Casenote

Estate of Saueressig and Post-Death Subscription: The Protective Function Reborn

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I. INTRODUCTION

Many beneficiaries have been unfortunate enough to discover that a testator’s failure to comply with testamentary execution requirements carries a heavy price. In recent decades, many states have taken steps to mitigate the impact of formal attestation requirements on expressions of testamentary intent. This modern response embodies a liberal attitude towards formalities in the law of wills, indicating that the once-solid foundation of execution requirements is crumbling. Indeed, commentators have opined that attestation formalities may be “withering away,” and some have called for their outright elimination. Despite these developments, the recent decision by the California Supreme Court in Estate of Saueressig indicates that formalities are far from extinct.

In Saueressig, the court held that California Probate Code section 6110 prohibits the completion of attestation requirements after the death of the testator. The court’s narrow interpretation of section 6110 constitutes a significant deviation from modern trends in the law of wills. Given the viability of holographic wills and will substitutes in California, all of which undermine the functions of execution formalities, Saueressig appears, upon first glance, to embody a result inconsistent with the prevailing wisdom of the law of wills.

Nevertheless, this Casenote argues that the bright-line rule adopted in Saueressig is superior to the “reasonable time” rule adopted by other jurisdictions and promulgated in the 1990 Uniform Probate Code (UPC). Consistent with the normative conception of formal functions, its primary benefit lies in its protection of the testator from fraud or mistake. In addition, the Saueressig approach promotes uniformity, predictability, and administrative efficiency. While Saueressig’s holding is laudable, the court’s reasoning is less than clear, leaving several unresolved questions.

2. See Lloyd Bonfield, Reforming the Requirements for Due Execution of Wills: Some Guidance From the Past, 70 TUL. L. REV. 1893, 1897 (1996) (characterizing the 1990 Uniform Probate Code’s dispensing power provision as a “revision in will execution that is nothing short of insurrection”).
3. Shipp, supra note 1, at 753.
9. See Saueressig, 38 Cal. 4th at 1056, 136 P.3d at 208 (emphasizing the central role of the protective function in prohibiting post-death subscription).
10. See id. at 1057, 136 P.3d at 209 (noting the benefits of a bright-line prohibition on post-death subscription).
This Casenote contends that Saueressig illustrates three key points. First, from a policy standpoint, the Saueressig rule maximizes the utility of the protective function of attestation formalities following the 1983 reforms to the California Probate Code. Implicit in this point is an assertion that the once-discredited protective function has undergone a legitimizing “rebirth” in the limited context of post-death subscription. Second, although its result is sound, Saueressig embraces the deeply-rooted but erroneous legal proposition that post-death subscription is incompatible with the temporal nature of the will instrument. Finally, Saueressig demonstrates the judicial tendency to interpret modern, minimalist wills acts in a manner inconsistent with the prevailing liberal attitude towards formalities.

Part II begins by surveying the legal background of Saueressig, including the conflicts in the California appellate courts that generated the Saueressig case and the competing rule adopted in other jurisdictions. Part III provides an in-depth look at the Saueressig case. Finally, Part IV analyzes the implications of the rule adopted in Saueressig.

II. BACKGROUND

A. Will Formalities: History and Functions

The Statute of Wills, enacted by the English Parliament in 1540, was not steeped in testamentary formalities. It merely required devises of land held in fee simple to be memorialized in writing. To increase the reliability of testamentary dispositions, the formal requirements for attested wills were enacted via the Statute of Frauds in 1677. The English Wills Act of 1837 expanded the application of attestation formalities beyond real property to include bequests of personal property. While the precise formula varies from state to state, attestation formalities in American jurisdictions have been strongly influenced by the execution requirements contained in the English Wills Act. Based upon these historical foundations, the law of wills has proven “extraordinarily resistant to change.”

12. Id.
14. Id. at 792-93.
15. Langbein, supra note 8, at 490.
16. Lindgren, supra note 4, at 547-48.
17. Miller, supra note 11, at 177.
Commentators have identified four functions performed by will formalities. First, they serve a cautionary or ritual function which promotes a reflective mindset on the part of the testator. The rituals surrounding the execution ceremony theoretically ensure that the testator is impressed with the significance of the testamentary act. Second, formalities serve an evidentiary function by generating potentially reliable evidence after the death of the testator, allowing courts to approximate the testator’s true intentions. Third, formal attestation requirements serve a protective function, insulating the testator from fraud, undue influence, or substitution. Fourth, formalities serve a channeling function, promoting uniformity while assuring that the testator’s intentions are expressed in a legally effective manner. Due to the schematic nature of formalities, effective channeling symbiotically enhances the benefits provided by the other formal functions.

B. The Erosion of Formalities

1. Deviation from the Strict Compliance Doctrine

As a general rule, courts require strict compliance with formalities in order to admit a will to probate. However, the policy of promoting free disposition of property is the driving force behind the law of wills. Thus, a profound tension exists between a healthy respect for testamentary intent and the application of formalities to invalidate wills that, aside from some slight defect in execution, truly reflect the testator’s intent. A few states have adopted equitable remedies such as the harmless error rule contained in section 2-503 of the revised 1990 UPC. Several other states have adopted the substantial compliance doctrine in varying degrees. However, the California Legislature has not yet enacted a harmless error provision.

18. See Langbein, supra note 8, at 492-97 (defining four purposes served by formal attestation requirements).
20. Id.
22. Id.
23. Langbein, supra note 8, at 493-94.
25. Miller, supra note 11, at 177-78.
26. Langbein, supra note 8, at 491.
27. Milligan, supra note 13, at 795.
28. Shipp, supra note 1, at 733.
29. See id. at 729-32 (examining various approaches to the substantial compliance doctrine).
Even in jurisdictions that have yet to adopt such equitable remedies, some courts have sought to effectuate the testator’s intent, if possible, by liberally interpreting statutes imposing formal requirements on the execution of testamentary documents.\textsuperscript{31} Accordingly, the modern attitude towards formalities is manifested in a number of methods that seek to effectuate the testator’s intent despite execution defects. There is an ongoing debate concerning the extent to which equitable remedies discourage compliance with attestation requirements and undermine the functions of will formalities.\textsuperscript{32}

2. Minimalist Wills Acts

Consistent with the modern trend of liberalization, the 1969 UPC was created with the basic policy of “validat[ing] the will whenever possible.”\textsuperscript{33} The 1969 UPC has had a nationwide effect on probate reform, and a majority of jurisdictions have been significantly influenced by its treatment of will formalities or have adopted its provisions outright.\textsuperscript{34} The 1969 UPC minimized the number and scope of execution formalities.\textsuperscript{35} It eliminated the traditional requirements that a witness sign in the presence of the testator, that witnesses sign in each other’s presence, and that the testator formally publish the will.\textsuperscript{36} Although the revised 1990 UPC retained the same basic formal requirements as the 1969 UPC,\textsuperscript{37} it added an additional temporal caveat, requiring witnesses to sign the will within a “reasonable time” of witnessing the testator’s signature or acknowledgement of the will.\textsuperscript{38}

In summary, the UPC’s provisions abolished many of the ceremonial elements contained in the Wills Act of 1837. Although the UPC “effectively demystified the process of will-making,” it failed to set forth a comprehensive policy rationale defining the modern role of formalities in the law of wills.\textsuperscript{39} Buffeted by liberal attitudes and conservative traditions, courts interpreting minimalist wills acts have been left to fill in construction gaps within a policy vacuum.

\textsuperscript{31} Kelly A. Hardin, Note, An Analysis of the Virginia Wills Act Formalities and the Need for A Dispensing Power Statute in Virginia, 50 WASH. & LEE L. REV. 1145, 1155 (1993); see also Shipp, supra note 1, at 730 (“[P]robate courts often strain to find that the statutory requirements have been met . . . .”).

\textsuperscript{32} See Hardin, supra note 31, at 1183-84 (discussing inconsistent policy objectives in a jurisdiction permitting holographic wills but rejecting equitable remedies).

\textsuperscript{33} UNIF. PROBATE CODE art. 2, pt. 5 general cmt. (1969).

