PROBATE LITIGATION

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The field of wills is obsessed with deterring litigation. Supposedly, will contests—challenges to the validity of a testamentary instrument—are time-consuming, expensive, expose the testator's eccentricities, and tear families apart. In turn, these factors give contestants the leverage to file "strike suits": baseless allegations that are designed to obtain a shakedown settlement. This gloomy view drives policy on several fronts. First, it has stunted the growth of the harmless error rule: a doctrine that empowers courts to enforce documents that do not comply with the statutory formalities for executing a will. Second, estate planning lawyers use the specter of conflict to contain the spread of homemade testamentary instruments—especially the nascent market for online wills. Third, the desire to minimize the damage caused by lawsuits has rekindled interest in antemortem probate: a regime that resolves will contests during the testator's lifetime. But although these debates rely on assumptions about probate litigation, we know little about the phenomenon. Indeed, our understanding of the issue comes largely from folklore, war stories, and the sliver of disputes that become reported appellate opinions. Thus, we can only speculate about the catalysts of these lawsuits, the harm they cause, or the terms of their confidential settlements.

This Article offers a glimpse inside the black box. Its centerpiece is an empirical study of 443 recent probate administrations from San Francisco, California. It follows these cases from the drafting of the will to the order for final distribution. In addition, it capitalizes on a state law that requires litigants to file settlement agreements in the record. Thus, it sheds new light on the causes and consequences of probate litigation. Some of this Article's findings confirm that disputes over wills are an evil to be avoided. But others defy the conventional wisdom. For example, this Article discovers that the harmless error rule facilitates testamentary intent without making cases last longer or cost more, that online wills do not seem to be linked to litigation, that will contests often settle for a high percentage of the claim value, and that disputes over attorneys who appoint themselves executor are surprisingly common. Finally, this Article explains how these insights inform existing debates and highlight topics that deserve more attention.

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I. INTRODUCTION

In October 2014, a man named William Palank committed suicide at his home in San Francisco.[1] Palank's wife, Sai, found five handwritten pages at the scene.[2] They read in part: "Do not go in [b]edroom. Call 911. I am gone. Love[,] Bill."[3] There was also a sixth page, which was typed and bore Palank's signature, but was not also signed by witnesses, that stated: "I, William J[.] Palank, being of sound mind and will, leave all my earthly possessions to my [l]oving wife . . . ."[4]

1. *See* Request for Continuance at 1, *In re* Estate of Palank, No. PES-14-298263 (Cal. Super. Ct. Dec. 2, 2014).

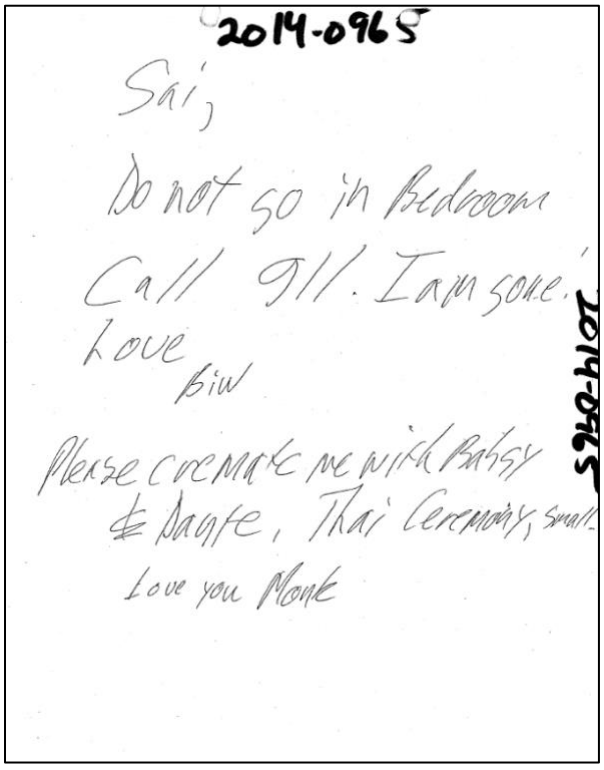
2. *See id.* at 1, 3–8.

3. Response to Objections to the Appointment of Netsai Supalerdasanong as Personal Representative at 10, 16, *In re* Estate of Palank, No. PES-14-298263 (Cal. Super. Ct. Feb. 6, 2015) [hereinafter Palank Response].

4. *Id.* at 15.

During the probate of Palank's estate, a dispute arose between his family and Sai about the legal effect of this writing.[5] When Sai married Palank in 2010, she signed a prenuptial agreement that waived her right to receive any property from him upon his death.[6] Yet this contract contained an exception for entitlements "created or affirmed by [Palank] under a will or other written document."[7] Thus, if Palank's note fell within this provision, his $1.8 million estate[8] would pass to Sai. If it were not, she would be disinherited.

FIGURE 1: EXCERPTS FROM WILLIAM PALANK'S SUICIDE NOTE AND WILL

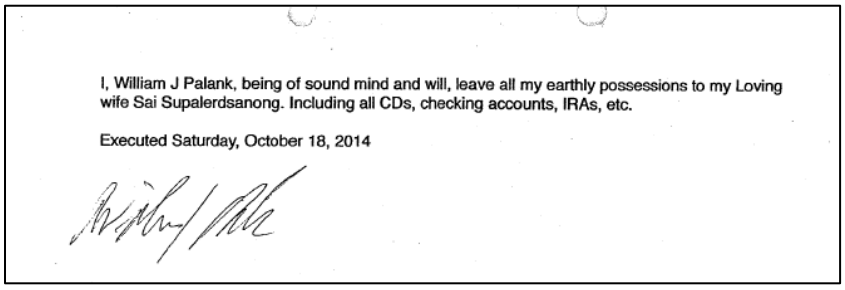


5. *See* Objectors James Palank and William G. Palank's Objection to Appointment of Netsai Supalerdsanong as Personal Representative at 1–3, *In re* Estate of Palank, No. PES-14-298263 (Cal. Super. Ct. Jan. 29, 2015).

6. *See* Palank Response, *supra* note 3, at 6, 8.

7. *Id.* at 8.

8. *See* Order for Final Distribution at 2, *In re* Estate of Palank, No. PES-14-298263 (Cal. Super. Ct. Sept. 23, 2015).



I, William J Palank, being of sound mind and will, leave all my earthly possessions to my Loving wife Sai Supalerdsanong. Including all CDs, checking accounts, IRAs, etc.

Executed Saturday, October 18, 2014

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Around 2002, Niccolo Oltranti's mental health began to decline.[9] He divorced his wife of fifty years.[10] He was arrested for assault.[11] He broke the frames of family photos and "scratched the eyes out of the individuals in the pictures."[12] He ominously told his doctor that "[s]omething big is going to happen."[13]

In 2009, Niccolo signed a will.[14] His previous estate plan, which he created in 1972, left his possessions equally to his children, Marie, Steven, Tony, and Paul.[15] But his 2009 will dramatically altered this arrangement.[16] It gave the residue of his $6 million estate 75% to Paul and reduced Marie, Steven, and Tony's share to just $25,000 each.[17] Shortly after Niccolo died, Tony contested this will in probate court, alleging that Niccolo had executed it at a time when he was "in a state of delirium [and] exhibiting psychotic behavior."[18]

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Dorothy Dati executed a concise three-page will that left her assets to a relative, a friend, and several charities.[19] Dati's attorney, Donald Nemir, served as one of the witnesses to the will and was named as executor.[20] In 2015, after

9. *See* Objection to Barbara La Gioia-Kotlarz's Petition for Probate of Will and for Letters of Administration with Will Annexed; Contest of Will at 3, *In re* Estate of Oltranti v. Barbara La Gioia-Kotlarz, No. PES-16-299593 (Cal. Super. Ct. May 11, 2016) [hereinafter Oltrani Objection].

10. *See* Declaration of Joel M. Klompus, M.D., in Support of Petition for Letters of Administration with Will Annexed at 4, *In re* Estate of Oltranti, No. PES-16-299593 (Cal. Super. Ct. May 11, 2016) [hereinafter Klompus Declaration].

11. *See* Oltrani Objection, *supra* note 9, at 3.

12. *Id.* at 4.

13. Klompus Declaration, *supra* note 10, at 2.

14. *See* Petition for Letters of Administration with Will Annexed at 8–14, *In re* Estate of Oltranti, No. PES-16-299593 (Cal. Super. Ct. Apr. 27, 2016).

15. *Cf. id.* at 9–10.

16. *Cf. id.* at 8–14.

17. *See id.* at 2, 9–10.

18. *See* Oltranti Objection, *supra* note 9, at 4.

19. *See* Petition for Probate of Will and for Letters Testamentary at 8-10, *In re* Estate of Dati, No. PES-15-298615 (Cal. Super. Ct. Mar. 18, 2015).

20. *See id.* at 9–10.

Dati died, Nemir began to administer her estate in probate court.[21] On February 4, 2018, however, Nemir also passed away, and this seemingly routine case took an unexpected turn.[22] Dati's nephew, Michael Reichling, took the reins as executor, and discovered that Nemir had embezzled tens of thousands of dollars from the estate.[23] Reichling thus filed a petition seeking to recover these funds on behalf of Dati's beneficiaries.[24]

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One of the most important goals in the field of wills is preventing litigation.[25] Disputes about testamentary instruments unfold in a unique setting. Estates pass through probate: a court-based process that transfers property from the dead to the living.[26] Because millions of people die every year, disruptions to this conveyor belt can overload the judicial system.[27] Similarly, will contests suffer from several pathologies. Claims like incapacity and undue influence are unpredictable. They are marred by the "worst evidence" problem: they hinge on the mental state of a person who is dead by the time of the trial and therefore cannot "authenticate or clarify his declarations, which may have been made years, even decades past."[28] Juries have a reputation for filling these gaps in the record with inferences that favor parties who contend that they were wrongly disinherited.[29] Finally, these battles move slowly, cost a fortune, and expose a family's dirty laundry.[30] Thus, according to the conventional wisdom, probate is

21. *See* Order Appointing Executor/Executrix at 1, *In re* Estate of Dati, No. PES-15-298615 (Cal. Super. Ct. Oct. 6, 2015).

22. *See* Petition for Surcharge and Recovery of Estate Property; For Award of Punitive and Exemplary Damages; For Double Damages; And for Costs and Attorney Fees at 2, *In re* Estate of Dati v. Donald Nemir, No. PES-15-298615 (Cal. Super. Ct. Jan. 31, 2019).

23. *See id.* at 2–4.

24. *See id.* at 1.

25. *See, e.g.*, Aviles v. Swearingen, 224 Cal. Rptr. 3d 686, 689 (Cal. Ct. App. 2017) (mentioning the "public polic[y] of discouraging [probate] litigation"); Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) ("[A] will representing the true wishes of a testator of sound mind should be so prepared and executed as to be invulnerable, if possible, to an improper attack[.]"); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 607 (1987) ("Practitioners have written a great deal about how to protect against and defeat will contests[.]").

26. *The Probate Process*, AM. BAR ASS'N, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/the_probate_process/ (last visited Mar. 23, 2022) [https://perma.cc/EF33-UG28].

27. *See* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (noting that because of probate's massive scale, "one-in-a-hundred litigation patterns are very serious").

28. John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 344, 344 n.47 (2013).

29. *See, e.g.*, Jaworski, *supra* note 25, at 88 (observing that jurors are "inclined to show a marked sympathy for the contestant"); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 237 (2001) (describing "the particular threat that juries pose to nonconforming wills").

30. *See, e.g.*, Henry W. Taft, *Comments on Will Contests in New York*, 30 YALE L.J. 593, 603, 606 (1921) (explaining that "[t]he cost of . . . trials to both the state and decedents' estates is enormous" and that these cases are "marred by an unseemly disclosure of [the testator's] foibles and weaknesses").

a breeding ground for "strike suits": "holdup[s] staged by disgruntled heirs to induce a settlement."[31]

This fear of probate lawsuits casts a long shadow over the entire field of wills. For example, it has hamstrung efforts to reform the rules that govern the execution of testamentary instruments. Traditionally, courts demanded strict compliance with the Wills Act: an ancient statute that requires wills to be memorialized in a signed and witnessed writing.[32] But this approach spawned heartbreaking cases in which judges cited minor deviations from these formalities to nullify would-be wills.[33] As a result, the 1990 revisions to the Uniform Probate Code ("UPC") included a novel principle called harmless error, which allows a judge to admit a writing to probate if there is clear and convincing proof that the decedent intended it to be her will.[34] Yet in the decades since then, harmless error has struggled to gain momentum.[35] Most legislatures have declined to adopt the doctrine because of concern that it will flood "the probate system [with] burdensome litigation."[36]

In addition, the estate planning bar emphasizes the risks of litigation to deter people from planning their own estates.[37] Lawyers have long been forced to compete with self-directed testators. For example, about half of American

31. Langbein, *supra* note 27, at 2043 n.12 (quoting DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993)); *see also* SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS, AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 643 (6th ed. 2021) ("[R]elatively few wills are contested [successfully]."); Neill H. Alford, Jr., *Book Review*, 14 GA. L. REV. 146, 148 (1979) (reviewing VERNER F. CHAFFIN, STUDIES IN THE GEORGIA LAW OF DECEDENT'S ESTATES AND FUTURE INTERESTS (1978)) ("[T]he most frequent ground[s] of contest [are] with almost equal frequency unsuccessful."); Edmond Nathaniel Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 518 (1934) ("Contestants have nothing to lose—the 'nuisance value' of delay and the abhorrence of respectable persons for publicity may result in a settlement."); David Cavers, *Ante-Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 443 (1934) ("The threat of the [will contest] is potent to extract settlements."); Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO STATE L.J. 264, 287 (1976) ("[O]ften the threat of a will contest by 'laughing heirs' is enough to exact an unreasonable settlement. . . ."); Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 324 n.171 (2017) ([H]eirs often bring frivolous will contests in the hope of extracting a settlement is well known."); Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685–86 (2011) (explaining why disinherited heirs may bring baseless will contests "to extract a settlement from the estate"); Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 7 (2013) (discussing "frivolous contests that stem from people's unhappiness rather than a sincere concern for the testator's intent"); Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 31 (2006) ("Untold numbers of disappointed heirs have challenged testamentary capacity to induce devisees to settle will contests rather than face the uncertainty of litigation").

32. *See* Wills Act 1837, 4 & 1 Vict. c. 26, § 9 (Eng.).

33. *See infra* text accompanying notes 85–87.

34. *See* UNIF. PROBATE CODE § 2-503, 8 U.L.A. 215 (2019).

