (8th Cir. 1985) (hypnosis question/answer session videotaped); Aetna Cas. & Sur. Co. v. Cooper, 485 So. 2d 1364, 1366 (Fla. Ct. App. 1986) (voice-over on videotape); State v. Thurman, 84 N.M. 5, 498 P.2d 697, 700 (N.M. Ct. App. 1972) (voice-over on videotape). \textit{See also} G. Joseph, \textit{supra} note 6, § 4.02[4][a], at 4-9 to 4-10.

109. \textit{See}, \textit{e.g.}, United States v. Daniels, 377 F.2d 255, 258 (6th Cir. 1967) (witness must identify circumstances surrounding photographed events); State v. Thurman, 84 N.M. 5, 498 P.2d 697, 700 (Ct. App. 1972). \textit{See also} G. Joseph, \textit{supra} note 6, § 4.02[4][a], at 4-10.

110. \textit{See}, \textit{e.g.}, Torres v. State, 442 N.E.2d 1021, 1024 (Ind. 1982) (words simultaneously uttered at time of occurrence may be admissible within \textit{res gestae} exception to hearsay rule). \textit{Res gestae} primarily includes spontaneous statements that modern decisions classify under other exceptions such as present sense impression, then existing mental, emotional, or physical condition, excited utterances, and the like. \textit{McCormick's Law of Evidence} § 288, at 686 (E. Cleary 2d ed. 1972). \textit{Res gestae} is a vague and imprecise exception that has stirred the ire of many commentators. \textit{Id.} § 288, at 687. "The ancient phrase can well be jettisoned, with due acknowledgment that it has served well in its era in the evolution of evidence law." \textit{Id.}

111. \textit{See}, \textit{e.g.}, \textit{Fed. R. Evid.} 803(1). For case law discussing this exception, \textit{see}, \textit{e.g.}, Pfeil v. Rogers, 757 F.2d 850, 861 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1107 (1986); United States v. Earley, 657 F.2d 195, 198 (8th Cir. 1981); United States v. Blakey, 607 F.2d 779, 785-86 (7th Cir. 1979) (involving audio recording); Brown v. Tard, 552 F. Supp. 1341, 1351 (D.N.J. 1982).


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recollection to refresh a witness' memory,\textsuperscript{113} and the unavailability and "all-purpose" exceptions.\textsuperscript{114}

Admission or exclusion of videotaped evidence depends upon sound judicial discretion.\textsuperscript{113} The courts that have discussed probate videotapes have not mentioned the basis of admission.\textsuperscript{116} The following section examines the opinions of Indiana's probate judges concerning Indiana's video will statute.

\textit{Judicial Reaction to Video Wills in Indiana}

The authors conducted a survey of Indiana probate judges to gauge judicial receptivity to utilizing videotape for probate purposes. Although the methodology employed in conducting this survey would not be used by statisticians, the results are not intended to provide generalized predictions of judicial behavior. In a state with less than one hundred probate judges, these results are not statistically significant. Nevertheless, the results may provide some insight as to how Indiana judges will interpret and apply the Indiana video will statute.

The questionnaire posed to the judges an Indiana estate hypothetical involving typical contest issues. Specifically, the hypothetical situation presented was as follows:

\begin{itemize}
\item \textit{114. See, e.g., Fed. R. Evid. 804 (unavailability); Fed. R. Evid. 804(b)(5) ("all-purpose" exception); McCormick's \textit{Law of Evidence} § 324.1 at 95-97 (E. Cleary 2d ed. Supp. 1978). For case law discussing this exception, see, e.g., Dartez v. Fibreboard Corp., 765 F.2d 456, 461-63 (5th Cir. 1985); United States v. Weisman, 624 F.2d 1118, 1128 (2d Cir. 1980) (concerning audio recording), cert. denied, 449 U.S. 971 (1980); United States v. Toney, 599 F.2d 787, 790 (6th Cir. 1979); United States v. Kim, 595 F.2d 755, 764-66 (D.C. Cir. 1979).}
\item \textit{116. See \textit{In re} Estate of Seegers, 733 F.2d 418, 421-22 (Okla. Ct. App. 1986); \textit{In re} Purported Last Will and Testament of Stotlar, CA No. 1149 (Del. Ch. 1987) (LEXIS, Del. library).}
\end{itemize}
Facts: In re Estate of Penny Moneygrubber