\textsuperscript{34} Miller, supra note 11, at 207.

\textsuperscript{35} Id. at 208.

\textsuperscript{36} Id. at 209.

\textsuperscript{37} Id. at 210.

\textsuperscript{38} UNIF. PROBATE CODE § 2-502(a) (1990).

\textsuperscript{39} Miller, supra note 11, at 177.
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In 1983, the California Legislature enacted Probate Code section 6110, substantially altering California’s scheme of testamentary formalities. Like section 2-502 of the 1969 UPC, section 6110 eliminated the requirement that witnesses sign the will in the testator’s presence. In addition, section 6110 abolished several of the more antiquated formalities, such as the requirements that the testator formally declare the instrument to be his will and request the witnesses to sign. In accordance with the modern movement to minimize formalities, section 6110 requires only that a will be in writing, signed by the testator, and signed by two persons who simultaneously witnessed the testator’s signature or acknowledgement of the will. The witnesses must also understand that they are signing the will of the testator. Like other minimalist wills acts, section 6110 does not elaborate on when or where a witness must sign a will relative to either the actual act of witnessing or the lifespan of the testator. Notably, the changes adopted by the Legislature were suggested by the California Law Revision Commission, which relied in part upon section 2-502 of the 1969 UPC in drafting its recommendations.

C. Holographic Wills

Accompanied by a number of jurisdictions influenced by French and Spanish civil law, California recognizes holographic wills. Traditionally defined as an unattested document entirely written, signed, and dated in the testator’s own handwriting, the statutory requirements for holographic wills have been reduced in scope by a number of state legislatures. Because a holographic will “need not assume any particular form,” a valid holograph may be found in nearly any type of document exhibiting testamentary intent. Courts in California have

41. See In re Estate of Saueressig, 38 Cal. 4th 1045, 1049, 136 P.3d 201, 203-04 (2006) (noting that prior to the enactment of section 6110, “a formal will required attestation by two witnesses in the presence of the testator”).
42. Id. at 1049, 136 P.3d at 204.
43. Id. at 1053, 136 P.3d at 206.
44. CAL. PROB. CODE § 6110 (West 1991 & Supp. 2007).
45. Id.
46. See id. (omitting spatial or temporal limitations on attestation).
47. Saueressig, 38 Cal. 4th at 1061, 136 P.3d at 211 (Moreno, J., dissenting).
48. Miller, supra note 11, at 212.
49. See CAL. PROB. CODE § 6111 (West 1991) (permitting the testamentary disposition of property by holographic instrument).
51. See id. at 162; see, e.g., CAL. PROB. CODE § 6111 (requiring only “material provisions” of a holograph to be in the testator’s handwriting).
found valid holographs in informal documents, such as personal letters, even though they discuss an array of issues incidental to the disposition of property.\textsuperscript{53}

From a policy standpoint, it is difficult to reconcile the legislative enactment and judicial treatment of holographic-will statutes with the strict compliance doctrine and formal requirements for attested wills.\textsuperscript{54} In jurisdictions recognizing holographic wills, testators who attempt in good faith but fail to fulfill the formal requirements for an attested will are in effect “punished,” while a document meeting the minimal requirements for a holographic will can be probated, even though it may contain substantive problems, for example, where a testator’s intent is less than clear.\textsuperscript{55} Thus, holographic wills may undercut some of the policies and functions underlying the formal requirements for attested wills.\textsuperscript{56}

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\textbf{D. National Split of Authority}

A number of states that adopted minimalist wills acts have confronted the issue of post-death subscription.\textsuperscript{57} In response, two competing rules have emerged. A majority of jurisdictions addressing the issue have adopted the rule established in 1983 by the Nebraska Supreme Court in \textit{In re Estate of Flicker}.\textsuperscript{58} Focusing on the protective function of attestation formalities, \textit{Flicker} held that Nebraska’s minimalist wills act prohibited post-death subscription.\textsuperscript{59} In the following decade, appellate courts in four other states adopted the same rule.\textsuperscript{60} Two of these later cases introduce an additional argument in favor of prohibiting post-death subscription, namely, that because a “will speaks as of the date of the testator’s death . . . the document should be complete at that time.”\textsuperscript{61}

Conversely, the Supreme Court of New Jersey interpreted the state’s minimalist wills act, also based on section 2-502 of the 1969 UPC, to allow a witness to sign a will “within a reasonable period of time” after observing the

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\begin{footnotes}
\footnote{53. See \textit{In re Estate of Smilie}, 222 P.2d 692, 694-96 (1950) (finding a potentially-ambiguous letter primarily concerning a family dispute to be testamentary in nature).}
\footnote{54. Lindgren, supra note 4, at 572-73.}
\footnote{55. Miller, supra note 11, at 279.}
\footnote{56. See Lindgren, supra note 4, at 573 (arguing that the recognition of holographic wills and will substitutes have rendered attestation formalities “isolated and unprincipled”).}
\footnote{57. See Crook v. Contreras, 116 Cal. Rptr. 2d 319, 327 (Ct. App. 6th Dist. 2002) (examining post-death subscription cases in various jurisdictions). Post-death subscription occurs when a witness affixes his or her signature to a will after the death of the testator in an attempt to fulfill the formal attestation requirements for a valid will, ostensibly after witnessing the testator sign or acknowledge the will at some previous point in time.}
\footnote{58. See \textit{In re Estate of Flicker}, 339 N.W.2d 914, 915 (Neb. 1983) (prohibiting post-death subscription); see also Contreras, 116 Cal. Rptr. 2d at 327 (noting that numerous jurisdictions have prohibited post-death subscription).}
\footnote{59. \textit{Flicker}, 339 N.W.2d at 915.}
\footnote{60. See, e.g., \textit{In re Estate of Royal}, 826 P.2d 1236 (Colo. 1992); \textit{In re Estate of Mikeska}, 362 N.W.2d 906 (Mich. Ct. App. 1984).}
\footnote{61. \textit{Royal}, 826 P.2d at 1238; see also \textit{In re Estate of Rogers}, 691 P.2d 114, 115 (Or. Ct. App. 1984) (relying solely on the alternative temporal rationale).}
\end{footnotes}
testator sign or acknowledge the will,\textsuperscript{62} regardless of whether the testator was living.\textsuperscript{63} More recently, the Arizona Court of Appeals, interpreting the revised 1990 UPC’s version of the “reasonable time” rule as adopted by the Arizona Legislature,\textsuperscript{64} held that post-death subscription was compatible with due execution.\textsuperscript{65} The Arizona court relied, in part, upon a comment to the revised section 2-502, which states that “[t]here is, however, no requirement that the witnesses sign before the testator’s death . . . .”\textsuperscript{66}

E. Setting the Stage: California’s Split of Authority

Before \textit{Estate of Saueressig}, California’s position on post-death subscription reflected the national split of authority in a microcosm. In \textit{Crook v. Contreras}, a case of first impression, the Sixth District Court of Appeal flatly rejected post-death subscription as inconsistent with Probate Code section 6110.\textsuperscript{67}

However, in a stinging rejection of \textit{Contreras}, the Second District Court of Appeal repudiated a bright-line prohibition on post-death subscription in \textit{Estate of Eugene}.\textsuperscript{68} The \textit{Eugene} court favored a fact-specific inquiry, holding that section 6110 permitted post-death subscription under certain circumstances.\textsuperscript{69} Because the facts in \textit{Estate of Eugene} provide perhaps the most compelling example in favor of post-death subscription, they are worthy of examination.