35. *See* Jessica A. Uzcategui, *Application of the Harmless Error Doctrine in California and Beyond*, 21 CA. TRS. & ESTATES Q., at 1 (2015).

36. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 704–05 (1991); *see also infra* text accompanying notes 101–05.

37. *See, e.g.*, David Horton, *Wills Law on the Ground*, 62 UCLA L. Rev. 1094, 1138 (2015); Bruce J. Warshawsky, *What Are the Risks of Preparing My Own Estate Planning Documents?*, CUNNINGHAM CHERNICOFF & WARSHAWSKY, https://www.cclawpc.com/estate-planning-and-probate/the-risks-of-preparing-your-own-estate-planning-documents/ (last visited Mar. 23, 2022) [https://perma.cc/BFW9-G86Y].

states facilitate homemade will-making by permitting holographic wills, which do not need to be witnessed but must be handwritten and signed by the testator.[38] Likewise, starting in the 1970s, a few jurisdictions began to publish free fill-in-the-blank will forms.[39] But the threat to the legal profession grew exponentially in the 2000s, when the Internet catalyzed "a boom in homegrown estate planning."[40] Companies like LegalZoom and Rocket Lawyer began to sell millions of digital will templates online[41]—a movement that has only accelerated during the COVID-19 pandemic.[42] Thus, to defend their turf, lawyers have published a steady stream of warnings that do-it-yourself wills "may be contested in court . . . for years, thereby subjecting your estate and your heirs to significant legal fees."[43]

Finally, to avoid the pitfalls of litigation, some states are redefining "probate." For more than a century, legislatures and commentators have explored the idea of "living" (or "antemortem") probate: a regime that allows a testator to obtain a court order validating her will before she dies.[44] This procedure solves the worst evidence dilemma by placing the testator on the witness stand, where she can demonstrate her competence and freedom from coercion "in direct view of the court or jury."[45] In turn, by dramatically improving the accuracy of verdicts, antemortem probate can help dispel "the odor of the strike suit[, which] hangs heavily over this field."[46] Recently, after years of gathering dust, living

38. *See, e.g.*, ARIZ. REV STAT. ANN. § 14-2503 (West 2021); CAL. PROB. CODE § 6111(a) (2020); N.C. GEN. STAT. ANN. § 31-3.4 (West 2021); TEX. PROB. CODE ANN. § 60 (West 2020) (repealed 2014); VA. CODE ANN. § 64.2 – 404 (West 2021); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1116 n. 139 (2015) (collecting statutes).

39. *See, e.g.*, CAL. PROB. CODE §§ 6220–6227 (West 2021); ME. STAT. tit. 18-A, § 2-514 (2020) (repealed 2019); MICH. COMP. LAWS § 700.2519 (2020); WIS. STAT. § 853.55 (2020).

40. Christine Larson, *A Need for a Will? Often, There's an Online Way*, N.Y. TIMES (Oct. 14, 2007), https://www.nytimes.com/2007/10/14/business/yourmoney/14wills.html [https://perma.cc/5DB5-M56X].

41. *See Where You Can Go Wrong with a Do-It-Yourself Will*, CNBC (Jan. 17, 2013, 3:35 PM), https://www.cnbc.com/id/100388275 [https://perma.cc/TW6X-97AV] (reporting that Rocket Lawyer sold 913,000 Internet wills in 2012 and LegalZoom sold 100,000 such wills in 2011).

42. *See* Bryan Borzykowski, *Americans Rush to Make Online Wills in the Face of the Coronavirus Pandemic*, CNBC (Mar. 25, 2020, 11:32 AM), https://www.cnbc.com/2020/03/25/coronavirus-pandemic-triggers-rush-by-americans-to-make-online-wills.html [https://perma.cc/7W55-Q7G4][OK] (reporting that some DIY will-making companies have seen as much as a 143% increase in testators using their services).

43. Pessin Katz, *Coronavirus and the Dangers of DIY Wills*, JD SUPRA (Mar. 31, 2020), https://www.jdsupra.com/legalnews/coronavirus-and-the-dangers-of-diy-wills-13020/ [https://perma.cc/M7JP-YZVK].

44. Michigan passed the first (and short lived) antemortem probate statute in the late nineteenth century. *See infra* text accompanying notes 137–47. For a modern living probate law, see OHIO REV. CODE ANN. § 5817.02(A) (West 2021) ("A testator may file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to subsequent revocation or modification of the will."). For some of the classic articles on the topic, see Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1979); Cavers, *supra* note 31; Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066 (1980); Fink, *supra* note 31; John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978).

45. Fink, *supra* note 31, at 266.

46. Langbein, *supra* note 44, at 66.

probate proposals have experienced a renaissance, sparking debate[47] and becoming law in Alaska,[48] Delaware,[49] New Hampshire,[50] Nevada,[51] and North Carolina.[52]

Despite the outsized importance of probate litigation, we know little about it. Indeed, virtually all of the research on the topic analyzes reported appellate opinions.[53] Although this kind of conventional doctrinal analysis is valuable, it also has limits. For one, it does not fully capture the factors that supposedly make lawsuits about estates so harmful, such as their delay, expense, and damage to family harmony.[54] Also, only a slender minority of disputes progress to a final judgment and result in a written decision accessible via mainstream legal content providers, such as Lexis and Westlaw.[55] Thus, these cases merely represent the tip of the litigation iceberg.[56] Finally, it is virtually impossible to analyze the "strike suit" thesis from these records because a settlement terminates litigation without requiring a judge to adjudicate the merits.[57] Thus, commentators worry that "the perceived prevalence of this issue may be underestimated by the fact that many suits are designed to compel a pretrial settlement and therefore, are never reported."[58]

This Article offers a fundamentally different perspective on disputes stemming from wills. Its centerpiece is an empirical study of 443 testate administrations that passed through probate court between 2014 and 2016 in San Francisco, California. The Article collects dozens of variables from each case, including the type of will, the testator's drafting choices, and the length and cost

47. *See, e.g.*, Katherine M. Arango, Note, *Trial and Heirs Antemortem Probate for the Changing American Family*, 81 BROOK. L. REV. 779, 780–81 (2016); Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 133–34 (1990); Jacob Arthur Bradley, Comment, *Antemortem Probate Is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 MISS. L.J. 1431, 1432–34 (2017); Kyle Frizzelle, Comment, *Better to Play Dead? Examining North Carolina's Living Probate Law and Its Potential Effect on Testamentary Disposition*, 39 CAMPBELL L. REV. 187, 188–90 (2017); Taren R. Lord-Halvorson, Note, *Why Wait Until We Die? Living Probate in a New Light*, 37 OKLA. CITY U. L. REV. 543, 543–46 (2012); Joseph A. Romano, Comment, *No "Dead Giveaways": Finding a Viable Model of Ante-Mortem Probate for New Jersey*, 48 SETON HALL L. REV. 1683, 1683–85 (2018); Susan G. Thatch, *Ante-Mortem Probate in New Jersey—An Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331, 332–333 (2015).

48. *See* ALASKA STAT. ANN. § 13.12.530 (West 2021).

49. *See* DEL. CODE ANN. tit. 12, § 1311 (West 2021).

50. *See* N.H. REV. STAT. ANN. § 552:18 (2020).

51. *See* NEV. REV. STAT. § 30.040(2) (2020).

52. *See* N.C. GEN. STAT. § 28A-2B-1 (2020).

53. For a rare exception, which we discuss in further depth *infra* Section II.C, see Schoenblum, *supra* note 25.

54. *See* Schoenblum, *supra* note 25, at 659; Travis J. Graham, *The Dangerous Dynamics of Estate Litigation*, GENTRY LOCKE (July 2017), https://www.gentrylocke.com/article/dangerous-dynamics-of-estate-litigation/ [https://perma.cc/2XUB-Z4Q9].

55. Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 685–86 (2018).

56. Compounding this problem, opinions that make it onto Westlaw or Lexis suffer from selection bias. Because most cases settle, only those that could easily result in a victory for either party should proceed to a verdict. As a result, fully prosecuted matters are more likely to be close calls than the entire universe of disputes. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14–15 (1984).

57. Langbein, *supra* note 44, at 66.

58. Thatch, *supra* note 47, at 334.

of the succession process. Thus, it provides needed proof about the causes of litigation and how contested matters compare to routine ones. In addition, the Article takes advantage of a state law that requires parties to file their settlement agreements in the probate record[59] to shed new light on the strike suit hypothesis.

Our findings help refine the legal system's understanding of probate litigation. For one, we discover that disputes are far more common than previously thought. A handful of empirical studies from the mid-twentieth century reported litigation rates between roughly 1% and 3.5%.[60] In stark contrast, litigation frequency in our study was an order of magnitude higher: 11.5%. Yet we also uncover evidence that casts doubt on the theory that strike suits are the leading cause of conflict. For starters, although most will contests settled, our analysis of these agreements reveals that, on average, contestants received a respectable 62% of the amount they would have recovered if they had prevailed at trial. Because parties with frivolous claims are unlikely to negotiate favorable settlements, we gather that many contests do, in fact, have merit. Also, the will contests in our sample were outnumbered by other causes of action, such as objections to the nomination or behavior of an executor. Thus, litigation seems to be endemic in probate for reasons that have nothing to do with baseless challenges to the validity of a will.

In addition, our research has implications for the normative debates that hinge on assumptions about probate litigation. First, our data suggest that the harmless error rule achieves valuable goals at virtually no cost. The Golden State adopted a modified version of the doctrine in 2009,[61] and parties often invoked it to validate authentic but unwitnessed writings like William Palank's suicide note.[62] But even more importantly, harmless error cases neither took longer nor cost more than uncontested estates. Second, most varieties of do-it-yourself wills were either correlated with an increase in the odds of will contests or other difficulties during the probate process. The same was not true, however, for the most controversial species of self-made will: those that are created online. Third, our study can be used both for and against antemortem probate. On the one hand, the absence of strike suits calls the need for living probate into question. But on the other hand, even if the incidence of shakedown will contests may be exaggerated, these disputes deserved their reputation as slow, expensive, and nasty. For example, the fight over Niccolo Oltranti's will lasted for 691 days, saddled the estate with more than $100,000 in additional attorneys' fees, and exposed family skeletons.[63] Thus, alternative methods of resolving estate

59. *See* CAL. PROB. CODE §§ 9832(a), 9833 (West 2021); *see also infra* text accompanying notes 240–41.

60. *See* MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 184 (1970) (1.3%); Schoenblum, *supra* note 25, at 613–14 (amounting to less than 1%); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 415–16 (3.5%). *But see* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 629 (2015) (12%).

61. *See* CAL. PROB. CODE § 6110(c) (2020).

62. *See supra* text accompanying notes 1–8.

63. *See* Order for Final Distribution on Waiver of Account and for Allowance of Statutory and Extraordinary Compensation and Costs to Administrator's Attorneys at 4, Estate of Oltranti, No. PES-16-299593 (Cal. Super. Ct. Feb. 6, 2018) (awarding litigation counsel $113,581); *see also supra* text accompanying notes 9–18.

conflict are worth exploring. Fourth, even though fiduciary litigation has received less attention than will contests, states should consider regulating the issue of drafting attorneys who, in effect, appoint themselves executor. Indeed, as in Dorothy Dati's estate,[64] this practice can embolden crooked fiduciaries and send a case off the rails.

The Article contains three main parts. Part II provides background by surveying how perceptions about probate litigation affect several important issues in wills law. Part II, however, also demonstrates that there is virtually no empirical evidence about these disputes. Part III fills this gap by describing the results of our research. Among other things, it examines correlates of litigation, differences in case length and cost between disputed and uncontested estates, and the outcome of both fully litigated and settled matters. Part IV then uses these insights to prescribe policy. Part V concludes.

II. PROBATE LITIGATION

One perennial challenge in estate planning is avoiding disputes. Indeed, people routinely ask their lawyers to ensure that their "will[s] can be admitted to probate without successful challenge on the basis of lack of testamentary capacity, undue influence or lack of compliance with the statutes relating to the validity of wills."[65] This Part explains why probate litigation is so dreaded. It then demonstrates how this concern influences three evolving issues: the harmless error rule, self-made wills, and antemortem probate. Finally, it reveals that there is little hard evidence underlying our assumptions in these spheres.

A. Theory

Commentators believe that will contests are detrimental for several reasons. This Section explores how these negative consequences supposedly embolden heirs to file strike suits.

One difficulty with will contests is that they are often based on the slippery and manipulable doctrines of mental incapacity and undue influence.[66] Incapacity revolves around whether the testator was able to "(1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose."[67] Undue influence occurs when a wrongdoer's power over the testator causes her to make a bequest that "is contrary to his true desire and free will."[68]

64. *See supra* text accompanying notes 19–24.

65. Fink, *supra* note 31, at 265.

66. *See* Langbein, *supra* note 27, at 2042 n.5.

67. Bye v. Mattingly, 975 S.W.2d 451, 455–56 (Ky. 1998). The contestant must demonstrate "incapacity at the particular time of the transactions being challenged." Wheeless v. Gelzer, 780 F. Supp. 1373, 1382 (N.D. Ga. 1991). However, "[e]vidence of mental unsoundness before or after execution, as long as it is not too remote . . . is admissible." Dorsey v. Dosey, 156 S.W.3d 442, 446 (E.D. Mo. 2005).

68. Howe v. Palmer, 956 N.E.2d 249, 253–54 (Mass. App. Ct. 2011). Undue influence cases are typically prosecuted under a burden-shifting regime. The contestant tries to raise a presumption of undue influence by

Both rules are so fact-sensitive that they make "the result of any given case . . . exceedingly difficult of prediction."[69]

The worst evidence problem makes these wildcards even wilder. The judge or jury must evaluate the testator's psychological state based entirely on circumstantial evidence.[70] In turn, this invites factfinders to decide cases based on extralegal factors, such as their "own views of morality and propriety."[71] Because disinherited family members inspire sympathy, this tendency systematically "favors the contestant."[72]

Moreover, the mere initiation of litigation is expensive and brings the probate process to a screeching halt. Indeed, allegations of incapacity and undue influence "require an investigation of the entire life history of the testator, and that protracts them for many days and sometimes many weeks."[73] For the beneficiaries, who already must wait until the end of the probate matter to collect,[74] this additional delay can be agonizing. Even worse, every penny spent on lawyers reduces the size of their inheritances. And these cases are not cheap. As David Cavers once quipped, "[t]he tax which [will contests] . . . levy upon estates . . . is frequently far more onerous than that exacted by the federal and state governments."[75]

Finally, these matters drag the decedent and her family through the proverbial mud. Because the testator's mental status is front and center, "a skilled plaintiff's lawyer will present evidence to a jury at a public trial touching every eccentricity that might cast doubt upon the testator's condition."[76] Similarly,

demonstrating the existence of "suspicious circumstances." Kelley v. Johns, 96 S.W.3d 189, 195 (Tenn. Ct. App. 2002); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & DON. TRANSFERS) § 8.3, cmt. f, h (AM. L. INST. 2003) (listing warning signs such as a testator's mental impairment and the wrongdoer's active participation in the execution of the will). If the challenger succeeds, the alleged wrongdoer must prove by clear and convincing evidence that the will was voluntary. *See In re* Estate of Bethurem, 313 P.3d 237, 241 (Nev. 2013); *In re* Estate of Smith, 597 S.W.3d 65, 77 (Ark. Ct. App. 2020) ("[A] presumption of undue influence arises, and the burden shifts to the proponent to prove beyond a reasonable doubt that the testator had testamentary capacity and was free from undue influence in executing the will.").