A written will is submitted for probate without a self-proving clause. The document is dated and signed by the testator and two witnesses and contains the usual “boilerplate” testamentary language. Opponents of the will allege that several pages of the instrument were replaced or modified. They also question the testator’s mental capacity and suggest that fraud in the execution and undue influence may have occurred. Some portions of the will are ambiguous in the description of property and the expression of beneficiaries. For example, the will refers to real estate located in Boise County, and the testator owned no property there. Also, the will awards a cash sum to “my nephew, Donald H. Moneygrugger,” when, in fact, the testator had a nephew named Ronald T. Moneygrubber and a cousin named Donald H. Assumpsit.

The will proponents offer a videotape of the testator reciting verbatim the written will. The video recording also captured the execution ceremony, as well as “close-ups” of the written will in its entirety. The videotape includes a sound track, and both the audio and visual portions are readily comprehensible. The videotape also contains a segment in which the testator left personal messages to her beneficiaries (and disowned heirs), and in which she correctly named all persons. The will contestants, however, object to the videotape as inadmissible.117

Ninety-three Indiana county judges for circuit, superior, and special probate courts were contacted. Their oral and written responses to the questions of whether they would admit the videotape under the statute as evidence of execution and as extrinsic evidence of other factors are categorized below. Eighty-nine judges responded by written survey and/or telephone conversations with the author. All figures given are percentages.

117. Hypothetical Estate Example, Video Will Survey of Indiana Probate Judges, by the authors, April/May 1988.
Survey Results

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<th>Questions</th>
<th>Yes</th>
<th>No</th>
<th>Undecided</th>
<th>Comment</th>
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<td>Videotape admitted as evidence under statute (for execution) and as extrinsic evidence for:</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Proper Execution</td>
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<td>3.23</td>
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<td>Absence of Undue Influence</td>
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<td>12.90</td>
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<td>Absence of Fraud in Exec.</td>
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<td>6.45</td>
<td>0.00</td>
<td>12.90</td>
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<tr>
<td>To Resolve Ambiguities in Written Will</td>
<td>77.41</td>
<td>9.68</td>
<td>6.46</td>
<td>6.45</td>
</tr>
<tr>
<td>If written will unambiguous,</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>is videotape still admissible?</td>
<td>61.29</td>
<td>19.36</td>
<td>9.68</td>
<td>9.76</td>
</tr>
<tr>
<td>If written will had self-proving clause,</td>
<td></td>
<td></td>
<td></td>
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<td>is videotape still admissible?</td>
<td>74.19</td>
<td>9.68</td>
<td>9.68</td>
<td>6.45</td>
</tr>
<tr>
<td>Are operator affidavits required?</td>
<td>77.42</td>
<td>12.90</td>
<td>3.23</td>
<td>6.45</td>
</tr>
<tr>
<td>Is proof of proper equipment operation required?</td>
<td>61.29</td>
<td>22.58</td>
<td>12.90</td>
<td>3.23</td>
</tr>
<tr>
<td>Is chain of custody required?</td>
<td>48.39</td>
<td>38.71</td>
<td>9.67</td>
<td>3.23</td>
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<tr>
<td>Is proof that videotape not tampered with required?</td>
<td>70.97</td>
<td>19.35</td>
<td>6.45</td>
<td>3.23</td>
</tr>
<tr>
<td>Is Time/Date generator adequate proof of no tampering?</td>
<td>61.29</td>
<td>12.90</td>
<td>3.23</td>
<td>22.58</td>
</tr>
<tr>
<td>Is admissibility standard same as photographs/sound recording?</td>
<td>96.77</td>
<td>0.00</td>
<td>0.00</td>
<td>3.23</td>
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<td>Does four-corners rule preclude videotape admissibility?</td>
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<td>6.45</td>
<td>19.36</td>
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<td>Is videotape admissible as proof of lost/destroyed will?</td>
<td>54.84</td>
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<td>16.13</td>
<td>6.45</td>
</tr>
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<td>Is videotape useful in probate?</td>
<td>96.77</td>
<td>0.00</td>
<td>0.00</td>
<td>3.23</td>
</tr>
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<td>Is videotape satisfactory as will itself? (if statute enacted)</td>
<td>38.71</td>
<td>45.16</td>
<td>3.23</td>
<td>12.90</td>
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<td>Is videotape heard in probate cases?</td>
<td>0.00</td>
<td>100.00</td>
<td>0.00</td>
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</tr>
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<td>Have you heard videotape in civil/criminal cases?</td>
<td>83.87</td>
<td>16.13</td>
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<td>Have you used videotape in private practice?</td>
<td>25.81</td>
<td>74.19</td>
<td>0.00</td>
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</table>