The testatrix in \textit{Estate of Eugene}, Cleopatra Eugene, retained an attorney to prepare her will and signed it in the presence of two witnesses.\textsuperscript{70} Although one witness signed the will, the other, Ms. Eugene’s attorney, accidentally failed to affix his signature.\textsuperscript{71} This critical error was not discovered until after Ms. Eugene’s death. Although the executrix submitted an affidavit from the attorney describing his inadvertent failure to sign, and the probate court found no signs of fraud or untruthfulness, the petition for probate of Ms. Eugene’s will was denied because her attorney “had not signed the will during [Ms. Eugene]’s lifetime.”\textsuperscript{72}

Thus, Ms. Eugene’s gift of her entire estate to the Union Rescue Mission, a charity, was defeated.\textsuperscript{73}

On appeal, the Second District reversed the probate court, articulating a novel standard under section 6110 to allow post-death subscription in certain

\textsuperscript{63} \textit{Id.} at 1013.
\textsuperscript{66} \textit{Id.} at 100-01 (citing \textit{Unif. Probate Code} § 2-502 cmt. (a)(3) (revised 1990)).
\textsuperscript{67} \textit{See Crook v. Contreras}, 116 Cal. Rptr. 2d 319, 328 (Ct. App. 6th Dist. 2002).
\textsuperscript{68} \textit{Estate of Eugene}, 128 Cal. Rptr. 2d 622, 627 (Ct. App. 2d Dist. 2002).
\textsuperscript{69} \textit{Id.} at 626.
\textsuperscript{70} \textit{Id.} at 623.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at 623-24.
situations: “judicial inquiry should focus on a rule that best accommodates all circumstances surrounding the actual witnessing of a testator’s unquestioned intent.” Rejecting both an older line of New York cases disapproving of post-death subscription on temporal and protective grounds, and the more recent interpretations of minimalist wills acts following In re Estate of Flicker, the court implied that its ad hoc approach to post-death subscription managed to secure the benefits of the protective function of formalities while avoiding results inconsistent with the intent of the testator. Thus, the sharply contrasting positions taken in Eugene and Contreras set the stage for the California Supreme Court’s decision in Estate of Saueressig.

III. ESTATE OF SAUERESSIG

A. Factual Background

The decedent and would-be testator, Timothy Saueressig, prepared a typewritten will without consulting an attorney. Unmarried and without living parents or siblings, he left his entire estate to three of his friends. He took the will to be notarized by another friend, Jongook Shin, at her Mail Boxes Etc. franchise. Apparently the decedent believed that notarization would render the will valid. At Mail Boxes Etc., the decedent told Shin and her husband, Theodore Boody, that he had drafted the new will to eliminate a beneficiary under his previous will. In the presence of both Shin and Boody, the decedent signed the will and asked Shin to notarize it. Although Boody understood that the document was the decedent’s will, he did not sign it as a witness. After Mr. Saueressig’s death, the will was found in a hand-labeled envelope.

74. Id. at 627.
75. Id. at 626 (noting that In re Cannock’s Will, 81 N.Y.S.2d 42 (Sur. Ct. 1948) was a “one-judge decision of the Queens County Surrogate’s Court,” and the opinion in In re Fish’s Will, 34 N.Y.S. 536 (1895) was rendered “without any authority at all”).
76. Id. (noting the inflexibility of the bright-line majority approach to post-death subscription).
77. See id. at 627 (concluding that an absolute prohibition on post-death subscription would actually encourage fraud by penalizing candor on the part of witnesses after the testator’s death).
79. Id. at 1057, 136 P.3d at 209.
80. Id.
81. Id. at 1047 n.3, 136 P.3d at 202 n.3.
82. Id. at 1057, 136 P.3d at 209 (Moreno, J., dissenting).
83. The court accepted the argument that “the only reasonable inference to be drawn from the decedent’s conduct is that he believed the notarization would validate his will.” Id. at 1047 n.3, 136 P.3d at 202 n.3 (quotations omitted). Under a more critical analysis, the fact that Ms. Shin was invited to sign the will in her capacity as a notary public, at the very least, raises significant questions as to Mr. Saueressig’s understanding of the nature and function of a will, if not intent.
84. Id. at 1047, 136 P.3d at 202.
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Despite a declaration by Boody stating that he was “ready and willing to sign the will as a witness,” the trial court denied the petition to probate the decedent’s will.\textsuperscript{85} Signed only by the notary, Shin, it did not contain the requisite number of witnesses’ signatures for an attested will under section 6110.\textsuperscript{86} The Court of Appeal reversed the trial court’s order denying probate of the will, holding, like the Eugene court, that section 6110 did not preclude post-death subscription.\textsuperscript{87}

B. The Court’s Reasoning

The California Supreme Court resolved the conflict between the appellate courts by adopting an absolute prohibition on post-death subscription.\textsuperscript{88} Finding section 6110 to be ambiguous on the matter,\textsuperscript{89} the court focused on the Legislature’s intent in enacting the minimalist wills regime embodied in section 6110. While conceding that the legislative history failed to address the issue expressly,\textsuperscript{90} the court noted that there was no affirmative evidence of any intent to permit post-death subscription.\textsuperscript{91} Reasoning that “[a] rule allowing postdeath attestation would essentially substitute oral testimony for the Legislature’s requirement of a written signature,”\textsuperscript{92} the court found it improbable that such a “vast and sweeping change” would be affected without mention.\textsuperscript{93}

Reaching further, the court attempted to discern the Legislature’s intent based on a series of changes to section 6110 involving the simultaneous presence requirement, an issue entirely distinct from post-death subscription.\textsuperscript{94} This requirement, an attribute of California’s previous (and more traditional) wills act, was the subject of academic debate during the passage of section 6110.\textsuperscript{95} As originally drafted, section 6110 required two witnesses to be present at the same time to witness a testator’s signing or acknowledgement of his or her will.\textsuperscript{96} However, this requirement was initially deleted prior to the enactment of section 6110.\textsuperscript{97}

\begin{itemize}
  \item \textsuperscript{85} Id. at 1048, 136 P.3d at 202-03.
  \item \textsuperscript{86} Id. at 1058, 136 P.3d at 210 (Moreno, J., dissenting).
  \item \textsuperscript{87} In re Estate of Sauерessig, 19 Cal. Rptr. 3d 262 (Ct. App. 2d Dist., 2004).
  \item \textsuperscript{88} Sauерessig, 38 Cal. 4th at 1052, 136 P.3d at 205.
  \item \textsuperscript{89} Id. at 1050, 136 P.3d at 204.
  \item \textsuperscript{90} Id. at 1054, 136 P.3d at 207.
  \item \textsuperscript{91} Id. at 1052-53, 136 P.3d at 206.
  \item \textsuperscript{92} Id. at 1056, 136 P.3d at 208.
  \item \textsuperscript{93} Id. at 1053, 136 P.3d at 206.
  \item \textsuperscript{94} Id. at 1054, 136 P.3d at 207.
  \item \textsuperscript{95} See id. at 1054-55, 136 P.3d at 207-08 (discussing letters sent to the Assembly Committee on the Judiciary by Professor Dukeminier and the Executive Committee of the Estate Planning, Trust, and Probate Law Section of the California State Bar).
  \item \textsuperscript{96} Id. at 1054, 136 P.3d at 207.
  \item \textsuperscript{97} Id.
\end{itemize}
In response, the Executive Committee of the Estate Planning, Trust, and Probate Law Section of the California State Bar sent a letter to the Assembly Committee on the Judiciary, expressing concern that testators would procrastinate and ultimately fail to obtain two witnesses if not compelled to do so by the simultaneous presence requirement. In defense of the modification, Professor Dukeminier, writing to the Committee on behalf of the California Law Revision Commission, opined that “more wills will fail because of the simultaneous presence requirement than will fail because the testator procrastinates in securing a second witness and dies in the meantime...” Shortly thereafter, the Legislature re-inserted the simultaneous presence requirement into section 6110. Based on this exchange, the court reasoned “that the Legislature was cognizant of concerns that a testator might delay too long, i.e. until his death, to procure a second witness, and that his will would thereby be invalid.”

Moving beyond legislative intent, the court made a temporal argument against post-death subscription. Reiterating the “critical principle” that a will is operative upon the testator’s death, the court reasoned that permitting post-death subscription would create a time-gap between the testator’s death and the fulfillment of section 6110’s formal requirements for attestation. Quoting an older New York case, In re Cannock’s Will, the court stated, “[a] will must be a valid, perfect instrument at the time of the death of the testator. It takes effect at the instant the testator dies. If invalid then, life cannot be given to it by the act of a third party.” In addition, the lack of any statutory mechanism by which to delay probate or intestacy procedures while securing a witness’ signature provided a further indication that post-death subscription was incompatible with California’s scheme of formalities for attested wills.