69. Cavers, *supra* note 31, at 441; *see also* Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 165 (1941) (arguing that the "standard by which mental incompetency is determined by the courts is . . . purely subjective[,] . . . . has no referent in the outside world[, is] . . . . impossible to apply[, and] . . . . defies accurate verbal formulation").

70. *See* Jaworski, *supra* note 25, at 91.

71. ELIAS CLARK, LOUIS LUSKY, ARTHUR W. MURPHY, MARK L. ASCHER & GRAYSON M.P. MCCOUCH , GRATUITOUS TRANSFERS 231 (5th ed. 2007); *see also* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) ("Courts impose and enforce [a] moral duty [for the testator to provide for her] . . . family through the covert manipulation of doctrine.").

72. Bradley, *supra* note 47, at 1435; Jaworski, *supra* note 25, at 88 (arguing that jurors are "inclined to show a marked sympathy for the contestant").

73. Taft, *supra* note 30, at 603.

74. Greg Depersio, *When Are Beneficiaries of a Will Notified?*, INVESTOPEDIA (Apr. 28, 2021), https://www.investopedia.com/ask/answers/101915/when-are-beneficiaries-will-notified.asp [https://perma.cc/T53E-SPNC].

75. Cavers, *supra* note 31, at 441.

76. Langbein, *supra* note 44, at 66; Jaworski, *supra* note 25, at 91 ("Insignificant circumstances are distorted into suspicious conduct, and what once were considered normal actions on the part of the testator suddenly become mental deficiencies.").

warring relatives gleefully highlight each other's lapses and personal failings.[77] Because of these bitter tactics, "there is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons."[78]

Together, these factors create fertile ground for nuisance litigation. Indeed, as Dan Kelly explains, contestants with questionable motives may sue "because they realize that, by increasing costs through delays, negative publicity, and litigation expenses, they may be able to extract a settlement from the estate."[79] And as John Langbein has elaborated, because settlements are usually private, this species of litigation blackmail is largely hidden from public view:

> A major reason that the impact of [probate] litigation in America is so difficult to measure is that most of it is directed towards provoking pretrial settlements, typically for a fraction of what the contestants would be entitled to receive if they were to defeat the will. Especially when such tactics succeed, they do not leave traces in the law reports.[80]

In sum, scholars agree that probate litigation soaks up time and money, and that disappointed heirs routinely parlay weak claims into settlements. As we discuss next, this dark view of will contests informs several crucial areas of law.

B. Policy

Ideas about litigation loom large in debates over how testators execute wills and courts assess them. This Section describes the relationship between will contests and the harmless error rule, do-it-yourself wills, and living probate.

1. Harmless Error

Scholars have long called for lawmakers to modernize the ancient rules that govern the creation of a will. But these proposals have encountered a formidable obstacle: fear of litigation.

For centuries, will execution doctrine has been infamous for its formalism. Under the Wills Act—which the British Parliament passed in 1837 and American states absorbed shortly thereafter—testamentary instruments must be written, signed by the testator, and attested by two witnesses who were physically present at the same time when they saw the testator sign or acknowledge the document.[81]

77. *See* Cavers, *supra* note 31, at 441.

78. *Id.*

79. Kelly, *supra* note 31, at 1685–86; Goldberg & Sitkoff, *supra* note 28, at 346 ("[O]penness to circumstantial evidence facilitates the bringing of strike suits by disgruntled family members whom the decedent truly meant to exclude.").

80. Langbein, *supra* note 44, at 66; *see also* Leopold & Beyer, *supra* note 47, at 131, 135 ("Because of the extratribunal nature of these settlements, their consuming effect is seldom recorded, making the extent of their thievery difficult to determine; however, everyday knowledge and experience suggests that this practice is widespread.").

81. *See* 7 Will. 4 & 1 Vict., c. 26 (1837); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 142-43 (10th ed. 2017) (describing the primacy of the Wills Act).

One objective of these mandates is to defuse will contests. For example, in a classic article, Ashbel Gulliver and Catherine Tilson argued that each element of the Wills Act helps ensure that wills are authentic and voluntary.[82] By requiring that testators use a signed and witnessed writing, the statute generates concrete proof of their wishes, prevents coercion, and clarifies that they meant to make a will.[83] Indeed, as other scholars have explained, when a decedent obeys these commands, "highly persuasive evidence of [her] capacity is secured" and she might be able to "discourage post-mortem contests . . . merely by disclosing to potential challengers the precautions that were taken."[84]

But despite these benefits, the execution formalities also have huge drawbacks. Courts interpret the Wills Act literally, refusing to enforce writings for minor errors even when a would-be testator "doubtless[ly] intended [them] to be [her] last will."[85] Decedents fail to engage in testation when they forget to sign the instrument,[86] sign in the wrong place,[87] or acknowledge their signatures to each witness individually, rather than when they are in the same room.[88] In this way, "[w]hether or not a decedent intended a . . . document to be his or her will has always been secondary to whether or not the document complied with the statutory formalities."[89]

Near the end of the twentieth century, several well-known scholars concluded that these harsh results were no longer acceptable.[90] Some called for the abolition of the Wills Act's attestation element, arguing that it once protected testators from coercion in the execution of deathbed wills, but became unnecessary once attorney-supervised estate planning became the norm.[91] Others argued that courts should construe the Wills Act purposively, rather than textually, by asking whether a testator substantially complied with the statute's goals.[92] Thus, "[d]own with formalism" became "the rallying cry of probate reform."[93]

82. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6–9 (1941).

83. *See id.* at 6–13.

84. Langbein, *supra* note 44, at 68.

85. *In re* Sage, 107 A. 445, 445 (N.J. 1919).

86. *See, e.g.*, Succession of Hoyt, 303 So. 2d 189 (La. Ct. App. 1st Cir. 1974); *In re* Glace's Estate, 196 A.2d 297, 300 (Pa. 1964).

87. *See, e.g.*, *In re* Schiele's Estate, 51 So. 2d 287, 290 (Fla. 1951).

88. *See In re* Groffman, 1 W.L.R. 733, 739 (High Ct. Just. 1968).

89. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

90. *See, e.g.*, Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 202 (1989); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489–503 (1975) [hereinafter Langbein, *Substantial Compliance*]; John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 53–54 (1987) [hereinafter Langbein, *Harmless Error*]; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 543 (1990); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L. Q. 39, 49 (1985).

91. *See* Gulliver & Tilson, *supra* note 82, at 9–13; Lindgren, *supra* note 90, at 555–56.

92. *See* Langbein, *Substantial Compliance*, *supra* note 90, at 515–16.

93. Mann, *supra* note 89, at 1033.

The 1990 revisions to the UPC took up the gauntlet. UPC section 2-503 sets forth a safe harbor for execution defects called the harmless error rule.[94] It allows probate judges to enforce a writing that violates the Wills Act if there is clear and convincing evidence that a testator wanted it to be her will:

> Although a document or writing added upon a document was not executed in compliance with [the Wills Act], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will . . . .[95]

But since then, harmless error has struggled to gain momentum. Only twelve states have embraced the principle in any fashion. Hawaii, Michigan, Montana, New Jersey, Oregon, South Dakota, and Utah have adopted section 2-503 wholesale.[96] In 2020, Minnesota joined their ranks on a temporary basis to facilitate will-making during the COVID-19 pandemic.[97] California, Colorado, and Virginia have passed "partial" harmless error statutes that still require the testator to sign the document but can cure defects related to attestation.[98] And Ohio recognizes an extraordinarily narrow version of the rule that preserves the Wills Act framework by demanding that both the testator and the witnesses subscribe the document.[99] The remaining thirty-eight American jurisdictions and the District of Columbia, however, have refused to liberalize centuries of settled law.[100]

The primary objection to the harmless error rule is the specter of conflict. For one, critics argue that the doctrine might cause "proponents of noncompliant

94. *See* UNIF. PROB. CODE § 2-503 (amended 1990) (UNIF. LAW. COMM'N 1990).

95. *Id.* Harmless error emerged in South Australia in the 1970s. *See* TWENTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA TO THE ATTORNEY-GENERAL: RELATING TO THE REFORM OF THE LAW ON INTESTACY AND WILLS 10–11 (1974) (proposing that "where there is a technical failure to comply with the Wills Act, . . . the Court or a Judge [could] declare that the will in question is a good and valid testamentary document if [s]he is satisfied that the document does in fact represent the last will and testament of the testator"); Wills Act, 1936, § 12(2) (1975) (S. Austl.) (amended 1990, 1994, 1998, and 2000). John Langbein then introduced it to American readers in an influential article. *See* Langbein, *Harmless Error*, *supra* note 90, at 51.

96. *See* HAW. REV. STAT. ANN. § 560:2-503 (West 2021); MICH. COMP. LAWS ANN. § 700.2503 (West 2021); MONT. CODE ANN. § 72-2-523 (West 2021); N.J. STAT. ANN. § 3B:3-3 (West 2021); OR. REV. STAT. ANN. § 112.238 (West 2021); S.D. CODIFIED LAWS § 29A-2-503 (West 2021); UTAH CODE ANN. § 75-2-503 (West 2021).

97. *See* MINN. STAT. ANN. § 524.2-503(b) (West 2021) ("This section applies to documents and writings executed on or after March 13, 2020.").

98. *See* CAL. PROB. CODE § 6110(c)(2) (West 2021); COLO. REV. STAT. ANN. § 15-11-503 (West 2021); VA. CODE ANN. § 64.2-404 (West 2021).

99. *See* OHIO REV. CODE ANN. § 2107.24 (West 2021). Ohio's Wills Act requires wills to be (1) "signed *at the end* by the testator" and (2) "subscribed in the conscious presence of the testator, by two or more competent witnesses, who *saw* the testator subscribe, or *heard* the testator acknowledge the testator's signature." *Id.* § 2107.03 (emphasis added). The state's harmless error statute allows the court to enforce a writing if there is strong evidence that the decedent "signed the document" (presumably anywhere) "*within the range of any of the witnesses' senses*, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication." *Id.* § 2107.24 (emphasis added).

100. SITKOFF & DUKEMINIER, *supra* note 81, at 176.

wills [to] flood the courts."[101] Seen through this prism, orthodox will-creation rules make the law crystal clear. Even if there is slam-dunk proof that a decedent wanted an unwitnessed writing to be effective, the Wills Act spares the probate court from having to entertain the argument.[102] But harmless error melts away these bright lines. Thus, it transforms easy cases into fact-laden trials that "increase[] [the] costs of administration."[103] Also, because harmless error dilutes the attestation requirement, it provides less assurance that testators are acting rationally and voluntarily.[104] As a result, the doctrine could lead to more incapacity and undue influence claims. For these reasons, harmless error has not been able to overcome the perception that a safe harbor for will execution formalities will spawn "an explosion of previously foreclosed litigation."[105]

2. Self-Help

Assertions about litigation also surface in the debate over do-it-yourself wills. Lawmakers, academics, and stakeholders disagree about whether these instruments are an elegant estate planning shortcut or a trial lawyer's "best friend."[106]

Holographs are probably the best-known kind of homemade will.[107] As noted, these informal instruments need not be witnessed but must be handwritten and signed by the testator.[108] They emerged in Rome, migrated to civil law

101. Mark Glover, *In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron*, 73 WASH. & LEE L. REV. ONLINE 288, 296–97 (2016).

102. *See* Langbein, *Substantial Compliance*, *supra* note 90, at 503.

103. Peter Wendel, *Testamentary Transfers and the Intent Versus Formalities Debate: The Case for a "Charitable" Common Ground*, 69 U. KAN. L. REV. 249, 270 (2020).

104. *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 881 (2012) (noting that the doctrine might create "the opportunity for fraud and undue influence").

105. Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 21 (2016); Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893, 1915 (1996) (suggesting that there is "a link between the prescribed formalities of execution" and will contests); Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1181–82 (1993) ("A dispensing power provision could increase litigation by encouraging parties to argue that technically defective wills are genuine."); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 829 (2014) ("The harmless error power might tend to encourage carelessness and breed litigation, or open up avenues for fraud."); Langbein, *Harmless Error*, *supra* note 90, at 37 (acknowledging that harmless error triggers "the fear of a litigation imbroglio"); Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 605 (2007) ("Another concern for jurisdictions that have not adopted the harmless error rule is that adoption of this rule would lead to more confusion and litigation . . . ."); Miller, *supra* note 36, at 706 ("It is difficult . . . to see how a harmless error rule could fail to bring about an initial increase in probate litigation . . . .").

106. LORD CHARLES NEAVES, SONGS AND VERSES, SOCIAL AND SCIENTIFIC 106 (5th ed. 1879) ("Ye [l]awyers who live upon litigants' fees, . . . You should never forget the [p]rofession's best friends; . . . the jolly [t]estator who makes his own [w]ill.").

107. *See Holographic Will: Why You Need More than Just a Handwritten Will*, FREEWILL, https://www.freewill.com/learn/holographic-will (Feb. 4, 2021) [https://perma.cc/NN8E-JCS2].