Analysis of Data

Given the language of the Indiana video will statute,118 not surprisingly nearly

118. Ind. Code Ann. § 29-1-5-3 (Burns Supp. 1988), which provides: “Subject to the applicable Indiana rules of trial procedure, a videotape may be admissible as evidence of the proper execution of a will.”
94 percent of the respondent judges would admit videotape as proof of proper execution. The data suggests that the courts also would find videotape readily acceptable to resolve written ambiguities or as parol evidence of testamentary capacity and intent, contents of the written will, and the absence of fraud and undue influence. Somewhat more curious was the indicated tolerance of video documentation of intent even if the will was *not* ambiguous. Case law has persistently declared that testamentary intent must be determined from the instrument itself unless ambiguities appear on its face. Nevertheless, 75 percent of the judges indicated that the four-corners rule would not affect videotape admissibility on this issue.

According to the judges’ responses, some documentation of equipment and operator competency is necessary. Nearly 78 percent of the judges surveyed would prefer a video technician’s testimony or affidavit to verify the integrity of the filming. Slightly more than 61 percent desired proof that the equipment functioned suitably, while almost 49 percent would require chain-of-custody to be established for the videotape. This “chain” requirement undoubtedly arose from the judges’ familiarity with criminal rules, and the affirmative and negative responses were the most evenly distributed.

A slight majority of those surveyed would allow videotape to corroborate the contents of a lost or destroyed written will. Nearly 71 percent of the judicial respondents would require documentation that the videotape had not been manipulated, but just over 61 percent felt that a time/date generator alone would accomplish this task.

As expected, the largest majority (almost 97 percent) would apply the common law rules of admissibility for photographs and sound recordings to videotape evidence. In response to the more general question of a videotape’s utility in probate proceedings, an identical majority acknowledged its value, although almost half disliked the concept of a videotape serving as a separate, valid testamentary document under an enabling statute.

None of the judges surveyed had presided over a probate case in which videotape was offered into the record, but nearly 84 percent were accustomed to the use of videotape for other civil or criminal law purposes. Fifty-five percent had admitted videotaped depositions, and videotape had been admitted as evidence for crime scenes (16 percent), child sexual abuse testimony and defendants’ confessions (13 percent each), accident scenes and driving while intoxicated (10 percent each), experiments (7 percent), and “day-in-the-life” and miscellaneous witness statements (less than 4 percent each). One judicial respondent had even seen videotape offered on the question of parental fitness for child custody in a dissolution matter.119

Most judges elected not to elaborate beyond the specific inquiries posed by the survey, but a few representative remarks included the following: (1) “I’ve had no experience with videotape apart from depositions in civil cases. I would be very liberal in permitting use of such tapes in will matters if they