The court also found persuasive the line of cases, beginning with Estate of Flicker, that emphasized the heightened potential for fraud under an attestation scheme permitting post-death subscription. Specifically, it would allow witnesses to control the disposition of estates. In addition, the court expressed concerns about uniformity, delay, and judicial economy that would arise under a flexible approach to post-death subscription.

98. Id.
99. Id. at 1055, 136 P.3d at 207 (citation omitted).
100. Id.
101. Id. at 1056, 136 P.3d at 208.
102. Id. at 1052, 136 P.3d at 205-06.
103. Id. at 1056, 136 P.3d at 208 (quoting In re Cannock’s Will, 81 N.Y.S.2d 42, 42-43 (Sur. Ct. 1948)).
104. Id. at 1052, 136 P.3d at 206.
105. Id. at 1051-52, 136 P.3d at 205.
106. Id. at 1056, 136 P.3d at 208.
107. Id. at 1057, 136 P.3d at 209.
IV. POST-DEATH SUBSCRIPTION AND THE PROTECTIVE FUNCTION

A. The Path to Post-Death Subscription

In jurisdictions with traditional attestation formalities modeled after the English Wills Act of 1837, the witnessing requirement has multiple manifestations. Its primary facet, retained in all modern wills acts, requires that two persons witness the testator’s signing or acknowledgement of the will and affix their signatures. These common actions of witnesses can be further compartmentalized into “observatory” and “signatory” functions.

A secondary manifestation, deemed an “increasingly anomalous” ritual by scholars, requires the witnesses to sign the will in the presence of the testator. As a practical matter, this traditional formality effectively thwarted post-death subscription. Although some jurisdictions have been more flexible than others in interpreting the presence requirement, it has produced “egregious” effects on the intent of well-meaning testators when strictly enforced. One major thrust of the 1969 UPC, and the minimalist wills acts it produced, was to simplify the attestation process by eliminating such overly burdensome formal requirements. However, in removing the presence requirement, which implicated the physical and temporal proximity between the testator and the acts of witnesses, minimalist wills acts have created a fresh opportunity for post-death subscription.

B. Legislative Intent: An Enigma

One pattern that emerges in cases interpreting minimalist wills acts is the lack of legislative history or indicia of legislative intent dealing specifically with

108. Miller, supra note 11, at 204.
109. See Wills Act, 1837, 7 Will 4 & 1 Vict., ch. 26 § IX, available at http://www.vanuatu.usp.ac.fj/pacific%20law%20materials/UK_legislation/UK_Wills.html (imposing a multitude of formal, ritualistic requirements on attested wills); see, e.g., CAL. PROB. CODE § 6110 (West 1991 & Supp. 2007) (retaining certain core formalities such as the simultaneous presence requirement).
111. Lindgren, supra note 4, at 572.
114. See Miller, supra note 11, at 224-25 (describing In re Weber’s Estate, 387 P.2d 165 (Kan. 1963), in which an elderly testator’s will was denied probate because he could not see the bank counter upon which the witnesses signed his will).
115. See UNIF. PROBATE CODE art. 2, pt. 5 general cmt. (1969) (aspiring to simplify execution requirements in order to validate wills “whenever possible”).
post-death subscription. In Saueressig, the court initially looked to legislative intent but ultimately resorted to alternative bases of reasoning to reach a conclusion. Like other statutes based on the 1969 UPC, section 6110 fails to provide guidance on the requisite timeframe for the witnessing requirement. Thus, the Saueressig court could only make an assessment of legislative intent based on the lack of any mention of post-death subscription, rather than any positive indicators. The court’s reliance on letters to the Assembly Committee on the Judiciary concerning the concededly different formal requirement of simultaneous presence further indicates that the rule adopted in Saueressig was more the result of significant policy considerations than a definitive manifestation of legislative intent.

C. Time and the Will Instrument: A “Critical Principle”?

1. Historical Context

An enormous body of precedent supports the proposition that a will, by its very nature, “speaks at death.” Unlike other methods for disposing of property, the will instrument is ambulatory and generally revocable on the whim of the testator. The traditional dilemma presented to courts has been to determine the earliest time that devises become operative relative to the testator’s death. However, in the context of post-death subscription, the timeframe focus is reversed. It becomes necessary to examine the implications, if any, of the passage of a period of time between the testator’s death and the witnesses’ acts of attestation. Post-death subscription poses the temporal question of whether a will must comply with statutory formalities at the moment of the testator’s death in

117. See, e.g., In re Estate of Royal, 826 P.2d 1236, 1238 (Col. 1992) (noting the “silence” of the relevant wills act as to post-death subscription and finding only broad circumstantial indications of legislative intent); In re Estate of Rogers, 691 P.2d 114, 115 (Or. Ct. App. 1984) (finding legislative history regarding the elimination of the presence requirement, but none specifically dealing with post-death subscription).
118. See Saueressig, 38 Cal. 4th at 1053-56, 136 P.3d at 206-08 (examining legislative history and finding no indication that the Legislature intended to permit post-death subscription).
119. Id. at 1056-57, 136 P.3d at 208-09.
120. See CAL. PROB. CODE § 6110 (West 1991 & Supp. 2007); Miller, supra note 11, at 210 (noting that the language of the 1969 UPC created certain interpretation problems).
121. See Saueressig, 38 Cal. 4th at 1054-55, 136 P.3d at 207 (finding the legislative history regarding the “related area” of the simultaneous presence requirement “instructive” for purposes of statutory construction).
122. See, e.g., In re Babb’s Estate, 252 P. 1039, 1040-41 (Cal. 1927) (“Although for some purposes a will is considered as speaking from the date of its execution, as a general rule it speaks from the death of the testator and must be construed as operating according to the state of things then existing.” (quotation and citation omitted)).
124. See David M. Becker, Debunking the Sanctity of Precedent, 76 WASH. L. Q. 853, 865 (1998) (discussing divergent English and American views as to whether the date of a devise is the time it is executed or the time when it becomes effective, viz., upon the testator’s death).
order to effectuate the designated gifts.\textsuperscript{125} In effect, courts must determine the latest point at which a will may become operative relative to the testator’s death.

The disposition of property in a will does not confer vested property rights upon beneficiaries during the testator’s lifetime.\textsuperscript{126} Rather, a will creates rights that vest upon the death of the testator.\textsuperscript{127} Courts have construed devises as “pass[ing] only at the moment” of the testator’s death.\textsuperscript{128} Thus, in “orthodox theory,” beneficiaries acquire property interests irrespective of the actions of third parties.\textsuperscript{129} Yet, as a practical matter, courts have recognized that a will is “inoperative” until it maneuvers through the probate process.\textsuperscript{130} Accordingly, there is a natural inconsistency between the theory of giving effect to wills at the moment of the testator’s death and actual practice, due to the administrative requirements of the probate process. Post-death subscription further heightens this tension between theory and practice.