108. American states differ about how much of the document must be handwritten. "First generation" holograph laws "require[] a holographic will to be entirely written, signed, and dated in the testator's handwriting." RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 3.2 cmt. b (1999). "Second

countries, and eventually spread to about half of the United States.[109] The logic behind this deviation from the Wills Act is that the testator's unique penmanship furnishes proof that the document is genuine.[110]

Holographs have long been controversial. On the plus side, because they cut drafting attorneys out of the loop, they are "accessible to all"[111] and function as a "poor man's will."[112] Moreover, because testators can dash off a holograph with a few flicks of the wrist, they "may be the *only* tool available to testators who fall seriously ill and wish to execute a will before death."[113] But on the flip side, skeptics accuse holographs of causing "chronic and unnecessary problems."[114] For example, because these wills are unwitnessed, they invite wrongdoing. As Gulliver and Tilson put it, holographs are "obtainable by compulsion as easily as a ransom note."[115] Likewise, holographs do not always look like traditional wills because they lack the formality that accompanies professional draftsmanship.[116] Thus, they can be found in letters,[117] diary entries,[118] and even recipes.[119] As a result, they can raise chin-stroking questions about whether a handwritten note represents idle musing about the disposition of property at death or an industrial-strength will.[120]

generation" statutes merely insist that the "material provisions" be handwritten. *Id.* cmt. a; *see also* UNIF. PROB. CODE § 2-503 & cmt. (1969) ("[A] holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped."). "Third generation" legislation soften this standard even more to "material portions." RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 3.2 cmt. b (1999) ("The material portion[s] . . . are the words identifying the property and the devisee."); UNIF. PROB. CODE § 2-503 (1990 amend.).

109. *See* Reginald Parker, *History of the Holographic Testament in the Civil Law*, 3 JURIST 1, 4–10, 28–31 (1943) (describing the spread of holographs).

110. *See* Adams' Ex'x v. Beaumont, 10 S.W.2d 1106, 1108 (Ky. 1928) ("[E]ach individual . . . acquires a style of writing, a certain mannerism in the formation of letters and words, absolutely peculiar to himself, and which, almost without exception, renders his handwriting easily distinguishable from that of others . . . ."); Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 33 (2008) (remarking that "[h]andwriting . . . assume[s] the role witnesses normally serve[]").

111. Emily Robey-Phillips, *Reducing Litigation Costs for Holographic Wills*, 30 QUINNIPIAC PROB. L.J. 314, 315 (2017).

112. L.H.H. Jr., Note, *Holographic Wills in Virginia: Problems at Probate*, 45 VA. L. REV. 613, 627 (1959).

113. Clowney, *supra* note 110, at 37–38; *see also* Geoff Ellwand, *An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History*, 77 SASK. L. REV. 1, 1, 3 (2014) (describing the case of George Cecil Harris, a farmer who became trapped under a tractor and used his penknife to scratch an enforceable holograph into the vehicle's fender).

114. Richard Lewis Brown, *The Holograph Problem—the Case Against Holographic Wills*, 74 TENN. L. REV. 93, 95 (2006).

115. Gulliver & Tilson, *supra* note 82, at 14. *But see* Reid Kress Weisbord & David Horton, *Inheritance Forgery*, 69 DUKE L.J. 855, 896 (2020) (finding that only two judicial opinions found that a holographic will was forged in national Westlaw survey of will forgery litigation from 2000 to 2019).

116. RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 3.2 cmt. a (1999).

117. *See* Adams v. Maris, 213 S.W. 622, 627 (Tex. Comm'n App. 1919).

118. *See* Reagan v. Stanley, 79 Tenn. 316, 317–18 (1883).

119. *See* John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 301 (1934) (describing a holograph that a woman wrote in a recipe for chili).

120. *See, e.g.*, *In re* Estate of Kuralt, 15 P.3d 931, 934 (Mont. 2000) (deeming a handwritten letter to be a holograph even though it promised to make a will in the future); Trim v. Daniels, 862 S.W.2d 8, 9, 12–13 (Tex. App. 1992) (holding that a handwritten passage on the back of a greeting card was legally effective).

Another genus of DIY testamentary instruments is the preprinted template. These wills have existed since at least the nineteenth century, when it became common for stationary stores to sell blank forms that testators could fill in by hand.[121] More recently, during the 1970s, form wills enjoyed a surge of attention as part of the broader push to expand access to justice for marginalized groups.[122] A parade of commentators proposed creating rudimentary "questionnaire" wills that would be easy for lay testators to understand, complete, and execute.[123] California, Maine, Michigan, and Wisconsin enacted "statutory" forms: free will kits approved by state legislatures that guided testators through the execution process in plain English.[124] By the early 1980s, forms seemed poised to transform end-of-life planning.

But the revolution never came. In theory, form wills seemed like an effective way to improve homemade will-making, but they were often disastrous in practice. One hitch was that forms, unlike holographs, still required witness attestation under the Wills Act, and testators did not always grasp this nuance.[125] Over and over, individuals completed a form but neglected to have it witnessed.[126] Also, despite the guardrails established by the pre-printed text, people still sometimes managed to fill in the blanks in a fashion that "ma[de] absolutely no sense[.]"[127] Thus, no state has released a statutory form will since 1986.[128]

121. *See* Matter of Estate of Rand, 61 Cal. 468, 475 (1882) (involving a will written on "a stationer's blank"); M.H. Hoeflich, *Law Blanks & Form Books a Chapter in the Early History of Document Production*, 11 GREEN BAG 2d 189, 195–99 (2008) (mentioning the "law blank" trade).

122. *See* Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 641–42 (1994).

123. *See* Edward C. Halbach, *Probate and Estate Planning: Reducing Need and Cost Through Change in the Law*, *in* DEATH, TAXES, AND FAMILY PROPERTY 165, 169 (Edward C. Halbach ed., 1977); Harold Marquis, Barbara Croft Hipple & Judith M. Becker, *The Questionnaire Will: A Device to Facilitate Testamentary Freedom for the Less Affluent*, 30 U. FLA. L. REV. 669, 676 (1978); Gregory V. Mersol, Note, *The Statutory Will: A Simple Alternative to Intestacy*, 35 CASE W. RES. L. REV. 307, 330–31, 334 (1984).

124. *See* CAL. PROB. CODE §§ 6220-6227 (West 2021); ME. REV. STAT. tit. 18-A, § 2-514 (West 2021); MICH. COMP. LAWS ANN. § 700.2519 (West 2021); WIS. STAT. ANN. § 853.55 (West 2021). Likewise, in 1984, the National Conference of Commissioners on Uniform State Laws released the Uniform Statutory Will Act. *See* Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forms vs. Fill-in Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231, 244 (1990). This model statute sought to provide stock language that testators could incorporate by reference into their wills. *See id.* at 252. However, only Massachusetts and New Mexico passed the law. *See* MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (2019); N.M. STAT. ANN. §§ 45-2A-2-45-2A-17 (2019).

125. Willing Staff, *The Legal Requirements of a Will*, WILLING LEARN (Oct. 2018), https://willing.com/learn/legal-requirements-of-a-will.html [https://perma.cc/5AUJ-9N6K].

126. *See, e.g.*, *In re* Estate of Mulkins, 496 P.2d 605, 605 (Ariz. Ct. App. 1972); Succession of Burke, 365 So. 2d 858, 860 (La. Ct. App. 1978); *In re* Estate of Bennett, 324 P.2d 862, 863 (Okla. 1958); *In re* Will of Morris, 67 Va. Circ. 29, 29–30 (2005). Courts sometimes saved these unattested forms by probating them as holographs. To do so, they invented the so-called "surplusage theory," which allowed them to disregard the typewritten language on the form and focus instead on any portions that were in the testator's handwriting. *See In re* Estate of Muder, 765 P.2d 997, 999 (Ariz. 1988); Estate of Black, 641 P.2d 754, 757 (Cal. 1982); 2 WILLIAM PARKER PAGE, PAGE ON THE LAW OF WILLS § 20.5 at 279–80 (2003) ("[T]he surplusage test [requires that] the non-holographic material [be] stricken and the remainder of the instrument admitted to probate if the remaining provisions made sense standing alone.").

127. Estate of Smith, 71 Cal. Rptr. 2d 424, 427 (Ct. App. 1998).

128. *See* Beyer, *supra* note 124, at 268.

Recently, though, form wills have reemerged in a sleek new guise. In the 2000s, self-help firms like LegalZoom, Nolo Press, and Rocket Lawyer began to sell estate planning software.[129] These products harness the power of the Internet to build the will-making experience around "interactive interview[s]."[130] Although they are not free like statutory forms, they are "far less expensive than retaining a lawyer," with providers typically charging between "$20 to $100 for a basic will."[131] Initially, online wills were seen as a tech novelty, with sales building gradually as consumers became accustomed to banking and shopping online.[132] Then, in 2020, amid the COVID-19 pandemic, "will writing companies . . . s[aw] huge spikes in their business."[133]

Lawyers have tried to stem this tide by arguing that online wills are unreliable and pose a heightened risk of estate litigation. For instance, an American Bar Association Task Force on the subject concluded that will-making is too important to leave to amateurs:

> [A] Will is one of the few human acts that survives death. It carries a legacy that can have lasting financial and emotional consequences on those who matter most—our loved ones. Mistakes made in the drafting of such an important document can profoundly alter familial relationships, leaving our family members at best confused or disappointed and at worst locked in hostile litigation.[134]

Likewise, in the media and on blogs, attorneys contend that online testamentary instruments will "increase the volume of estate litigation in the future."[135] To date, however, lawyers and their trade lobbies have yet to

129. Larson, *supra* note 40.

130. *Legal DIY Websites Are No Match for a Pro*, CONSUMER REPS. (Sept. 2012), https://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm [https://perma.cc/8TVM-RXGK].

131. Lynnette Khalfani-Cox, *Cost-Effective Wills*, AARP, https://www.aarp.org/money/estate-planning/info-03-2011/cost-effective-wills.html (last visited Mar. 23, 2022) [https://perma.cc/B9LH-RUDS].

132. *See* Larson, *supra* note 40.

133. Ingrid Lunden, *UK's Farewill Raises $25M for Its New-Approach Online Will Writing, Funerals and Other Death Services*, TECH CRUNCH (July 8, 2020, 4:15 AM), https://techcrunch.com/2020/07/08/uks-farewill-raises-25m-for-its-new-approach-online-will-writing-funerals-and-other-death-services/ [https://perma.cc/D6EL-K54F]. For example, Gentreo, an online estate planning platform, reported a 220% increase in weekly sales. *See* Catherine Thorbecke, *Coronavirus Leads to a Surge in Wills: 'Everyone is Thinking About Their Mortality'*, ABC NEWS (Apr. 2, 2020, 4:10 AM), https://abcnews.go.com/Health/coronavirus-leads-surge-wills-thinking-mortality/story?id=69874540 [https://perma.cc/B4UB-N3RA]; *see also* David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. ONLINE 18, 18 (2020) (explaining that the pandemic has spurred interest in estate planning).

134. *Do It Yourself Estate Planning*, AM. BAR ASS'N, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/diy_estate_planning/ (last visited Mar. 23, 2022) [https://perma.cc/487K-XLBA].

135. LeClair Ryan, *Do It Yourself Wills: Will They Lead to More Litigation?*, LEXOLOGY (Nov. 7, 2016), https://www.lexology.com/library/detail.aspx?g=65595926-abc9-4be5-b31e-ff314cd91a9d [https://perma.cc/487D-QWKV]; Catey Hill, *Don't Buy Legal Documents Online Without Reading This Story*, MARKETWATCH (Nov. 27, 2015, 9:29 AM), https://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015-11-23 [https://perma.cc/3KE4-AFSE] ("Online legal documents can be out of date, inaccurate or downright wrong, and the companies admit as much."). Conversely, legal academics

empirically substantiate the alleged correlation between online wills and estate litigation.

3. Living Probate

Finally, perceptions about lawsuits are integral to the living probate movement. A growing number of states have passed statutes authorizing a proceeding called "living probate" (also known as "antemortem probate") through which testators may adjudicate the validity of their will before death, thereby circumventing the possibility of a will contest after they die.[136]

Michigan adopted the first antemortem probate statute in 1883.[137] It permitted a person to petition a probate court for an order "admitt[ing] and establish[ing]" a writing "as [their] last will and testament."[138] To set this machinery in motion, the statute required the testator to notify intestate heirs of the probate hearing.[139] The judge would then decide whether the will was valid and enter a "decree [that] shall have the same effect as if [it was] made . . . after the death of the testator."[140] Finally, the law specified that wills that had passed into its safe harbor were just like "ordinary wills" and thus could be freely revoked or amended.[141]

Two years later, however, the Michigan Supreme Court held that the statute was unconstitutional in *Lloyd v. Wayne Circuit Judge*.[142] The justices commended the legislature for trying to eliminate "the post mortem squabblings and contests on mental condition which have made a will the least secure of all human dealings."[143] Yet the court determined that the law was fatally flawed because it did not require that *all* interested parties receive notice of the antemortem probate proceeding.[144] In addition, a concurring justice speculated that the statute improperly allowed judges to issue advisory opinions.[145] As the

tend to view online wills much more favorably. *See* Iris J. Goodwin, *Access to Justice: What to Do About the Law of Wills*, 2016 WIS. L. REV. 947, 951 (2016) (arguing that these instruments have the potential to "transform[] of this area of the law from an elite universe to one by and for everyone"); *cf.* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879–81 (2013) (arguing that policymakers should create simple electronic wills to ensure "universal access to the will-making process").

136. Bradley, *supra* note 47, at 1432.

137. *See* 1883 Mich. Pub. Acts 17.

138. *See id.* § 1.

139. *See id.* § 2.

140. *Id.* § 4.

141. *Id.* § 6.

142. 23 N.W. 28, 29 (Mich. 1885).

143. *Id.* at 30 (Campbell, J., concurring) (commenting also that the statute "was probably designed to prevent the unseemly and disgraceful attempts, too often made, to defeat the enforcement of the last will of persons whose competency to deal with their own affairs was never doubted or interfered with").

144. *See id.* at 29. In fact, in the case at bar, the testator had disinherited his wife and then added insult to injury by not informing her of the hearing. *See id.* at 29–30. Under the intestacy statute then in effect, surviving descendants inherited to the exclusion of the decedent's surviving spouse. *See* MICH. COMP. LAWS § 5772(a)(1) (1881) (providing that, if the decedent "shall have no issue, his estate shall descend to his widow during her natural lifetime"). Thus, if the testator had children at the time of antemortem probate, the testator's spouse would not have been an heir and, therefore, not entitled to notice of the antemortem probate proceeding.