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119. This data was collected by the authors, from the Judicial Responses to the Video Will Survey of Indiana Probate Judges, April/May 1988.
were probative of any matter in issue." (2) "A court would be foolish to stand in the way of advancing technology. Videotapes will be used more and more in the future." (3) "Many of the questions which could be raised would be best handled by appropriate legislation." (4) "I think with proper safeguards to insure authenticity [videotape] can be a valuable tool [for probate]." (5) "Videotaped wills are silly!" (6) "Videotape will not stop fraud, [it will] just make it more sophisticated." 120

Clearly, the vast majority of Indiana probate judges who responded are receptive to the use of videotape in proving the usual points of contention in will contests. Practitioners may find videotape to be routinely acceptable as proof of execution, capacity, intent, will content, lack of undue influence and fraud, as well as to resolve ambiguities. Although predictions of actual judicial behavior cannot be drawn from this data, it would be safe to conclude that videotape captured rave reviews in the Indiana probate courts. These survey results indicate that one may be securely optimistic in predicting videotape's increasing significance in the probate arena.

Existing and Proposed Legislation

Indiana

Indiana was the first, and to date, the only state to enact legislation specifically addressing the use of videotape in the probate process. In 1985, House Enrolled Act 1913 was passed by the Indiana general assembly allowing videotape to be admitted during probate as evidence of a valid will execution. 121 The Act was codified in the section of the Indiana Code governing the execution of wills. 122 As originally introduced, the Act required that the entire execution ceremony be taped in a single continuous session. 123 The testator was to be taped reciting the entire will, and the testator and witnesses were to be shown throughout the act of execution. 124 As enacted, the provision allowed any part or all of the execution process to be videotaped. 125 The section provided as follows: "Subject to the applicable Indiana rules of trial procedure, a videotape may be admissible as evidence of the proper execution of a will." 126

The provision, as enacted, was merely an enabling statute providing little guidance; rather it invited innovative use of videotape and requires the courts

122. IND. CODE ANN. § 29-1-5-3 (Burns Supp. 1988).
125. IND. CODE ANN. § 29-1-5-3 (Burns Supp. 1988).
126. Id.
to establish its limitations. Although broad in its use of videotape as evidence of proper will execution, its application was limited to that purpose.

In 1989, an amendment bill was introduced seeking to eliminate the videotape provision. The Senate Judiciary Committee, however, reinstated the language. 127 When the House considered this legislation, the House Judiciary Committee expanded videotape's evidentiary role. Under the modified resolution, videotape would be admissible as evidence of (1) the proper execution of a will; (2) the intentions of a testator; (3) the mental state or capacity of a testator; (4) the authenticity of a will; and (5) matters determined by a court to be relevant to the probate of a will. 128 This new language would immensely broaden the scope of the statute and further increase the value of videotape as an evidentiary tool.

In January 1988, another amendment would have authorized the use of videotape in living wills. 129 The provisions regarding living wills read as follows:

(e) If a living will declarant or a life-prolonging procedures will declarant makes a videotape that demonstrates:

1. the proper execution of the declaration;
2. the intention of the declarant;
3. the mental state or capacity of the declarant; or
4. the authenticity of the declaration;

the attending physician (if provided a copy of the videotape) shall make a copy of the videotape a part of the declarant's medical records. However, the physician's failure to do so does not affect the validity of the declaration.

(h) A videotape may be used to demonstrate the following:

1. The proper execution of the declaration.
2. The intentions of the declarant.
3. The mental state or capacity of the declarant.
4. The authenticity of the declaration. 130

This proposal has not yet been enacted.

New Jersey

In September 1986, the New Jersey legislature introduced an act providing

for the use of videotape as a testamentary instrument.\textsuperscript{131} The proposal was extremely broad, allowing videotape to be used not merely as an evidentiary tool but as a valid will itself, provided it was accompanied by a written transcription.\textsuperscript{132} The bill was favorably reported upon by the Assembly Judicial Committee in the spring of 1987, but it was not enacted. The bill set forth a detailed account of what the videotape must include and the steps to be followed in the taping process. The bill read as follows:

3B:3-2. Formal execution of will.