2. Formalistic Dichotomy

Courts have long regarded the relationship between time of death and the will instrument as an independent rationale for prohibiting post-death subscription.\textsuperscript{131} In a relatively recent case banning post-death subscription, the Oregon Court of Appeals relied solely on the temporal argument that a will, being effective at the instant of the testator’s death, must fail if the execution formalities have not been observed by that time.\textsuperscript{132} Other jurisdictions interpreting minimalist wills acts have also been influenced by this distinct rationale, separating it from policy concerns about the functions of attestation formalities.\textsuperscript{133} The Saueressig court reinforced this dichotomy, deeming the temporal rationale a “critical principle” in the law of wills.\textsuperscript{134} Although this makes perfect sense from a purely theoretical standpoint, it is not at all clear why the temporal nature of the will instrument should compel a prohibition on post-death subscription. Given the modern minimalist policy of giving effect to a

\begin{itemize}
\item \textsuperscript{125} See In re Cannock’s Will, 81 N.Y.S.2d 42 (Sur. Ct. 1948) (holding that a purported will bearing only the testator’s signature at the time of his death was an invalid testamentary instrument).
\item \textsuperscript{126} Cook v. Cook, 111 P.2d 322, 327 (Cal. 1941).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} See In re Davison’s Estate, 215 P.2d 504, 508 (Cal. Dist. Ct. App. 2d Dist. 1950) (“The testamentary act anticipates that the testator’s devises will pass only at the moment of his decease . . . ”).
\item \textsuperscript{129} Frederic S. Schwartz, Models of Will Revocation, 39 REAL PROP. & TR. J. 135, 161 (2004).
\item \textsuperscript{130} In re Walsh’s Estate, 223 P.2d 322, 325 (Cal. Dist. Ct. App. 2d Dist. 1950).
\item \textsuperscript{131} See In re Fish’s Will, 34 N.Y.S. 536 (1895); see also In re Cannock’s Will, 81 N.Y.S.2d 42 (Sur. Ct. 1948).
\item \textsuperscript{132} In re Estate of Rogers, 691 P.2d 114, 115 (Or. App. 1984).
\item \textsuperscript{133} See, e.g., In re Estate of Royal, 826 P.2d 1236, 1238 (Colo. 1992) (distinguishing the temporal and protective function rationales within the line of cases prohibiting post-death subscription); In re Estate of Mikeska, 362 N.W.2d 906, 910 (Mich. Ct. App. 1984) (recognizing the temporal rationale but rejecting it as a matter of statutory interpretation).
\item \textsuperscript{134} In re Estate of Saueressig, 38 Cal. 4th 1045, 1052, 136 P.3d 201, 205 (2006).
\end{itemize}
testator’s intent wherever possible, this rationale seems overly formalistic and artificial.

The Saueressig court grounded its temporal reasoning in a line of New York cases beginning with In re Matter of Fish’s Will, in which the issue of post-death subscription was apparently addressed for the first time in a reported case. In a two page opinion, the New York court stated,

If [post-death subscription is permitted], the anomaly might be presented of the disposition of an estate being suspended intermediate the death of the testator and the time the witness or witnesses shall perform the act of subscribing their names to the instrument. . . . A will must be a valid, perfect instrument at the time of the death of the testator. It takes effect at the instant the testator dies. If invalid then, life cannot be given to it by the act of a third party.

Although the New York court was emphatic in its reasoning, it failed to cite any authority for this proposition. In addition, the court did not provide a citation to the wills act that it was interpreting. Apart from practical concerns about the potential suspension of an estate’s disposition pending a signature, the court in In re Fish’s Will did not establish an independent policy justification for prohibiting post-death subscription based solely on the relationship between time and the characteristics of the will instrument. The more recent cases adopting this rationale have similarly failed to establish a non-formalistic justification for why, especially in light of modern liberal trends in the law of wills, the relation between time and the will instrument should independently dictate such a result.

Courts in jurisdictions permitting post-death subscription have not addressed the theoretical timeframe implications necessarily presented by post-death subscription. In Estate of Eugene, a California Court of Appeal noted the existence of the temporal basis for prohibiting post-death subscription but

135. Miller, supra note 11, at 207; see also UNIF. PROBATE CODE art. 2, pt. 5 general cmt. (1969) (stating the general policy objectives underlying modern minimalist wills acts).
136. See Saueressig, 38 Cal. 4th at 1056, 136 P.3d at 208 (quoting In re Cannock’s Will, 81 N.Y.S.2d at 42-43, which in turn quoted In re Fish’s Will, 34 N.Y.S. at 537-38).
137. In re Fish’s Will, 34 N.Y.S. at 537-38.
138. See Estate of Eugene, 128 Cal. Rptr. 2d 622, 626 (Ct. App. 2d Dist. 2002) (noting that the New York court in In re Fish’s Will, 34 N.Y.S. 536, did not provide authority for its reasoning).
139. See In re Fish’s Will, 34 N.Y.S. at 537-38 (omitting any citation to the pertinent New York statute).
140. See id.
141. See, e.g., Saueressig, 38 Cal. 4th at 1052-56, 136 P.3d at 205-08 (discussing the temporal rationale with approval); In re Estate of Rogers, 691 P.2d 114, 115 (Or. Ct. App. 1984) (adopting outright the temporal rationale).
142. See In re Estate of Peters, 526 A.2d 1005, 1008-10 (N.J. 1987); see also In re Estate of Jung, 109 P.3d 97, 102 (Ariz. Ct. App. 2005) (failing to address the potential conflict between the temporal rationale and a rule permitting post-death subscription).
dismissed it without comment.\footnote{143} To its credit, the dissent in \textit{Saueressig} went one step further, conceding that the temporal argument against post-death subscription had a “stronger basis” in precedent than the majority’s other arguments.\footnote{144} Unfortunately, the dissent likewise failed to provide a convincing rationale for rejecting that argument.\footnote{145} The validity of the dichotomous approach of many courts to the temporal and protective function rationales is discussed below.

3. \textit{Smoke and Mirrors?}

Courts have consistently distinguished between the temporal rationale for prohibiting post-death subscription and alternative policy rationales that may compel the same result.\footnote{146} This distinction is misplaced. The “critical principle” that a will becomes effective at the instant of a testator’s death\footnote{147} has traditionally invoked the will instrument’s ambulatory nature and the general rule of revocability,\footnote{148} whereas post-death subscription has implications on the opposite side of the temporal spectrum. Thus, “there is nothing inherent in the common law governing wills that requires [a temporal prohibition on post-death subscription].”\footnote{149}

A traditional justification for the temporal rationale is that “[t]he law favors the vesting of estates at the earliest opportunity.”\footnote{150} Thus, devises become effective on the date of the testator’s death unless “a later time for their vesting is apparent from express provisions in the will.”\footnote{151} Despite the unwillingness of courts to note the inapplicability of this formalistic rationale in the context of post-death subscription, it should be noted that post-death subscription is not the only instance in which a will that fails to satisfy the requisite formalities at the testator’s death is later validated by external actors. Equitable remedies, such as the substantial compliance doctrine, necessarily involve similar intermediate
periods of time between the testator’s death and validation.\textsuperscript{152} Although post-death subscription involves the act of a private third party rather than the judgment of a court, it implicates similar theoretical timeframe concerns.

In an era where minimalist wills acts have been enacted to “validate the will whenever possible,”\textsuperscript{153} the “critical principle” should not be construed to impose a formalistic blanket prohibiting any intermediate period between the testator’s death and the fulfillment of formal requirements for attestation. Thus, while the temporal argument would certainly be much more powerful in more traditionally-oriented jurisdictions where witnesses are required to sign in the presence of the testator,\textsuperscript{154} it seems genuinely inapposite in jurisdictions that have adopted minimalist wills acts based on the UPC.

The temporal rationale is pertinent to prohibiting post-death subscription only inasmuch as timely fulfillment of execution requirements enhances the operation of the formal functions of attestation. The \textit{Saueressig} court’s uncritical acceptance of the temporal rational as the primary basis for prohibiting post-death subscription\textsuperscript{155} obfuscates the core policy interests at stake. Simply put, the temporal argument, as an independent justification for a bright-line rule against post-death subscription, harkens back to the “formalism for the sake of formalism” mentality that has historically frustrated the intent of many a bona fide testator.\textsuperscript{156}