145. *See Lloyd*, 23 N.W. at 30–31 (Campbell, J., concurring).

concurrence noted, because testators can freely make new wills or amend existing ones, contestants would not necessarily receive any property even if they prevailed.[146] As a result, the concurrence reasoned that a living probate matter did not actually feature a "controvers[y] between conflicting parties in interest."[147]

But about a century later, antemortem probate enjoyed an unlikely revival.[148] In 1976, Howard Fink wrote a piece that championed the defunct Michigan law.[149] Fink extolled the virtues of an approach that would dissolve the worst evidence problem by holding will contests "while the testator is alive and able to testify . . . in direct view of the court or jury."[150] In addition, he observed that living probate could shave the rough edges off of the Wills Act by giving testators the chance to take corrective action if "the technical execution of the will were found wanting."[151] Finally, Fink explained why *Lloyd* did not bar a state from passing such a statute. First, he argued that the notice defects that the court had flagged could be fixed by better draftsmanship.[152] Second, he asserted that concern about advisory opinions had not withstood the subsequent widespread acceptance of declaratory relief.[153] Therefore, he concluded that living probate "was essentially buried by the Michigan Supreme Court, on a rationale which would not control its decision today."[154]

Fink's article was influential. By 1980, Arkansas, North Dakota, and Ohio had adopted versions of his proposal.[155] These statutes, like their Michigan predecessor, subscribe to what is known as the "contest model" of living probate.[156] They give testators the option of "an accelerated will contest"[157] by empowering them to seek "a judgment declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their

146. *See id.* at 31 (Campbell, J., concurring).

147. *Id.* (Campbell, J., concurring).

148. The living probate experiment was not entirely dormant after *Lloyd*. In the 1930s, a handful of scholars addressed the topic, and the National Conference of Commissioners on Uniform State Laws briefly considered weighing in. *See* Cavers, *supra* note 31, at 444–45; Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 161–63 (1990). Likewise, in 1946, the drafters of the Model Probate Code rejected the notion of living probate because "few testators would wish to encounter the publicity involved in such a proceeding." LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW: INCLUDING A MODEL PROBATE CODE, 20 (Hessel E. Yntema, ed., Mich. Legal Studs. 1946). *See generally* Daniel H. Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571 (1933).

149. Fink, *supra* note 31, at 266.

150. *Id.*

151. *Id.* at 266–67.

152. *See id.* at 274–76. By 1976, as in most states, Michigan's intestacy statute included the surviving spouse as an heir for decedents who were also survived by descendants. *In re* Estate of Vary, 237 N.W.2d 498, 451 (Mich. Ct. App. 1975); MICH. REV. STAT. § 702.80 (1948). So, under a statutory requirement to notify all intestate heirs, a testator would have had to provide notice of the proceeding to her spouse and children. Under the doctrine of virtual representation, notifying the decedent's heirs would be sufficient to represent the interests of remote contingent takers. Fink, *supra* note 31, at 276.

153. *See id.* at 274.

154. *Id.* at 289.

155. *See* ARK. CODE ANN. § 28-40-202(a) (West 2021); N.D. CENT. CODE § 30.1-08.1-01 (West 2021); OHIO REV. CODE ANN. § 5817.02(A) (West 2021).

156. Langbein, *supra* note 44, at 63 (coining the term "contest model").

157. *Id.* at 73.

signatures, and the[ir] testamentary capacity and freedom from undue influence."[158]

But this enthusiasm soon waned. Leading scholars critiqued the contest model. For example, Mary Louise Fellows argued that the primary benefit of the regime—transplanting will contests from the future to the present—was also a vice.[159] As she observed, disgruntled family members had little incentive to participate in premature litigation because there was no guarantee of a reward:

> The expectant heirs and beneficiaries of prior wills affected by the proffered will . . . must bear litigation costs early although their inheritance remains uncertain until the testator's death. To take, they must not only survive the testator, but they also risk that the testator will consume or otherwise dispose of the property before his death . . . [or] execute a new will disinheriting them entirely.[160]

Likewise, John Langbein argued that the contest model was based on the flawed assumption that testators would fall on their swords by christening a hearing that might strike "an irreparable blow to family harmony."[161] Thus, Langbein suggested a rival "conservatorship model" that would borrow from "the existing procedure that is used to determine the capacity of the living . . . in protective proceedings."[162] Unlike the bare-knuckled brawling of the contest model, the conservatorship model would entrust a guardian ad litem with investigating the testator's mental acuity and freedom from coercion.[163] The testator's kin could thus "communicate any relevant information or suspicions to the guardian ad litem in confidence, without having to take actions overtly hostile to the testator."[164] Similarly, Gregory Alexander and Albert Pearson floated an "administrative model" that would be "neither adjudicative nor adversarial," but would be controlled by a kind of court-appointed special master.[165]

This debate remained academic until the 2010s, when a second wave of living probate statutes materialized.[166] Nevada extended its declaratory relief

158. N.D. CENT. CODE § 30.1-08.1-01; *cf.* ARK. CODE. ANN. § 28-40-202(a) ("Any person who executes a will disposing of all or part of an estate located in Arkansas may institute an action in the circuit court of the appropriate county of this state for a declaratory judgment establishing the validity of the will."); OHIO REV. CODE ANN. § 5817.02(a) ("A testator may file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to subsequent revocation or modification of the will.").

159. *See* Fellows, *supra* note 44, at 1073.

160. *Id.* at 1073–74.

161. Langbein, *supra* note 44, at 73.

162. *Id.* at 75.

163. *See id.* at 78–79.

164. *Id.* at 78.

165. Alexander & Pearson, *supra* note 44, at 112. Alexander and Pearson parted company with Langbein in two main ways. First, they would not require the testator to disclose the will to the guardian ad litem. *See id.* at 93–96. Second, they would dispense with notice to interested parties, which they argued was not constitutionally compelled. *See id.* at 98–111.

166. *See* ALASKA STAT. ANN. § 13.12.530 (West 2021); DEL. CODE ANN. tit. 12, § 1311 (West 2021); N.H. REV. STAT. ANN. § 552:18 (West 2021); NEV. REV. STAT. ANN. § 30.040(2) (West 2021); N.C. GEN. STAT. ANN. § 28A-2B-1 (West 2021). *But see* Kellar v. Davis, 829 S.E.2d 466, 470 (Ga. 2019) (refusing to allow a party to obtain a declaratory judgment about the validity of a will during the testator's life in the absence of a living

procedures to cover questions about the validity of a will.[167] Other jurisdictions, including New Hampshire, adopted the contest model.[168] And still others, such as Alaska and North Carolina, nodded towards the privacy of the conservatorship and administrative models by shielding certain information from disclosure.[169] These developments rekindled discussions about whether antemortem probate minimizes the damage caused by "spurious will contest[s]."[170]

C. Data

Despite this preoccupation with litigation, we know little about it. To be sure, over the years, scholars have published a handful of studies of probate records.[171] Yet almost all these articles fall into one of two camps: they examine the sociological or historical significance of the files or the efficacy of the administrative process.[172] Thus, they only mention litigation in passing.

For example, in 1950, Edward Ward and J.H. Beuscher published a review of 415 estates from Dane County, Wisconsin.[173] Ward and Beuscher focused on

probate statute on the grounds that the testator might change the will and thus "any ruling determining its validity would constitute an improper advisory opinion"). New Jersey and New York also considered passing such laws. *See* Thatch, *supra* note 47, at 333; Press Release, N.Y.C. B. Ass'n, Comment on Permitting Pre-Mortem Probate in the State of New York (Jan. 15, 2009), http://www.nycbar.org/pdf/report/Pre_Mortem_Probate.pdf [https://perma.cc/BBQ4-UAMJ].

167. NEV. REV. STAT. ANN. § 30.040(2).

168. N.H. REV. STAT. ANN. § 552:18(I) ("During his or her life, an individual may commence a judicial proceeding to determine the validity of his or her will, subject only to the will's subsequent modification or revocation.").

169. *See* ALASKA STAT. ANN. § 13.12.585(a) (stating that all pleadings other than the notice of the filing of the petition, a summary of the proceedings, and the order are "confidential"); N.C. GEN. STAT. ANN. § 28A-2B-5 ("Following the entry of a judgment, a party to the proceeding may move that the contents of the file be sealed and kept confidential. . . ."). Similarly, Delaware uses a non-judicial procedure in which a testator can serve a will on a potentially adverse party, who then must file a contest within 120 days. *See* DEL. CODE ANN. tit. 12, § 1311(a)–(b).

170. Arango, *supra* note 47, at 811 (proposing a living probate statute that emphasizes confidentiality); Bradley, *supra* note 47, at 1433 (arguing that "that antemortem probate statutes are a bad idea and states would be ill advised to enact them").

171. Arango, *supra* note 47, at 790.

172. *See, e.g.*, Stephen Duane Davis II & Alfred L. Brophy, *"The Most Solemn Act of My Life": Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 803 (2011) (surveying 100 wills from Greene County, Alabama, from before the Civil War); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (surveying a handful of estates from 1953 and 1957 from Cook County, Illinois); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1446–47 (2007) (reviewing estates from San Bernardino County, California in 1964); Jason C. Kirklin, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479, 535 (2011) (considering eighty-one wills from Hamilton County, Indiana in the middle of the nineteenth century); Alberto B. Lopez, *Antebellum and Postbellum Testamentary Transfers in Three Kentucky Counties*, 53 U.C. DAVIS L. REV. 2433, 2438 (2020) (assessing the "testamentary anatomy of wills in three Kentucky counties from 1860 to 1870"); Robert A. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TR. J. 596, 596 (1974) (collecting data from four Minnesota counties in 1969).

173. *See* Ward & Beuscher, *supra* note 60, at 393. Ward and Beuscher started by examining all the death certificates within the county for the years 1929, 1934, 1939, 1941, and 1944. *See id.* at 393–94. After excluding people who either did not live in the area or were age twenty or younger, they selected every fifth death certificate and then looked up these names in the files of the local probate court. *See id.* at 394.

the demographics of the decedents and issues such as costs and the length of cases.[174] They also devoted a short section of their article to litigation, which consisted of six contests out of 166 wills (3.6%).[175] They reported that two challenges succeeded and four were voluntarily dismissed.[176] Thus, Ward and Beuscher concluded that "[o]ne of [our] most interesting findings . . . is the rarity of contests that actually result in the trial of litigated issues in probate proceedings."[177]

Likewise, Marvin Sussman, Judith Cates, and David Smith examined 659 cases from Cuyahoga County, Ohio in the mid-1960s and followed up by consulting some decedents' family members.[178] Again, the authors were largely concerned with factors other than disputes—in this instance, the social meaning of inheritance.[179] They reported, however, that litigants sought to invalidate six of 453 wills (1.3%).[180] Five such matters ended with jury verdicts against the contestants and then settled before an appeal.[181] The sixth contest settled without a trial.[182] Sussman, Cates, and Smith asked survivors about the settlements and discovered that they ranged in size from $400 to $150,000.[183] They concluded that "will contest[s] are resolved through compromise" and that contestants "had a very good chance of getting something, but the amount was less than they asked."[184]

The most thorough account of probate litigation so far is Jeffrey Schoenblum's 1987 article, *Will Contests—An Empirical Study*.[185] Schoenblum surveyed 7,638 probate administrations from Nashville, Tennessee during a nine-year period.[186] He found sixty-six will contests: a litigation rate of less than 1%.[187] About two-thirds of these matters featured allegations of either incapacity or undue influence exclusively.[188] Conversely, asserted violations of the execution formalities were both less common and underdeveloped, suggesting that they were merely "added as a make-weight."[189] Overall, contestants achieved mixed results. Ten of them voluntarily dismissed their claims.[190]

174. *See id.* at 395–409.

175. *See id.* at 415–16.

176. *See id.* at 416. Likewise, Ward and Beuscher found seven disputes about the meaning of a will (4.2%) and three battles over service as administrator or executor. *See id.* at 416–18.

177. *Id.* at 415.

178. SUSSMAN, CATES & SMITH, *supra* note 60, at 45–52.

179. *See id.* at 3 ("The study explores the exercise of testamentary freedom . . . in relation to acts of familial responsibility and intergenerational behavior.").

180. *See id.* at 184.

181. *See id.*

182. *See id.*

183. *See id.*

184. *Id.* at 188.

185. *See* Schoenblum, *supra* note 25.

186. *See id.* at 613–14.

187. *See id.* Schoenblum noted that these disputes often arose out of low-value estates, which prompted him to speculate that some contestants were motivated by "nonpecuniary impulses." *Id.* at 615, 617.

188. *See id.* at 647–49.

189. *Id.* at 647.

190. *See id.* at 625.

Twenty-five went to trial, where they won just eight times.[191] Twenty-four settled.[192] But surprisingly, none of them "settle[d] for mere token awards."[193]

More recently, one of us has published a pair of symposium contributions that tried to refine our understanding of two specific litigation-related issues.[194] The first probed whether California's adoption of partial harmless error in 2009 led to more disputes.[195] Examining cases from Alameda County, California from between 2008 and 2010, it discovered that harmless error surfaced in just 0.57% of all matters that were eligible for the doctrine.[196] It therefore found no evidence that the rule "vastly increase[s] the number of will contests."[197] The second article collected data about self-made wills from both Alameda and San Francisco Counties.[198] Using a logistic regression, it determined that several types of homemade testamentary instruments were correlated with a statistically significant increase in the odds of conflict relative to lawyer-drafted wills.[199] Thus, it found preliminary support for the idea that "some of these documents [are] litigation magnets."[200]

This body of work is valuable, but it also leaves many questions unanswered. For example, we know little about what factors are correlated with conflict or how California's harmless error experiment is playing out on the ground now that more time has passed since its enactment and attorneys may be more familiar with it. Likewise, data about litigation rates does not tell us whether disputed matters are slower, costlier, or more destructive to family cohesiveness than uncontested ones. Finally, prior empirical studies of probate records focus on will contests, and thus do not speak to other kinds of lawsuits, like petitions to remove an executor or breach of fiduciary duty claims. Accordingly, because these papers are merely "a starting point for subsequent research,"[201] we try to take them to the next level in the remainder of this Article.

III. EMPIRICAL RESULTS

This Part is the descriptive heart of our Article. It explains our methodology and then presents our findings about will types and terms, corelates of litigation, probate length and expense, and case outcomes.

191. *See id.* at 626.

192. *See id.* at 620.

193. *Id.* at 624.

194. David Horton, *Do-It-Yourself Wills*, 53 U.C. DAVIS L. REV. 2357, 2357 (2020) [hereinafter Horton, *DIY Wills*]; David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2027 (2018) [hereinafter Horton, *Harmless Error*].

195. *See* Horton, *Harmless Error*, *supra* note 194, at 2032.

196. *See id.* at 2050.

197. *Id.* at 2065.

198. *See* Horton, *DIY Wills*, *supra* note 194, at 2364.