2. A videotape is valid as a will, if it is accompanied by a written transcription and otherwise complies with the requirement set forth in N.J.S. 3B:3-1 et seq.

3. The videotaped will shall additionally comply with the following requirements:

a. The testator shall appear before the camera with at least two witnesses and his attorney. He shall announce to them that this videotape session is his last will and testament and request that they act as witnesses;

b. The attorney shall question the testator during the filming of the videotape to demonstrate the testator's sound mind and satisfactory memory and understanding of the event;

c. The testator shall recite aloud the entire contents of the will, which recitation must be videotaped in its entirety in a continuous fashion so that there are no interruptions in the videotape;

d. The testator must appear on the videotape during the entire recording session;

e. The videotape must possess a sound track recording;

f. The audio and visual quality must be sufficiently clear and intelligible so as to be readily comprehended and so as to readily identify the testator, witnesses, and attorney;

g. The videotape must be made self proved by simultaneously executing a written document pursuant to the provisions of N.J.S. 3B:3-4 which shall set forth the name and address of the video operator;

h. The execution of the self proving document shall also be videotaped and the testator, witnesses, and officer shall appear before the camera; and

i. The videotape must be taped with a time and date generator.

132. \textit{Id.}
4. The videotaped will, along with the self proving document, shall be retained by the testator and a duplicate copy of both the videotaped will and the self proving document shall be retained by the testator’s attorney. The duplicate copy shall be clearly marked as a copy and it shall be stated on the recording that it is a copy and is not to be used as a will.

5. A videotaped will may be reproduced from one type of videotape to another type of video medium, provided that:
   a. The testator declares in writing that he intends the replication to operate as a republication of the original videotaped will;
   b. The replication occurs in the presence and under the direction and supervision of the testator;
   c. The reproduced video recording complies with all the requirements for videotaped wills;
   d. A written self proving document is simultaneously executed pursuant to N.J.S. 3B:3-4 and paragraph g, of section 3 of this act, which sets forth the date and location of replication, the testator’s intention to replicate and republish the original videotaped will, the testator’s purpose for the replication and the names and addresses of all persons present or involved in the replication process; and
   e. The original reproduced video recording shall be retained by the testator and the self proving document shall be attached to the reproduced video recording.

6. A videotaped will which meets the provisions of this act will may [sic] be admitted to probate without further affidavit, deposition or proof. A videotaped will which fails to meet the provisions of this act may be admitted to probate only in solemn form in the manner provided by the Rules Governing the Courts of the State of New Jersey.\footnote{133}

If enacted as proposed, the bill would establish explicit guidelines for the practitioner. Because of its comprehensive approach, the bill should be subject to very little misinterpretation by the courts or misapplication by attorneys. Conversely, the provision’s exhaustive nature may prevent innovative use by practitioners and would give courts little or no discretion in ruling on a videotaped will’s validity.

\textit{New York}

In 1987, a bill was proposed in the New York legislature that would have allowed videotape to be admitted in probate proceedings.\footnote{134} The proposal would

\footnote{133. \textit{Id.}}
\footnote{134. S. Res. 5098, 210th N.Y. Leg. (1987-88) (bill proposed additional section 1407-a to Surrogate’s Court Procedure Act).}
have created a new section providing for the use of videotape as an evidentiary tool in proving a will. However, it has not yet been enacted. The provision read as follows:

§ 1407-a. Additional proof
In addition to other procedures prescribed for the proof of wills, a videotape may be admissible during probate proceedings as evidence of the following:
1. The proper execution of a will;
2. The intentions of the testator as indicated in a will;
3. The mental state or capacity of the testator;
4. The authenticity of a will; and
5. Any other facts that, in the court’s discretion, are relevant to the probate of the testator's will or the administration of the testator's estate.

Although strictly evidentiary in nature, the proposed section is fairly broad as it expressly provides for application if relevant in the court's discretion. This subsection not only would retain the court's substantial discretion, it would encourage practitioners to use videotape in original and experimental ways.