\textbf{D. The Protective Function}

\textit{1. Protective Policy in Modern Wills Acts}

The formal requirements set forth in a legislative scheme for attested wills are generally thought to serve evidentiary, cautionary, protective, and channeling functions.\textsuperscript{157} However, modern developments in the laws of testamentary disposition, such as the enactment of minimalist wills acts,\textsuperscript{158} the proliferation of non-probate transfers,\textsuperscript{159} and the increasing recognition of holographic wills

\begin{footnotesize}
\begin{enumerate}
\item[152.] See \textit{Langbein}, supra note 8, at 514 (noting that the substantial compliance doctrine permits the proponents of a will lacking the requisite formalities to prove, in court, that the deceased testator intended the proffered document to be a will).
\item[153.] \textit{UNIF. PROBATE CODE} art. 2, pt. 5 general cmt. (1969).
\item[154.] \textit{See Saueressig}, 38 Cal. 4th at 1061, 136 P.3d at 211 (Moreno, J., dissenting) (noting that the traditional presence requirement practically foreclosed the possibility of post-death subscription).
\item[155.] \textit{Id.} at 1052, 136 P.3d at 205-06.
\item[156.] \textit{See Sherwin}, supra note 21, at 457 (discussing situations where blind adherence to attestation formalities has historically frustrated the intent of the testator).
\item[157.] See \textit{Langbein}, supra note 8, at 492-97 (defining four functions served by formal attestation requirements).
\item[158.] Miller, supra note 11, at 207-08.
\item[159.] John H. \textit{Langbein}, \textit{The Non-Probate Revolution and the Future of the Law of Succession}, 97 HARV. L. REV. 1108, 1116-17 (1984); see also Grayson M.P. McCouch, \textit{Will Substitutes Under the Revised Uniform
\end{enumerate}
\end{footnotesize}
under the UPC, have collectively compromised the internal consistency, from a policy standpoint, of wills acts in many jurisdictions. The cautionary function, for example, has been a visible casualty of holographic wills statutes and minimalist wills acts that have done away with ceremonial formalities such as the publication requirement.

Naturally, the basic element of any testamentary scheme providing for attested wills is the witnessing requirement. The witnessing requirement, in turn, is the primary vehicle for implementing the protective function. Like other formal functions, the protective function has been eroded by developments embodied in the UPC and minimalist wills acts. The elimination of the requirement that witnesses affix their signatures in the presence of the testator, along with the abolition of the witness competency requirement, are central causes of this functional erosion.

More than thirty years ago, Professor Langbein noted that the UPC had “repudiated” the protective function by eliminating the presence requirement. Although courts traditionally attributed enormous functional importance to protective policy, modern scholars have deemed it an “historical anachronism” because testators in modern times are less likely to execute deathbed wills and more likely to employ the services of an attorney. In practice, attestation may be of little protective value due to the ready availability of agreeable witnesses, many of whom are strangers that “hardly see themselves as the testator’s sentinels.” Given the rise of will substitutes as efficient alternatives to the probate system, attestation simply appears unnecessary to protect against the harms it is intended to prevent.

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161. See Lindgren, supra note 4, at 572-73 (questioning whether the attestation requirement is compatible with holographic wills and will substitutes).


163. Lindgren, supra note 4, at 541.

164. Langbein, supra note 8, at 498.

165. Id. at 511.

166. Id.

167. Id. at 496-97; see also Lindgren, supra note 4, at 542 (advocating the complete elimination of attestation requirement).

168. Lindgren, supra note 4, at 555 (noting that most wills are likely to be executed in the presence of attorneys). Agreeable witnesses may include, for example, paid staff members from law offices.


170. See Langbein, supra note 159, at 1140 (noting the proliferation of nonprobate transfers).

171. Lindgren, supra note 4, at 557.
However, despite the progressive arguments of Langbein and other scholars, courts and legislatures have continued to place substantial emphasis on protective policy. In jurisdictions with minimalist wills acts, post-death subscription is one area in which this seemingly counterintuitive trend is prominently visible.

2. Saueressig’s Treatment of the Protective Function

In Estate of Saueressig, the California Supreme Court equated the protective function with “sound public policy.” The court first noted that the Law Revision Commission Comments to section 6110 reflected the legislative intent in enacting California’s minimalist wills regime. Thus, one of the legislative purposes underlying section 6110’s attestation scheme was to “minimize the opportunity for fraudulent alteration of the will or substitution of another instrument for it . . . .” The court also found persuasive the protective policy arguments set forth by other courts, observing that “[p]ermitting witnesses to sign a will after the death of a testator would erode the efficacy of the witnessing requirement as a safeguard against fraud or mistake.” Thus, despite its primary reliance upon the temporal rationale, the Saueressig court, like most courts to prohibit post-death subscription, attached significant weight to the heavily criticized protective function of attestation formalities.

3. Re-Framing the Debate: Anachronistic Rationale or Legitimate Policy Concern?

Post-death subscription implicates the protective policy because it allows the “final disposition of the estate . . . to depend, not solely upon the intention of the testator, but upon the will or caprice of one who had been requested to perform the very simple act of becoming a witness.” In jurisdictions permitting post-death subscription, an individual witnessing the execution of a will is more than a mere prerequisite to due execution. Rather, the witness becomes a testamentary dictator with the individual power to frustrate or effectuate the intent of a testator who can no longer speak.

173. See, e.g., In re Estate of Flicker, 339 N.W.2d 914, 915 (Neb. 1983) (prohibiting post-death subscription under the protective rationale).
175. Id. at 1048-49 & n.4, 136 P.3d at 203 & n.4.
176. Id. at 1052, 136 P.3d at 205 (quoting In re Estate of Flicker, 339 N.W.2d at 915).
177. Id. at 1052, 136 P.3d at 205 (finding other cases prohibiting post-death subscription persuasive because they were “consistent with the critical principle that a will is operative following the death of the testator”).
178. Id. at 1056, 136 P.3d at 208 (quoting In re Cannock’s Will, 81 N.Y.S.2d 42, 42-43 (Sur. Ct. 1948)).
At this juncture, the temporal rationale, overly formalistic when applied independently of the protective function, becomes pertinent:

[t]he lack of any requirement that the testator be living when the witness signs the will would deprive the testator of the chance to dispute the attestation and the consequent validity of the will. Only if he is alive can the testator say, “This will is not mine,” or “I did not ask this person to witness my will.”

When the formalistic temporal rationale is viewed in the operative context of the protective policy, it becomes apparent that post-death subscription may render the protective function vulnerable to circumvention.

a. The Reliability and Motives of Witnesses

Post-death subscription undermines the protective function of attestation formalities in two distinct situations. The first involves the reliability and motives of witnesses, a recurring concern of courts addressing post-death subscription. Unlike equitable remedies, under which courts independently determine the fate of a testator’s dispositions based on an ascertainable standard, post-death subscription gives enormous power to third-party witnesses who, at the very least, may feel no obligation to help validate the testator’s will. Even though witnesses may generally seek to help effectuate the testator’s intent, this is not always the case. For example, in In re Watkin’s Estate, a witness watched the would-be testator sign a will but subsequently refused, without reason, to affix his signature, thereby rendering the decedent’s will invalid. Post-death subscription compounds the problem of witness reliability because the testator may detrimentally rely on an insincere witness’s oral promise to sign, and thus procrastinate in finding a willing witness to, at the very least, fulfill the observatory function of attestation prior to the testator’s death.

Interested witnesses pose special problems in the context of post-death subscription. Under traditional wills acts, gifts to interested witnesses were automatically forfeited. However, the 1969 UPC eliminated the competency

179.  Id. at 1055-56, 136 P.3d at 208.
180.  See, e.g., In re Fish’s Will, 34 N.Y.S. 536, 537 (1895) (discussing with apprehension the potential capriciousness of subscribing witnesses).
181.  Shipp, supra note 1, at 732-35 (examining the application by courts of the dispensing power to technically deficient will instruments).
182.  In re Fish’s Will, 34 N.Y.S. at 537 (reasoning that post-death subscription allocates testamentary power to witnesses in a manner inconsistent with statutory attestation regimes).
183.  In re Watkin’s Estate, 75 So.2d 194, 195 (Fla. 1954).
requirement, facilitating the increased participation of interested witnesses. Jurisdictions recognizing post-death subscription give witnesses who already have incentives to influence the testator’s disposition of property a tempting opportunity to benefit themselves by choosing whether or not to validate the decedent’s purported will.

A recent Arizona case permitting post-death subscription, *In re Estate of Jung*, illustrates this testamentary anomaly. The testator, Bernard Jung, died August 8, 2002, having executed a will in 1980. The dispute centered on the validity of a codicil that was prepared by the testator’s son, Marc, two days before his father’s death. Although the codicil “purport[ed] to effectuate his father’s wishes,” it made certain dispositions that, in contrast to the equal allocation of property in the 1980 will, benefited Marc over his brother Ted.