199. *See id.* at 2392. The article divided self-made wills into five categories: lawyer-drafted, homemade attested, holographs, forms, and software. *See id.* at 2381–82. In Alameda County, holographs were associated with higher litigation rates; in San Francisco County, the same was true for homemade attested instruments. *See id.* at 2393.

200. *Id.* at 2395.

201. Schoenblum, *supra* note 25, at 659.

A. Methodology and Caveats

We recently compiled a dataset of 1,349 probate matters that were heard in San Francisco Superior Court between January 1, 2014 and December 31, 2016.[202] Because we wanted this Article to focus solely on wills, we dropped 676 intestacies. In addition, we cut 230 "pour-over wills," which leave property to an existing trust. We did so because pour over wills are mere conduits to inter vivos trusts: they ensure that any assets that the settlor failed to transfer to her trust during her life end up passing under the trust's terms after she dies.[203] Because inter vivos trusts are not required to be filed in the probate proceeding, we do not have enough information about those estates to use them.[204] Also, by eliminating pour-over wills, we zeroed in on documents that served as one of the testator's core estate planning vehicles.[205] Ultimately, these changes left us with 443 cases.

There are both drawbacks and benefits to our research technique. Admittedly, relying on a single county's probate files may provide a skewed picture. For starters, San Francisco is not nationally representative: it has lower poverty levels and higher median home values than the rest of the country.[206] In addition, California's probate system differs from other jurisdictions' regimes. Some states give probate courts the discretion to award executors and their lawyers "reasonable compensation" under the facts of a particular case.[207] But the Golden State has a more rigid fee structure. Executors and their counsel are

202. We gathered this information by asking research assistants to go day by day through the court's online "search by date" interface. *See Case Calendar*, SUPERIOR CT. CAL., COUNTY S.F., https://webapps.sftc.org/cc/CaseCalendar.dll?=&SessionID=234265FB7A045EF3B4DD02F420AB8711094F2C46 (last visited Mar. 23, 2022) [https://perma.cc/ULW5-3A2V]. We previously used these cases to write a paper about "heir hunting": companies that locate relatives of a decedent who may not be aware of their inheritance rights. *See* David Horton & Reid Kress Weisbord, *Heir Hunting*, 169 U. PA. L. REV. 383, 383 (2021). In addition, as mentioned above, one of us used this data to write a symposium piece on self-made wills. *See* Horton, *DIY Wills*, *supra* note 194, at 2364.

203. *See In re* Henry B. Wilson, Jr., Revocable Tr. Dated June 27, 2002, No. A-15-1014, 2017 WL 5608085, at *16 (Neb. Ct. App. Nov. 21, 2017), *aff'd on other grounds sub nom. In re* Wilson, 915 N.W.2d 50 (2018) (explaining that pour over wills exist "to send everything to the trust"); MICHAEL J. GAU, A PRACTICAL GUIDE TO ESTATE PLANNING AND ADMINISTRATION 61 (2005).

204. *Cf.* Mark Glover, *Boilerplate in Pour-Over Wills*, 103 IOWA L. REV. ONLINE 138, 144 (2018) (critiquing a similar methodology that excluded pour-over wills).

205. Admittedly, we cannot know from court records whether decedents supplemented their wills with nonprobate transfers such as life insurance or pay-on-death accounts. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (describing the rise of "will substitutes" that "enable[e] property to pass on death without probate and without will").

206. *Compare QuickFacts: San Francisco County, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/sanfranciscocountycalifornia (last visited Mar. 23, 2022) [https://perma.cc/JD8Q-G7KX] (determining San Francisco County's poverty rate to be 9.5% and its median owner-occupied housing value to be $1,097,800), *with QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045218 (last visited Mar. 23, 2022) [https://perma.cc/HVQ6-QS4H] (calculating that the U.S. poverty rate is 11.4% and its median owner-occupied housing value is $217,500).

207. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/27-1 (West 2021); TEX. EST. CODE ANN. § 551.004 (West 2021); *In re* Estate of Wallace, 829 S.W.2d 696, 701 (Tenn. Ct. App. 1992) ("This determination must be made in light of all the relevant circumstances, including the extent of the executor's responsibilities, the nature of the services rendered, the promptness and adequacy of the services, and the value of the benefits conferred.").

entitled to "ordinary" fees based on a percentage of the value of the estate and can only earn more by performing "extraordinary" services.[208] Finally, the fact that California is a community property state likely warps the demographics of our data. Because a surviving spouse can sometimes collect assets from a deceased spouse's estate outside of the probate process,[209] our research oversamples single people.[210] Divergences like these may limit the generalizability of our findings.

Yet on the plus side, using probate records allows us to stockpile information. Indeed, we collected or calculated more than 100 variables from each case. These datapoints range from relatively pedestrian issues like the decedent's gender to more complicated topics such as the expense, length, and outcome of litigation. These details are not available to researchers who rely solely on judicial opinions.

B. Results

This Section discusses our findings. After providing an overview, it examines types of wills, their terms, factors that seemed to breed conflict, and the cost, time, and results of litigated cases.

1. General Findings

Table 1 contains basic information about the estates in our dataset. It reveals that the average case took 532 days from the petition for probate to the order for final distribution. The mean gross value of decedents' property was $1,675,695.[211] Executors received an average of $13,614 in statutory fees and $155 in extraordinary fees, and attorneys pocketed a mean of $21,820 in statutory fees and $1,660 in extraordinary fees. Thus, the average total amount of fiduciary and attorney fees represented approximately 2.2% of the average estate value.

208. *See* CAL. PROB. CODE §§ 10810-11 (West 2021). For similar states, see ARK. CODE ANN. § 28-48-108 (West 2021); FLA. STAT. ANN. § 733.617 (West 2021); IOWA CODE ANN. § 633.197 (West 2021); M.D. CODE ANN. EST. & TRUSTS § 7-601 (West 2021); MO. ANN. STAT. § 473.153 (West 2021); NEV. REV. STAT. ANN. §§ 150.060-.067 (West 2021).

209. *See, e.g.*, CAL. PROB. CODE § 13500 (West 2021) (allowing surviving spouses to obtain property from their former husband's or wife's estate by filing a spousal property petition).

210. Indeed, just forty of the 443 testators (9.0%) in our files were married at death.

211. Two caveats about our "estate value" variable cut in opposite directions. On the one hand, the California probate system, like most such regimes, uses the gross value of an estate. *See* Horton, *supra* note 60, at 626–27; *In re* Estate of Bowlds, 102 P.3d 593, 594 (Nev. 2004). As a result, it will exaggerate the wealth of decedents who have significant debts or unpaid mortgage liability. But on the other hand, some of the testators in our sample may own nonprobate assets, such as property placed in a trust. We have tried to minimize this possibility by dropping pour-over wills, *see supra* notes 203–04, but we cannot eliminate it. In turn, this means our "estate value" calculations might also underestimate a person's net worth.

Table 1: Descriptive Statistics		
Variable	N	Mean
Estate Length in Days	389	532
Estate Value	443	$1,675,695
Statutory Executors' Fees	389	$13,614
Extraordinary Executors' Fees	389	$155
Statutory Attorneys' Fees	389	$21,820
Extraordinary Attorneys' Fees	389	$1,660
Notes: (1) Fifty-four estates are missing information about the amount of extraordinary fees awarded or the length of the probate matter.		

2. Will Types and Terms

We divided the wills in our sample into five categories: (1) documents that were written by estate planning counsel; (2) "homemade attested" wills that were self-authored and signed by attesting witnesses; (3) holographic wills that were handwritten by the testator but *not* signed by attesting witnesses;[212] (4) fill-in-the-blank form wills; and (5) "software wills" purchased from online legal service providers, which we identified by their distinctive font and formatting.[213]

As shown in Figure 2, when sorted by type, our sample contained 304 wills written by attorneys (68.8%), fifty-eight holographs (13.1%), thirty-six homemade attested instruments (8.1%), twenty-five software wills (5.6%), and twenty forms (4.5%).[214]

212. As a result, if the testator handwrote a will but also had it witnessed, we placed it into the "homemade attested" camp.

213. For more on this issue, see Horton, *DIY Wills*, *supra* note 194, at 2381–82.

214. As we mentioned *supra* note 124, form wills can either be private or promulgated by the California Bar Association. Ten of the forms in our data were sold by vendors and ten were California Bar forms.

FIGURE 2: BREAKDOWN OF WILLS BY TYPE

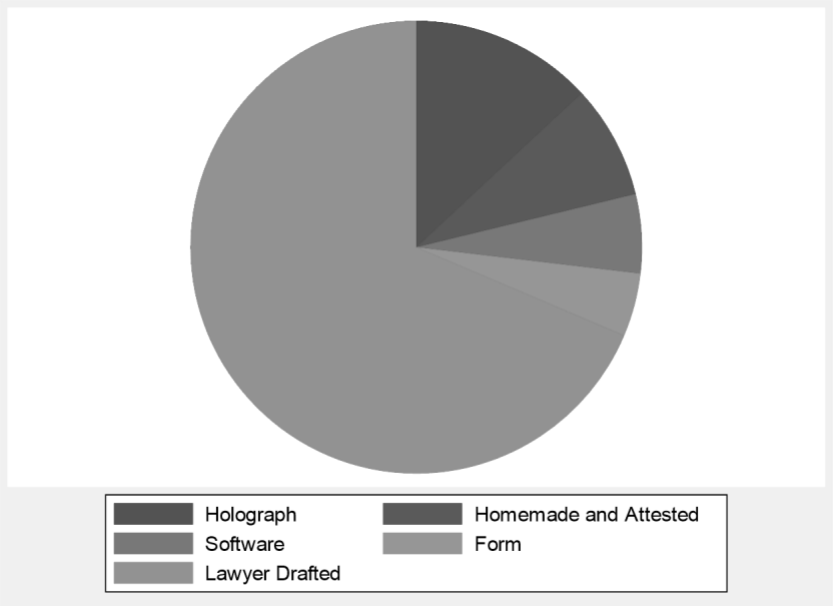


Table 2 shows how the terms of these wills varied by type. For instance, instruments written by lawyers often tried to prevent litigation: 18.4% of them contained a fiduciary exculpation provision[215] and 73.4% featured a no-contest clause.[216] These measures were less prevalent in homemade attested wills (8.3% fiduciary exculpation, 11.1% no-contest clause), holographs (0% fiduciary exculpation, 10.3% no-contest clause), and forms (5.0% fiduciary exculpation,

215. We defined a "fiduciary exculpation provision" as a term that either (1) waived one or more of the executor's fiduciary duties or (2) exonerated her from liability. Forty-three wills (9.7%) included a waiver of at least one fiduciary duty, including twenty-six waivers of the duty to diversify (5.9%), eighteen waivers of the duty to diversify assets (4%), and nine waivers of the duty of care (2%). In addition, thirty-eight (8.6%) featured a liability waiver. *Cf.* Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 U.C. DAVIS L. REV. 2561, 2598 (2020) (examining wills from New Jersey and determining that about 15% waive a fiduciary duty and 10% include a general fiduciary exculpation clause).

216. A no contest clause, which disinherits anyone who files a claim related to the estate, is a centuries-old technique that tries to deter litigation. *See* Anonymous, 86 Eng. Rep. 910, 910 (1674) (featuring a will that stated that "[i]f A. molest B. by suit or otherwise, he shall lose what is devised to him, and it shall go to B"). In general, these provisions are enforceable unless a litigant had "probable cause" for her claims. UNIF. PROB. CODE § 2-517 (2020); ARIZ. REV. STAT. ANN. § 14-2517 (2021); COLO. REV. STAT. ANN. § 15-12-905 (West 2021); MINN. STAT. ANN. § 524.2-517 (West 2021). "Probable cause" is "the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 cmt. j (AM. JUR. L. INST. 1983). California's approach to the validity of no contest provisions has long been in flux. *See, e.g.*, *Revision of No Contest Clause Statute*, 37 CAL. L. REVISION COMM'N REPS. 359, 379–90 (2007) (summarizing the intricacies of the doctrine). However, in the decade before our research period began, the California legislature revamped its no contest clause statute in a way that roughly aligned it with the majority view. *See* CAL. PROB. CODE §§ 21310–21311 (West 2021) (embracing a slightly more complicated version of the "probable cause" standard).

0% no-contest clause).[217] Likewise, 99% of professionally drafted wills and 95% of forms named an executor. But only 80.6% of homemade attested wills and 56.9% of holographs took this elementary estate planning step.[218]

Software wills had more in common with attorney-created wills than the other do-it-yourself options. In fact, 36% of software wills had a fiduciary exculpation clause: a proportion that is actually *higher* than the corresponding figure in lawyer-drafted wills by a statistically significant margin. In addition, 60% of software wills boasted a no-contest clause and 100% named an executor, although these figures are not statistically different from professional wills. Admittedly, the anti-litigation language in software wills might be boilerplate, rather than the product of an informed decision.[219] Nevertheless, it appears that software wills allow users to engage in relatively sophisticated estate planning.

217. These divergences were statistically significant except for fiduciary exculpation clauses in both homemade attested wills and form wills. We would be remiss if we did not briefly mention a testator named Peter Fries, who inserted a memorable no contest clause into his homemade attested will. Rather than disinheriting litigants, he specified that they should receive a reminder of his religious faith:

> Should anyone in any form challenge the provisions of this last will and testament, the Executors/Administrators designated above are ordered to secure for each challenger a Memorial Mass for Divine Grace and Guidance at St. Mary's Cathedral [San Francisco]—and provide each challenger with an appropriate mass card so stating[:] *Deus caritas est, et qui manet in caritate, in Deo manet et Deus in eo.*

Petition for Probate of Will and for Letters Testamentary at 9–10, Estate of Fries, No. PES-14-297969 (Cal. Super. Ct. Aug. 8, 2014).

218. These differences were statistically significant. *Cf.* Clowney, *supra* note 110, at 47 (finding that 43% of holographs did not name an executor); Weisbord, *supra* note 215, at 2588–89 (finding that 100% of a sample of 249 non-holographic wills from Sussex County, New Jersey appointed an executor).

219. In general, we doubt that testators understand legalistic language in wills. *See* Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 668 (2018) (examining 230 wills from Sussex County, New Jersey, and finding that they routinely dealt with arcane matters through "language that sounds authoritative, but makes little sense in context"); David Horton & Reid Kress Weisbord, *Boilerplate No Contest Clauses*, 82 LAW & CONTEMP. PROBS. 69, 88 (2019) (reaching similar conclusions about no contest clauses in a sample of 457 wills from Alameda County, California).