Texas

In 1985, the Texas legislature introduced two bills concerning the use of videotape as evidence in probate proceedings. House Bill 247, companion to Senate Bill 732 and identical to it, provided for the application of videotape or film of the will ceremony as an evidentiary tool. Neither bill was enacted, but H.B. 247 read as follows:

Sec. 84A. FILM OR VIDEOTAPE AS EVIDENCE.
(a) A film or videotape recording of the execution of a will is admissible as evidence of the identity and competency of the person making the will, and of any other matter relating to the will and its validity.
(b) This section does not prevent the supreme court from adopting rules of evidence relating to the use of film and videotape evidence in other proceedings, or from supplementing this section with other rules not inconsistent with this section.

Although limited to admission for purely evidentiary purposes, the language of this proposal was sufficiently broad to allow for virtually unrestricted ad-

135. Id.
136. Id.
140. Id.
Expressly providing for admission as evidence of the testator's "identity and competency" is unnecessary surplusage in view of the following clause allowing videotape to be admitted as evidence of anything relevant to the will and its validity. The testator's identity and competency are certainly relevant to the validity of the will. Perhaps the testator's competency was expressly referred to because that was the primary purpose for which the provision was intended, but that is unclear.

Proposed Model Statute—Evidentiary

A videotape may be admissible during probate proceedings as evidence of:

1. the proper execution of a will;
2. the intentions of the testator;
3. the mental state or capacity of the testator;
4. the authenticity of a will; and
5. any other facts that, in the court's discretion, are relevant to the probate of the testator's will or the administration of the testator's estate.

This proposed statute expressly authorizes the admission of videotape only for evidentiary purposes. Each evidentiary element of proof in the probate process could be addressed by the use of videotape, and the court would have broad discretion to admit any facts "relevant to the probate."

Proposed Model Statute—Testamentary Instrument

A videotape may be admissible as a will, [either with or without a written transcription,] provided that the following requirements are met:

1. the testator must recite aloud the entire contents of the will;
2. such recitation must be videotaped in its entirety in a continuous fashion, so that there are no interruptions in the videotape;
3. the testator must appear on the videotape during the entire recording session;
4. the videotape must possess a soundtrack recording;
5. the audio and visual recording must be of a sufficiently clear and intelligible quality as to be readily comprehended upon display; and
6. a written self-proving or acknowledgment document must be executed contemporaneously with the videotape recording of the will.

(a) The self-proving or acknowledgment instrument must be signed by the testator (or by another person at the direction and in the presence of the testator) and two (2) or more witnesses, each in the presence of the others.

141. Id.
142. Id.
143. Adapted from Buckley, Devising Videotaped Will Statutes: A Primer, BARRISTER (Spring 1986), at 37.
(b) The execution of the self-proving or acknowledg-
ment document may [shall] also be videotaped with the
testator and attesting witnesses appearing together within
the camera's field of vision during recordation of the
execution ceremony.[:][and]
[(7) a written transcription may [shall] accompany the videotaped
will, and such a writing shall contain a provision in which the person
that prepared the transcript states, under oath, that the writing
was made contemporaneously with the videotape.]^{144}

Any provision allowing a videotape to function as a written will must be
drafted to avoid the dangers the writing requirement was designed to prevent.
By requiring a continuous recording of the execution ceremony, possible tampering with the tape, which may arise if there are a number of stops and starts, would be reduced.^{145} Even without the optional addition of the written transcription, the signature requirement is satisfied by an accompanying self-
proving document. The explicit guidelines set forth by the provision would
prevent misuse of this new medium in the probate process and would foster uniformity in its use and application.