The testator signed the codicil in the presence of Marc and his caregiver, Alison Scott. Ms. Scott signed the will as a witness on the same day. Marc first declared, in an affidavit, that he signed the codicil on August 6, 2002, in his father’s presence. He later testified that he had signed the document on August 7, 2002, even though copies shown to Ted five days after his father’s death contained only Ms. Scott’s signature. Ted challenged the validity of the codicil, alleging “that Marc was responsible for misdating the document and perpetrating a fraud on the court.” The codicil was denied probate.

The Arizona Court of Appeals reversed, holding that a witness may sign a will after the testator’s death. The court grounded its reasoning in the language of Arizona Revised Statutes (ARS) section 14-2502(A)(3), which essentially adopted the “reasonable time” rule promulgated in the revised 1990 UPC. Mirroring section 2-502 of the 1990 UPC, ARS section 14-2502 provides that witnesses must sign within a “reasonable time” of witnessing the testator’s acknowledgement or signing of his or her will. Like the dissent in *Saueressig*, the Arizona Court of Appeals noted that comment (a)(3) to section 2-502 of the 1990 UPC provides that “[t]here is . . . no requirement that the witnesses sign before the testator’s death.” It is worth noting that *In re Estate of Jung*

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185. UNF. PROBATE CODE § 2-505(b) (1969) (“The signing of a will by an interested witness does not invalidate the will or any provision of it.”); see also WILLIAM M. MCGOVERN & SHELDON F. KURTZ, PRINCIPLES OF WILLS, TRUSTS AND ESTATES 107-08 (2005) (explaining that under traditional attestation regimes, a competent witness was a disinterested person who had not been convicted of an infamous crime).


187. Id. at 98.

188. Id.

189. Id.

190. Id. at 98-99.

191. Id. at 98.

192. Id. at 99.

193. Id. at 102.


overruled a previous Arizona case prohibiting post-death subscription, *Gonzalez v. Satrustegui*, which was decided prior to the enactment of ARS section 14-2502.\(^{196}\)

*In re Estate of Jung* presents circumstances that are somewhat suspicious. Although the facts are unclear as to Bernard’s mental or physical condition, it appears that Ted did not examine the will drafted by Marc prior to Bernard’s death.\(^{197}\) Because the dispositions in Bernard’s will benefited Marc over Ted, Marc had every incentive to affix his signature in order to validate Bernard’s will. Under these facts, post-death subscription presents the same competency issues implicated by the participation of any interested witness, with the exception that Marc had the additional subsequent power to validate the will and perhaps perpetrate a fraud on his father’s estate simply through his individual actions.

In contrast, the motives of witnesses become an acute problem in regimes permitting post-death subscription when devises are made in favor of a non-witnessing third party. Witnesses who stand to receive more property under a prior will or by intestate succession have every incentive to procrastinate and later withhold their signatures, thereby illicitly promoting their interests at the expense of intended beneficiaries. For example, if Ted rather than Marc had been the beneficiary of the additional parcels of real estate, Marc could have nefariously increased his net worth by simply refusing to sign the codicil. Thus, in addition to both practical and theoretical concerns about whether subscribing witnesses should have dispositive power over testators’ estates, post-death subscription creates incentives for interested witnesses that are especially problematic.

\(b\). **Mistake and Uncertain Intent**

Implicit in any rule permitting post-death subscription is a problematic assumption regarding a testator’s behavior and intent. This assumption is evident in a second situation that implicates the protective policy. Specifically, a testator may execute a will and two witnesses may perform the observatory function, but the testator may deliberately fail to procure the signatures because he is unsure of his final intentions.\(^{198}\) Thus, post-death subscription might subject a testator to mistaken substitution by an ignorant witness who, acting in good faith, is attempting to validate dispositions that the testator ultimately did not intend to make. Implicit in this argument is the proposition that the protective function extends beyond intentional misconduct to encompass mistakes that may

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197. Id. at 98.
jeopardize the effectuation of the testator’s intent.\textsuperscript{199} Underlying this corollary to the protective rationale is the axiom that although extrinsic evidence may be used to draw a post-death inference about the testator’s intent, there is always the potential for error in his or her absence, especially in the absence of compliance with the requisite formalities.\textsuperscript{200}

E. The Rebirth of the Protective Function

Clearly, post-death subscription must be prohibited under the protective rationale, if at all. Yet scholars have generally dismissed the protective function as an archaic remnant of a previous era operating under dissimilar patterns of succession.\textsuperscript{201} In most instances, this prevailing wisdom is probably correct. However, post-death subscription presents special circumstances that implicate the protective function in a novel manner.\textsuperscript{202} As noted above, giving a private third-party witness dispositive control over a testator’s estate facilitates fraud. Furthermore, post-death subscription leaves a testator vulnerable to mistaken imposition by well-intentioned witnesses. In short, because the testator is no longer available to clarify his intentions, there is a heightened potential in contested cases for the very evils the much-maligned protective policy is meant to prevent. In the debate over post-death subscription, concerns based on protective policy, such as those expressed by the \textit{Saueressig} court, assume a new functional relevance in the context of modern minimalist wills acts.

The traditional arguments set forth against the protective function comfortably assume the completion of formalities during the testator’s lifetime.\textsuperscript{203} Thus, scholars have conceptualized fraud as occurring discreetly and simultaneously with the execution of the will, and thus being imposed upon the unwitting testator during his or her lifetime.\textsuperscript{204} This traditional and limited conception of fraud, conjured up by the term “deathbed wills,”\textsuperscript{205} is somewhat

\textsuperscript{199.} See In re Estate of Flicker, 339 N.W.2d 914, 915 (Neb. 1983) (assuming implicitly that the protective function applies to prevent mistake under the broad category of “miscarriages of justice”); see also In re Estate of Peters, 526 A.2d 1005, 1012 (N.J. 1987) (“[The] purpose of wills statute is to prevent fraud, perjury, mistake and the chance of one instrument being substituted for another.” (citing 2 W. Bowe & D. Parker, \textit{Page on the Law of Wills} § 19.4, at 66 (rev. ed. 1960) (emphasis added and quotations omitted))).

\textsuperscript{200.} See Pamela R. Champine, My \textit{Will be Done: Accommodating the Erring and the Atypical Testator}, 80 Neb. L. Rev. 387, 392-93 (2001) (noting that deviation from the strict compliance doctrine eliminates the “safe harbor” provided by formalities for channeling expressions of testamentary intent).

\textsuperscript{201.} Lindgren, supra note 4, at 556.

\textsuperscript{202.} \textit{Flicker}, 339 N.W.2d at 915.

\textsuperscript{203.} See, e.g., Langbein, supra note 8, at 497 (arguing that the protective function is obsolete because wills are generally executed while testators are in the “prime of life”); Lindgren, supra note 4, at 554-55 (“[T]estators are not particularly susceptible to pressure from those around them.” (emphasis added)).

\textsuperscript{204.} Mann, supra note 170, at 1042; Lindgren, supra note 4, at 554-55 (deeming the protective function an unnecessary manifestation of “benevolent paternalism” towards “capable and dominant” members of society, such as property owners, who are least likely to need protection).

\textsuperscript{205.} Lindgren, supra note 4, at 554.
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archaic itself. Although the protective function is surely obsolete to the extent that attestation fails to thwart fraudulent devises, post-death subscription implicates fraud in a different temporal context. Ironically, the inadequacy of the protective function in the eyes of modern scholars is contingent upon the very factor that is absent in cases of post-death subscription. Given the novel dangers presented, a bright-line prohibition on post-death subscription embodies a sound rebirth of the protective function.

F. The “Reasonable Time” Rule: A Feasible Alternative?

As an alternative to a bright-line prohibition on post-death subscription, a minority of jurisdictions have adopted a flexible rule providing that witnesses must sign within a “reasonable time” of observing the testator sign or acknowledge his will. Initially formulated by the New Jersey Supreme Court, this approach was later adopted by the drafters of the revised 1990 UPC in section 2-502. Although the 1990 UPC’s “reasonable time” provision represents an attempt to “resolve certain interpretation issues” presented by the 1969 UPC, the question of whether post-death subscription was properly addressed from a policy standpoint is open to debate.