Table 2: Terms

	Fiduciary Exculpation		No Contest		Names Executor	
Type of Will	N	Percent†	N	Percent†	N	Percent†
Lawyer-Drafted	56	18.4%	223	73.4%	301	99.0%
Homemade Attested	3	8.3% (p = 0.131)	4	11.1%** (p = 0.000)	29	80.6%*** (p = 0.000)
Holograph	0	0.0%*** (p = 0.000)	6	10.3%*** (p = 0.000)	33	56.9%*** (p = 0.000)
Form	1	5.0% (p = 0.127)	0	0.0%*** (p = 0.000)	19	95.0% (p = 0.116)
Software	9	36.0%* (p = 0.034)	15	60.0% (p = 0.151)	25	100% (p = 0.618)
Total	69	15.6%	248	56.0%	407	91.9%

Notes:
(1) † Z-tests compare lawyer-drafted wills with each kind of DIY will.
(2) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

The testators in our data nominated a variety of different people as executor. As Table 3 showcases, 103 (23.3%) entrusted the role of primary executor to their child or grandchild, sixty-six (14.9%) chose their spouse or partner,[220] sixty-one (13.8%) picked a sibling, fifty-one (11.5%) designated another relative, and twenty-eight (6.3%) named an attorney, accountant, or professional fiduciary. The remaining ninety-eight (22.1%) ranged from in-laws to an individual who was identified as the decedent's "student and follower"[221] to the owner of a dive bar where the testator was a regular.[222]

220. The paucity of wills that selected spouses or partners as primary executor likely reflect the general lack of married testators in our data. *See supra* text accompanying notes 209–10.

221. Petition for Probate of Will and for Letters Testamentary at 9, Estate of Chun, No. PES-16-300038 (Cal. Super. Ct. Aug. 1, 2016).

222. *See* Notice of Ex Parte Petition and Ex Parte Petition for Stay in Proceeding and Suspension of Powers of Personal Representative; Memorandum of Points and Authorities at 5, Estate of Wesche, No. PES-14-297404 (Cal. Super. Ct. Jan. 19, 2016). In addition, forty-four wills (9.9%) appointed co-primary executors. Most of the time, both co-primary executors were members of the same class, such as two of the testator's kids or nieces. (For cases with co-executors who were not members of the same group, we listed the person with the closest biological relationship to the testator as the "primary executor.") One testator established a simple mechanism for resolving conflict among co-executors by writing "[i]f they cannot agree upon any particular course of action at any time, let them flip a coin, two out of three." Petition for Probate of Will and for Letters Testamentary at 8, Estate of Huttig, No. PES-15-299197 (Cal. Super. Ct. Oct. 8, 2015). 283 (63.9%) decedents took the precaution of listing at least one-contingent executor. These fallback provisions governed in the 126 cases (28.4%) where the primary executor or co-executors either died, declined to serve, or could not be found. Finally, contingent executors were unable to serve in thirty-six estates (8.4%).

Table 3: Primary Executor Named in Will		
Relationship to Decedent	N	Percent
Spouse or Partner	66	14.9%
Child or Grandchild	103	23.3%
Sibling	61	13.8%
Other Relative	51	11.5%
Professional	28	6.3%
Other	98	22.1%
No Nomination	36	8.1%
Total	443	100%

3. Correlates of Litigation

Because probate is unique, we should begin our discussion of "litigation" by defining that term. In most contexts, "litigation" means "'a case before a court.'"[223] As a result, identifying "litigation" could not be easier: all matters within the judicial system are "litigated." Estate administration, however, *automatically* takes place in court. Thus, one must look closer to separate routine estates from contested ones. Compounding this problem, parties in probate often take action that might be seen as "litigation" but do not involve a counterparty. For example, beneficiaries might ask the judge to interpret an ambiguous bequest or trace the testator's family tree.[224] Even if there is no opposition, the judge might deny the request, which gives the proceeding a quasi-contested flavor.[225] Nevertheless, we wanted our "litigation" variable to be as useful as possible for the policy debates we described in Part II. Because quasi-contested filings rarely breed family animosity or derail and drain the estate—the harms that are normally associated with litigation—we excluded them from our litigation count. Thus, for our purposes, "litigation" occurred only if one party formally objected to another party's actions.

In sharp contrast to previous studies, which found litigation rates of between less than 1% and 3.6%,[226] fifty-one San Francisco estates (11.5%) were tainted by litigation. We broke the disputes in these matters into three rough camps: will contests, fiduciary litigation, and other. Because several cases featured more than

223. Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colo., Inc., 328 P.3d 275, 280 (Colo. App. 2013) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1322 (2002)).

224. David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 157 n.290 (2016) (describing these quasi-adversarial matters).

225. *See* Horton, *supra* note 60, at 633.

226. *See supra* Section II.C. Admittedly, this may be a California-specific phenomenon. As noted, estates in which one spouse leaves property to another—which are especially unlikely to involve litigation—are exempt from probate. *See supra* text accompanying notes 209–10. As a result, the court files may contain a disproportionate percentage of messy or contentious matters.

one allegation, we found a grand total of seventy separate causes of action. Table 4 breaks these claims down by type.

Table 4: Litigation by Claim Type	
Type of Case	N
Will Contest	25
Fiduciary Litigation	22
Other	13
Total	70

Two types of claims dominated. Will contests, which appeared in twenty-five estates (5.6%), were the most common. Contestants typically argued that a will was invalid for multiple reasons. Collectively, they asserted undue influence fourteen times, incapacity eleven times, a lack of testamentary intent ten times, fraud or forgery eight times, and failure to comply with the execution formalities seven times. In addition, fiduciary litigation was almost as prevalent as will contests, occurring in twenty-two matters (5.0%). Thirteen parties objected to the nomination of an executor and ten argued that the executor had breached her fiduciary duties.[227] The remaining disputes included five assertions (1%) that a third party held property that belonged to the estate[228] and a motley assortment of other allegations, such as that the decedent had breached a contract to make a will[229] or accidentally omitted a child from his estate plan.[230]

For further refinement of the sample, we sorted the will contests into two subcategories. The first subcategory, "formalities/intent" challenges, includes disputes that allege either noncompliance with the statutory formalities or a lack of testamentary intent. Both types of claims share the common thread of asserting that a writing is just a writing—not a will. The second subcategory, "incapacity/undue influence" cases, includes allegations of incapacity, undue influence, fraud, or forgery. These claims generally challenge the voluntariness of the testator's estate plan.

A bivariate analysis reveals that several variables are linked to disputes. The first, as Table 5 displays, is the type of will. 2.3% of lawyer-drafted documents resulted in a formalities/intent contest. But 13.9% of homemade and attested instruments and 10.0% of form wills spawned formalities/intent claims. Both differences were statistically significant ($p < 0.01$ and $p < 0.05$,

227. Two litigants both objected to an executor and sued for breach of fiduciary duties, which is why the total number of fiduciary-related claims exceeds twenty-two.

228. In California, these are known as "850" petitions after the Probate Code section that authorizes them. *See* CAL. PROB. CODE § 850(a)(2)(D) (West 2021) (allowing executors to sue "[w]here the decedent died having a claim to real or personal property, title to or possession of which is held by another").

229. *See* Petition to Determine Persons Entitled to Distribution of Estate at 2–3, Estate of Agonoy, No. PES-16-300333 (Cal. Super. Ct. Feb. 8, 2019).

230. *See* Petition for Determination of Entitlement to Estate Distribution at 3, Estate of Chung, No. PES-16-299654 (Cal. Super. Ct. May 5, 2017).

respectively). In addition, 3.3% of attorney-written wills led to incapacity/undue influence claims. Again, the corresponding metric for form wills (15.0%) was higher by a statistically meaningful margin ($p < 0.01$).

Table 5: Litigation By Will Type

	Formalities or Intent†		Incapacity or Undue Influence†		Fiduciary Litigation†	
Type of Will	N	Percent of Estates	N	Percent of Estates	N	Percent of Estates
Lawyer-Drafted	7	2.3%	10	3.3%	16	5.3%
Homemade and Attested	5	13.9%** (p = 0.004)	1	2.8% (p = 0.870)	2	5.5% (p = 0.941)
Holograph	2	3.4% (p = 0.608)	2	3.4% (p = 0.951)	1	1.7% (p = 0.243)
Form	2	10.0%* (p = 0.042)	3	15.0%** (p < 0.010)	1	5.0% (p = 0.959)
Software	1	4.0% (p = 0.596)	1	4.0% (p = 0.849)	2	8.0% (p = 0.563)
Total	17	3.84%	17	3.84%	22	5.0%

Notes:
(1) † Z-tests compare lawyer-drafted wills with each kind of DIY will.
(2) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

The second variable that seems to incite conflict is the testator's dispositive choices. Some wills deviate from the default rules of intestacy: they either favor nonrelatives or divide assets lopsidedly among similarly situated family members (like giving more to one child over another). We will call these "unequal" wills.[231] As Table 6 demonstrates, 51.4% of matters that did not feature will contests arose from unequal wills. Yet the proportion of these wills in incapacity/indue influence cases was 76.5%, which was higher by a statistically significant amount ($p < 0.05$).

231. Unequal choices are not surprising because one of the main reasons for making a will is to opt out of the neutral family allocation rules of intestate succession.

Table 6: Will Contests: Other Variables[232] [233]

Variable	Mean in Cases Without Will Contests	Mean in Formalities/ Intent Cases	Mean in Incapacity/ Undue Influence Cases
Will Divides Unequally†	51.4%	58.8% (p = 0.550)	76.5%* (p = 0.043)
Codicil Executed†	9.8%	11.8% (p = 0.791)	5.9% (p = 0.591)
Days Between Will and Death(FN)††	3,572	3,670 (p = 0.888)	2,241 (p = 0.139)
No Contest Clause†	56.7%	41.2% (p = 0.206)	52.9% (p = 0.759)
Estate Value††	$1,678,288	$1,939,180 (p = 0.805)	$1,316,009 (p = 0.712)
Express Disinheritance FN†	9.8%	17.6% (p = 0.293)	17.6% (p = 0.293)

Notes:
(1) † Z-tests measure the difference in means.
(2) †† T-tests measure the difference in means.
(3) Some of the estates are missing information.
(4) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Third, as Table 7 elucidates, two factors leapt out in matters with fiduciary litigation. For one, these causes of action were concentrated in wealthier estates. Testators in matters without executor-related conflict owned an average of $1,578,137, which was lower by a statistically significant sum than the $3,542,604 mean in litigated cases ($p < 0.05$). Also, we found a connection between creditor's claims[234] and fiduciary disputes. Individuals or entities tried to collect debts in 30% of estates where there was no fiduciary litigation and

232. One complication with calculating the amount of time between the signing of the will and the testator's death stems from the legal effect of codicils (amendments to a will). Under the doctrine of republication by codicil, courts treat a will as though it has been re-executed each time the testator creates a codicil. *See In re* Will of Marinus, 493 A.2d 44, 51 (N.J. Super. Ct. App. Div. 1985). Thus, in the forty-three estates with codicils, we applied this rule and deemed the operative date of the will to be the date of its most recent codicil.

233. We defined an "express disinheritance" clause as a provision that singles out a particular individual by name to receive either nothing or a nominal bequest (such as $1). *See, e.g.*, Petition for Letters of Administration with Will Annexed at 6, Estate of Cuzzort, No. PES-14-297923 (Cal. Super. Ct. Jul. 24, 2014) ("I specifically direct that LARRY KEITH CUZZORT be disinherited and receive nothing from my estate. We have been separated from [sic] many years and his whereabouts are unknown to me."). We included this variable because we hypothesized that some people might have a visceral reaction to being explicitly—rather than implicitly—cut out.

234. If a decedent dies with debts, a creditor must present the claim in the probate matter. *See* CAL. PROB. CODE § 9002 (West 2021). The executor can either pay the obligation or reject it (which entitles the creditor to file a civil lawsuit to try to collect). *See id.* § 9351.

59.1% of matters where there was a dispute, which was a statistically significant difference ($p < 0.01$).

Table 7: Fiduciary Litigation: Other Variables[235] [236]

Variable	Mean in Cases Without Fiduciary Litigation	Mean in Cases With Fiduciary Litigation
No Executor Nominated†	8.1%	9.1% (p = 0.865)
Primary Executor Cannot Serve†	27.8%	40.9% (p = 0.184)
Contingent Executor Cannot Serve†	8.3%	9.1% (p = 0.898)
Co-Executors Serve†	5.0%	0% (p = 0.283)
Full IAEA Authority(FN)†	94.8%	95.5% (p = 0.889)
Executor Represented by Attorney†	94.3%	95.5% (p = 0.819)
Fiduciary Exculpation†	15.7%	13.6% (p = 0.797)
No Contest Clause(FN)†	55.1%	72.7% (p = 0.105)
Days Between Will and Death††	3,608	2,219 (p = 0.081)
Estate Value††	$1,578,137	$3,542,604* (p = 0.037)
Creditor's Claim Filed†	30.0%	59.1%** (p = 0.003)
Fiduciary Exculpation Clause†	15.7%	13.6% (p = 0.797)
Estate Contains Land†	45.8%	54.5% (p = 0.425)

Notes:
(1) † Z-tests measure the difference in means.
(2) † T-tests measure the difference in means.
(3) Some of the estates are missing information.
(4) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

235. The IAEA is the Independent Administration of Estates Act. *See* CAL. PROB. CODE § 10400 (West 2021). If a probate court grants full IAEA authority—which happened 94.8% of the time in our dataset—the executor can take many actions without requesting advance judicial approval, including transferring property, paying taxes, and suing and defending claims. *See id.* §§ 10552–10564.

236. In some jurisdictions, no contest clauses (arguably) only govern challenges to the validity of a will. *See, e.g.*, Boettcher v. Busse, 277 P.2d 368, 371 (Wash. 1954) (refusing to apply a no contest provision because "the instant case is not a will contest"). However, California courts have held that challenges to certain fiduciary matters can trigger a no contest clause. *See* Hearst v. Ganzi, 52 Cal. Rptr. 3d 473, 485 (Ct. App. 2006). Thus, we include a "no contest" variable for both will contests and fiduciary-related allegations.

To investigate further, we ran logistic regression analyses that used the three different species of litigation—formalities/intent claims, influence/capacity claims, and fiduciary claims—as dependent variables. We supplemented the independent variables mentioned above with a few additional controls. For will contests, we examined the testator's gender and marital status both at the time of execution of the will and at death. For fiduciary litigation, we considered the identity of the executor, dividing relationships into five groups: spouse or partner, descendant, other relative, professional, and nonrelative.