The Future of Probate Videotape

The use of probate video is in its infancy. Videotape technology was not
developed until the 1950s^{146} and did not become widely available and afford-
able until the late 1970s and early 1980s.^{147}

As recently as eight to ten years ago, the concept of probate video had
not yet entered legal literature and commentary. Within the past eight years,
probate video has begun to enter the mainstream of estate planning as more
articles are written,^{148} statutes introduced (one even being enacted),^{149} and
public awareness of the technique increases.^{150} As with most innovative tech-
niques, videotape in the probate process has its skeptics.^{151}

Eventually more jurisdictions will enact provisions expressly authorizing the
use of videotape as evidence of the will execution ceremony and as a replace-

144. Id.
145. Id.
146. See, e.g., 2 C. Scott, Photographic Evidence § 716 (1969) ("Videotape was first
demonstrated in 1951 and was in commercial use by 1954."); Salvan, Videotape for the Legal
Community, 59 Judicature 222, 222-24 (1975) (Ampex Corporation invented videotape in 1956
and its first commercial use occurred on November 30, 1956).
147. Inspection of current television, radio, and newspaper ads clearly shows relatively low
cost and widespread availability of videotape recorders, video cameras, and related products.
148. See supra note 18.
149. See supra the section "Existing and Proposed Legislation."
1; Personal Law: Where There's a Way, There May Not be a Will, 39 Changing Times 89 (June
1985); Berardinelli, Technology Beat: Immortal Movies and Paper Briefcases, Tex. Press Clipping
Bureau Dallas, Nov. 5, 1984, at 243, col. 1.
problems with videotape outweigh its potential benefits).
ment/alternative to a written will. The speed with which such techniques gain widespread support will continue to increase as the legal profession and the lay community become more comfortable with these new methodologies.

Just as written wills may become relegated to history, so too may videotaped wills. As technology continues its incessant progress, new methods of documenting a testator's last wishes will emerge, many of which are beyond speculation. One that seems plausible is the "hologramic" will. By use of laser-generated, three-dimensional images, near perfect reproductions of testators will be possible. Such recordings, rather than being on a magnetic tape, could be stored in a microchip small enough to fit on the head of a pin. Testators would be able to carry all of their valuable documents, including their wills, with them at all times and perhaps even have some of them surgically implanted in their bodies.

Conclusion

Attorneys dedicated to providing clients with the best legal services available must remain abreast of technological developments that impact the legal profession. Videotape, a relatively recent advancement, is increasingly utilized in both civil and criminal arenas and is beginning to make its way into the probate context. Videotape potentially may serve two separate probate functions: (1) as an evidentiary tool to prove certain elements of a valid will; and/or (2) as constituting the testamentary instrument itself. Utilizing videotape in these ways is highly advantageous because as accuracy is refined, testamentary intent is clarified, and will contests are discouraged.

A number of procedural barriers may temporarily impede the use of videotape in probate. If offered as the actual testamentary document, an enabling statute is necessary to circumvent the traditional writing requirement, unless the surrounding circumstances fall within holographic will parameters. If offered for purely evidentiary purposes, videotape constitutes excellent extrinsic proof of testamentary intent, capacity, proper execution, and lack of fraud or undue influence. When utilized for these evidentiary purposes, videotape must satisfy the same evidentiary requirements encountered by traditional forms of extrinsic evidence offered on these issues. Videotape is generally held to the admissibility standards applicable to photographs, audio recordings, or motion pictures. The most important admissibility concern is that the tape be a true and accurate representation of the events portrayed. The introduction of videotape will likely be met with a battery of hearsay objections, although most of these can easily be overcome. Ultimately, admissibility is at the court's discretion and the videotape may be excluded if its probative value is substantially outweighed by other equitable concerns.

To date, Indiana is the only state to enact a probate video statute. A poll of Indiana probate judges indicates that the judiciary views the statute favorably as an evidentiary tool. Other state legislatures, including New Jersey, New York, and Texas, have proposed probate provisions allowing the introduction of videotapes either as evidence or as the will itself. None of these proposals have yet been passed into law.
The law governing video probate is still in its formative stages. However, the concept is maturing, and in the best interests of justice, its use should gain rapid support as videotape is proven to be a highly accurate and invaluable tool in the probate arena. In the interests of professionalism, attorneys should seek to avail themselves and their clients of the significant edge offered by the use of videotape in probate.