The paramount benefit of the “reasonable time” approach is that it directly furthers the noble policy goal of mitigating the impact of formalities on a testator’s expression of intent. From this perspective, the minority rule is entirely consistent with the policy thrust of minimalist wills acts. It receives additional support from the anti-formalism rationales advanced in favor of equitable remedies. In short, it is a paradigmatic manifestation of the movement against “intent-defeating formalism” in the law of wills.

However, the “reasonable time” rule entails significant costs on a number of fronts. First, it diminishes the “routinizing value” of formalities by imposing a “time-consuming and administratively inefficient burden” of inquiry into individualized factual circumstances. Given the “massive volume” of probate litigation and the limited resources of probate courts, interference with the

206. Mann, supra note 170, at 1042.
208. Peters, 526 A.2d at 1011.
210. Miller, supra note 11, at 210.
211. See UNIF. PROBATE CODE art. 2, pt. 5 general cmt. (1969) (“The basic intent of these sections is to validate the will whenever possible.”).
212. Cf. Estate of Eugene, 128 Cal. Rptr. 2d 622 (Ct. App. 2d Dist. 2002) (holding for proponent on the basis of the substantial compliance doctrine in addition to finding that California Probate Code section 6110 permitted post-death subscription under an ad hoc approach similar to the reasonable time rule).
213. See Mann, supra note 170, at 1033, 1035-36 (explaining that there has been a “long campaign against formalism in wills adjudication”).
214. Id. at 1048.
blanket application of formalities may have serious systemic consequences.\textsuperscript{215} In addition, the “reasonable time” approach is likely to encourage probate litigation in a manner similar to equitable remedies,\textsuperscript{216} producing “attendant delay” and inefficiency in the administration of estates.\textsuperscript{217}

Quite apart from its system-wide implications for the probate process, the amorphous nature of the reasonableness standard imposes additional individualized costs. Like the ad hoc approach advanced by the Eugene court, the reasonable time rule sacrifices uniformity.\textsuperscript{218} The reported cases applying the minority rule have failed to articulate any factors to guide courts in conducting post-death subscription inquiries.\textsuperscript{219} Given the idiosyncrasies inherent in any reasonableness approach, it is more likely to produce inconsistent results in similar circumstances, thereby compromising the goal of fairness for similarly situated parties. Thus, the rule’s apparent flexibility requires that its contours be redefined in every case, providing little guidance to testators and attorneys alike. Although a reasonableness standard might be perfectly suited to other areas of law, it would seem inimical to the law of wills, which is “an area of law that heavily values the certainty produced by fixed rules.”\textsuperscript{220}

The costs discussed above are, for the most part, a byproduct of a flexible standard operating in the context of the strict compliance doctrine. The “reasonable time” standard carries high functional costs, however, because of its tendency to subvert the protective function under specific circumstances in which that function has gained new relevance. Like any rule permitting post-death subscription, the “reasonable time” standard confers dispositive power upon witnesses, leaving the disposition of the testator’s estate at best dependent upon the uncertain whims of a witness\textsuperscript{221} and at worst subject to fraudulent interference.\textsuperscript{222} Even in the absence of fraud, it renders the testator vulnerable to mistake by allowing witnesses to validate something that the testator may have tentatively acknowledged to be his will while deliberately postponing the fulfillment of the signatory function.\textsuperscript{223}

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} \textit{See} Lloyd Bonfield, \textit{Reforming the Requirements for Due Execution of Wills: Some Guidance From the Past}, 70 TUL. L. REV. 1893, 1920 (1996) (warning about the potential for a flood of probate litigation following the adoption of the dispensing power).

\textsuperscript{217} \textit{In re} Estate of Saueressig, 38 Cal. 4th 1045, 1057, 136 P.3d 201, 209 (2006).

\textsuperscript{218} \textit{See id.} at 1057, 136 P.3d at 209 (noting the potential for inconsistency under a flexible approach to post-death subscription).


\textsuperscript{220} \textit{Champine, supra} note 200, at 389.

\textsuperscript{221} \textit{See In re} Cannock’s Will 81 N.Y.S.2d 42, 42-43 (Sur. Ct. 1948) (expressing concern over the potential unreliability of third party witnesses).

\textsuperscript{222} \textit{See, e.g., In re} Estate of Flicker, 339 N.W.2d 914, 915 (Neb. 1983) (“Permitting witnesses to sign a will after the death of a testator would erode the efficacy of the witnessing requirement as a safeguard against fraud . . . .”).

\textsuperscript{223} \textit{Saueressig}, 38 Cal. 4th at 1056, 136 P.3d at 208.
A bright-line rule against post-death subscription maximizes the utility of the protective function by obviating the dangers inherent in more flexible approaches. Thus, the rule adopted by the *Saueressig* court greatly reduces the potential for fraud or mistake.\(^{224}\) Furthermore, it provides the crucial benefits associated with a hard-and-fast rule including uniformity, administrative efficiency, predictability, and fairness to similarly situated parties.\(^{225}\)

Like all formal attestation requirements, the primary cost of *Saueressig*’s bright-line prohibition is a certain measure of testamentary freedom.\(^{226}\) In hard cases such as *Estate of Eugene*,\(^{227}\) the results may indeed be reminiscent of an era where harsh formalism prevailed. Yet formalities are legitimate to the extent that “they signify that functions deemed essential to the process have been fulfilled.”\(^{228}\) Unlike other areas in which formalities have emerged as draconian measures, post-death subscription presents a special case for their stringent application. Where witnesses have failed to sign a will prior to the testator’s death, there is a strong potential for abrogation of the protective function. Furthermore, the social benefits flowing from administrative efficiency may justify a denial of probate even where the testator’s intent is not contested.\(^{229}\) This cost is acceptable in light of the significant drawbacks inherent in the alternative approaches to post-death subscription.\(^{230}\) Post-death subscription presents a unique functional challenge to formal attestation regimes. The majority of courts have rightly declined to sacrifice functionality for flexibility.

\textbf{V. Conclusion}

One modern scholar has asserted that the protective function “is not sufficiently important in the present era to justify any more emphasis” on attestation formalities than the bare requirements imposed by any given wills act.\(^{231}\) The specialized rebirth of the protective function in the context of post-death subscription casts doubt on the absolute validity of this assertion. Once the misleading temporal rationale is cast aside, the result in *Saueressig*, rather than mechanically representing “intent-defeating formalism,” becomes consistent with

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\begin{itemize}
  \item 224. *Id.* at 1056-57, 136 P.3d at 208-09.
  \item 225. *See id.* at 1057, 136 P.3d at 208-09.
  \item 226. *See Sherwin, supra* note 21, at 457 (noting that the stringent application of attestation formalities “contradicts the principle of free choice in disposition of property that supposedly drive[s] the law of donative transfers”).
  \item 227. *Estate of Eugene*, 128 Cal. Rptr. 2d 622 (Ct. App. 2d Dist. 2002).
  \item 228. *Mann, supra* note 170, at 1037.
  \item 229. *Cf. id.* at 1048 (discussing the argument that administrative efficiency, coupled with the socially acceptable alternative of intestate succession, might justify the denial of probate for a technically deficient instrument).
  \item 230. *See Saueressig*, 38 Cal. 4th at 1057, 136 P.3d at 208-09 (discussing the problems associated with more flexible approaches to post-death subscription).
  \item 231. *Lindgren, supra* note 4, at 555.
\end{itemize}
}
a sound policy judgment that enhances the protective function while providing a multitude of benefits associated with a bright-line rule.

Minimalist wills acts present new challenges in an area of law that has undergone significant changes in recent decades. Despite the potential costs associated with the *Saueressig* approach, the benefits are certain and of substantial magnitude. Accordingly, jurisdictions that have yet to confront the issue should adopt a bright-line prohibition on post-death subscription.