As Table 8 displays, this more-sophisticated technique generally confirmed the bivariate findings. Four variables demonstrated a statistically significant impact on the odds of a claim. First, homemade attested wills were correlated with a 104% increase in the odds of formalities/intent claims when compared to lawyer-drafted documents ($p < 0.01$). Second, form wills fared worse: when measured against the baseline of professional wills, the odds of a formalities/intent dispute rose by 97% ($p < 0.05$) and the odds of incapacity/undue influence claims climbed by 68% ($p < 0.05$). Third, unequal wills were connected to a 46% increase in the odds of an incapacity/undue influence challenge ($p < 0.05$). Finally, the assertion of a creditor's claim bumped the odds of fiduciary litigation up by 29% ($p < 0.05$).

Table 8: Litigation Regression Analyses
Logit Model

Logit Coefficient
(Standard Errors)
[Odds Ratio]

	Formalities or Intent	Incapacity or Undue Influence	Fiduciary Claims
Will Type *(Reference Category is Lawyer-Drafted Wills)*			
Homemade Attested	2.342** (0.797) [10.406]	-0.428 (1.205) [0.652]	-0.008 (1.079) [0.992]
Holograph	0.793 (0.922) [2.211]	0.148 (0.921) [1.160]	-1.486 (1.417) [0.226]
Form	2.270* (1.036) [9.676]	1.910* (0.948) [6.754]	0.357 (1.308) [1.419]
Software	1.115 (1.144) [3.048]	0.298 (1.105) [1.347]	0.657 (0.901) [1.928]
Relationship Between Testator and Executor *(Reference Category is Spouse or Partner)*			
Descendant	†	†	0.513 (1.251) [1.671]
Other Relative	†	†	0.785 (1.211) [2.192]
Professional	†	†	0.848 (1.330) [2.334]
Nonrelative	†	†	0.580 (1.210) [1.787]
Other Controls			
Will Divides Unequally	0.400 (0.589) [1.492]	1.521* (0.681) [4.576]	†
Codicil Executed	0.584 (0.820) [1.793]	-0.512 (1.072) [0.599]	0.026 (0.828) [1.026]
Days B/w Will & Death	0.000 (0.000) [1.000]	-0.000 (0.000) [1.000]	-0.000 (0.000) [1.000]

No Contest Clause	0.074 (0.684) [1.077]	0.424 (0.705) [1.528]	1.010 (0.668) [2.745]
Estate Value	0.000 (0.000) [1.000]	-0.000 (0.000) [1.000]	0.000 (0.000) [1.000]
Female T	0.224 (0.538) [1.251]	-0.361 (0.554) [0.697]	†
T Married at Execution	0.790 (0.843) [2.203]	0.972 (0.974) [2.644]	†
T Married at Death	0.612 (0.943) [1.843]	0.745 (0.983) [2.107]	†
Express Disinheritance	0.973 (0.730) [2.647]	0.583 (0.713) [1.792]	†
No Executor Nominated	†	†	1.585 (1.165) [4.878]
Primary Executor Cannot Serve	†	†	0.804 (0.553) [2.234]
Contingent Executor Cannot Serve	†	†	0.171 (0.707) [1.186]
Co-Executors Serve	†	†	††
IAEA Authority	†	†	-0.340 (1.198) [0.967]
Executor Represented by Attorney	†	†	0.116 (1.148) [1.123]
Creditor's Claim Filed	†	†	1.052* (0.496) [2.863]
Fiduciary Exculpation Clause	†	†	-0.616 (0.708) [0.540]
Estate Contains Land	†	†	0.831 (0.494) [2.295]
Constant	-5.134*** (0.890)	-4.515*** (0.959)	-5.006* (1.977)
N	439	439	418

Notes:
(1) † Not all variables are relevant in each specification.
(2) †† Because no cases in which co-executors serve led to fiduciary litigation, the regression drops the variable.
(3) The regression samples are smaller than the overall dataset because some cases are missing information.
(4) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

4. Costs and Time

Unsurprisingly, our data confirmed that litigated estates incur more costs and take longer to resolve than uncontested matters. As we mentioned above, California's fixed fee schedule allows attorneys to recover for "extraordinary" services, such as defending a lawsuit.[237] The average amount of extraordinary compensation in matters without disputes is $505. Conversely, in the thirty-three disputed matters for which we have data, this figure is a sky-high $14,112, which is a statistically significant difference (p = 0.000). Similarly, the mean number of days in tranquil estates is 511, whereas the same figure for contested matters is 769, which is also statistically significant (p = 0.000). Finally, a handful of litigated cases were still ongoing as of February 2021. As a result, our numbers likely underestimate the true amount of expense and delay. Table 9 breaks down our figures by claim type.

237. *See supra* text accompanying note 208.

Table 9: Litigation Costs and Case Length

Type of Case	N	Mean Extraordinary Attorneys' Fees†	N	Mean Days in Probate†
No Litigation	356	$505	357	511
Formalities/Intent	5	$16,739*** (p = 0.00)	5	670 (p = 0.19)
Incapacity/ Undue Influence	4	$17,145*** (p = 0.00)	2	798 (p = 0.13)
Both Types of Will Contests	6	$35,805*** (p = 0.00)	6	784* (p = 0.01)
Fiduciary Claims	13	$4,789*** (p = 0.00)	13	763* (p = 0.00)
Will Contest and Fiduciary Claims††	2	$0 (p = 831)	2	569 (p = 0.76)
Other Claims	3	$12,107*** (p = 0.00)	4	975** (p = 0.00)
Total	389	$1,660	389	532

Notes:
(1) † T-tests measure the difference in means against the baseline of cases without litigation.
(2) †† The two estates with both will contests and fiduciary claims featured formality/intent challenges.
(3) Fifty-four estates are missing information about the amount of extraordinary fees awarded or the length of the probate matter.
(4) $^{*}\ p < 0.05$, $^{**}\ p < 0.01$, $^{***}\ p < 0.001$

5. *Case Outcomes*

a. Will Contests

Recall that commentators take it as gospel that heirs routinely file meritless will contests and obtain blackmail settlements from the estate.[238] Conversely, our study suggests that strike suits are rare. Admittedly, we discovered that contestants lost most of the cases that did not settle. Indeed, the court upheld the will in three of the four formalities/intent challenges, each of the two incapacity/influence cases, and three of the four matters featuring both kinds of claims.

238. *See supra* Section II.A.

Table 10: Outcome of Will Contests

	Formalities or Intent		Incapacity or Undue Influence		Both Types of Will Contests	
	N	Percent	N	Percent	N	Percent
Proponent Won†	3	37.5%	2	25.0%	3	33.3%
Contestant Won††	1	12.5%	0	0%	1	11.1%
Case Settled	4	50.0%	6	75.0%	4	44.4%
Unclear	0	0%	0	0%	1	11.1%
Total	8	100%	8	100	9	100%

Notes:
(1) † Proponent wins include contests that are voluntarily dismissed.
(2) †† Contestant wins include wills that are withdrawn from probate.

But ironically, contestants performed much better in disputes that *did* settle. As noted, the confidential nature of settlements is a major impediment to testing the strike suit hypothesis.[239] But in California, parties must obtain judicial approval of settlements that either require a transfer of more than $25,000 of a decedent's assets[240] or involve title to real property.[241] Because every settlement in our dataset satisfied at least one of these criteria, we were able to access these normally private contracts. We used this information to calculate each contestant's "success rate": the settlement amount divided by the sum the contestant would have received if she had prevailed and invalidated the will.[242] Contrary to the strike suit thesis, Table 11 reports that the average success rate was a healthy 62%: 68% in formalities/intent cases, 63% in incapacity/undue influence contests, and 56% in cases with both types of claims.

239. *See supra* text accompanying notes 79–80.

240. *See* CAL. PROB. CODE § 9833 (West 2021).

241. *See id.* § 9832(a)(1).

242. Suppose Testator had two children, Son and Daughter, owned $100,000 in property, and executed a will leaving everything to Daughter. Son filed a will contest and ultimately settled for $10,000. If son had prevailed, he would have taken half of the estate ($50,000) in intestacy. Thus, Son's success rate would be $10,000/$50,000, or 20%.

Table 11: Will Contest Settlements

	Formalities or Intent		Incapacity or Undue Influence		Both Types of Will Contests	
	Mean	Median	Mean	Median	Mean	Median
Settlement Amount	$ 237,500	$ 120,500	$3,174,136	$557,685	$1,222,841	$1,104,275
Success Rate	68%	80%	63%	66%	56%	57%

Notes:
(1) We were able to calculate the success rate for 12 of the 14 settlements.
(2) Two cases featured dueling will contests, where both parties simultaneously attacked one will and defended another. In these cases, we calculated the success rate for each party with respect to the instrument they sought to invalidate.

b. Fiduciary Litigation

Beneficiaries with complaints against the executor fared well on the merits. As Table 12 reveals, they received some relief on eleven objections, settled twice, and lost eight times. The most successful type of claim was an objection to an executor. Although the person named in the will "has the right to appointment as personal representative,"[243] a beneficiary can oppose a nomination at the outset or seek to remove an existing executor.[244] To prevail, the challenger must establish that the executor is unfit to serve or has mismanaged or neglected the testator's property.[245] Out of deference to the testator, "courts exercise the power of removal sparingly, and only upon a clear showing of serious misconduct."[246] Some litigants in our data, however, cleared this high hurdle by proving that the executor had allowed the probate matter to

243. CAL. PROB. CODE § 8420 (West 2021).

244. If no one listed in the will can serve, the court will fill the gap by appointing an administrator with the will annexed using a strict pecking order. In California, closely related candidates enjoy priority, with spouses at the top, followed by descendants, parents, siblings, and so on. *See* CAL. PROB. CODE § 8461 (West 2021); Estate of Garrett, 71 Cal. Rptr. 3d 864, 867 (Cal. Ct. App. 2008) ("The purpose of the provision for priority is to 'plac[e the administration of the estate] in the hands of persons most likely to manage the estate property to the best advantage of those beneficially interested.'" (quoting Estate of Kaseroff, 562 P.2d 325, 328 (Cal. 1977)). Other jurisdictions calibrate this list differently. *See, e.g.*, UNIF. PROB. CODE § 3-203(a) (amended 2019) (privileging individuals who receive property under the will over relatives).

245. *See* CAL. PROB. CODE § 8502(a)–(c) (West 2021); UNIF. PROB. CODE § 3-611(b) (amended 2019) (permitting removal if the executor "has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office").

246. *In re* Heino, 103 N.Y.S.3d 526, 526 (N.Y. App. Div. 2020) (quoting *In re* Petrocelli, 763 N.Y.S.2d 73, 73 (N.Y. App. Div. 2003)); *see also* Estate of Sapp, 248 Cal. Rptr. 3d 244, 263 (Cal Ct. App. 2019) (affirming removal where "the record shows [that the executor] spent more than 15 years delaying the sale of the estate's property"); *cf. In re* Estate of Farquharson, 535 S.E.2d 774, 776 (Ga. Ct. App. 2000) ("Irreconcilable differences and animosity, between a nominated executor on the one hand and the beneficiaries on the other, authorize but do not require the probate court's refusal to appoint the person nominated in the will as executor.").

"drag[on] for four years with nothing to show"[247] or had abused her power, such as by taking out a loan secured by the testator's house or trying to steal the share of an elderly beneficiary.[248]

Table 12: Outcome of Fiduciary Litigation				
	Objection to Executor		Breach of Fiduciary Duties	
	N	Percent	N	Percent
Objection Granted	7	53.8%	1	10.0%
Objection Granted in Part and Denied in Part	0	0%	3	30.0%
Objection Denied	4	30.8%	4	40.0%
Case Settled	2	15.4%	1	10.0%
Objection Mooted	0	0%	1	10.0%
Total	8	100%	10	100%

***

To summarize, our findings both confirm and undermine perceptions about probate litigation. On the one hand, as expected, some kinds of self-made wills are correlated with will contests, and all forms of disputes bog down and drain the estate. But on the other hand, few will contests seemed like strike suits, and conflict over executorships were surprisingly common. In the next Part, we use these insights and others from our data to prescribe policy.

IV. POLICY IMPLICATIONS

This Part explores the normative dimensions our research. First, it explains that we found strong support for partial harmless error doctrines like California's. Second, it uses our data to articulate arguments both for and against self-made wills and living probate. Third, it asserts that policymakers should

247. Petition for Suspension and Removal of Personal Representative and Appointment of Petitioner as Successor Personal Representative at 8, *In re* Estate of Bartnof, No. PES-15-298784 (Cal. Super. Ct. June 28, 2019); Order Granting Petition for Removal of Personal Representative at 1, *In re* Estate of Bartnof, No. PES-15-298784 (Cal. Super. Ct. Oct. 24, 2019).

248. *See* Petition for Removal of Lisa Burleson Peguese as Executor and Personal Representative of Estate; and Appointment of Administrator as Successor Personal Representative at 3–5, Estate of Stamps, No. PES-15-298683 (Cal. Super. Ct. Dec. 13, 2016); Order for Removal of Lisa Burleson Peguese as Executor and Personal Representative of Estate at 2, Estate of Stamps, No. PES-15-298683 (Cal. Super. Ct. Feb. 22, 2017).

consider subjecting attorneys who draft wills that name themselves as executors to heightened scrutiny.

A. Partial Harmless Error

Three decades after its introduction, harmless error remains a minority rule. This Section contends that California's partial adoption of the principle—which applies to attestation errors—has major upsides and little downside.

Beneficiaries of noncompliant wills tried to invoke harmless error in eleven estates (2.5%). They were wildly successful. Judges granted eight harmless error petitions without objection.[249] In the remaining estates, a contestant emerged but gained little traction. Two quickly withdrew their oppositions and the other lost at trial. Thus, as Table 13 highlights, the harmless error "win rate" was 100%.[250]

Table 13: Harmless Error Outcomes		
Result	N	Percent
Will Admitted	11	100%
Will Not Admitted	0	0%
Settled	0	0%
Total	11	100%

These cases thrust harmless error's benefits into sharp relief. The rule provided a safety net for testators who tried to make their own wills and did not understand the execution formalities. Nine harmless error matters featured a testator who did not know that a nonhandwritten will needed to be attested by two witnesses.[251] But even though these writings did not comply with the Wills Act, there was no doubt about the decedents' intent. Daniel Yturraspe videotaped himself signing a document that left his assets to his boyfriend.[252] Harry Mason not only emailed his will to his financial consultant but recorded his wishes in

249. Because there was no objection, we did not count these eight cases as "litigated."

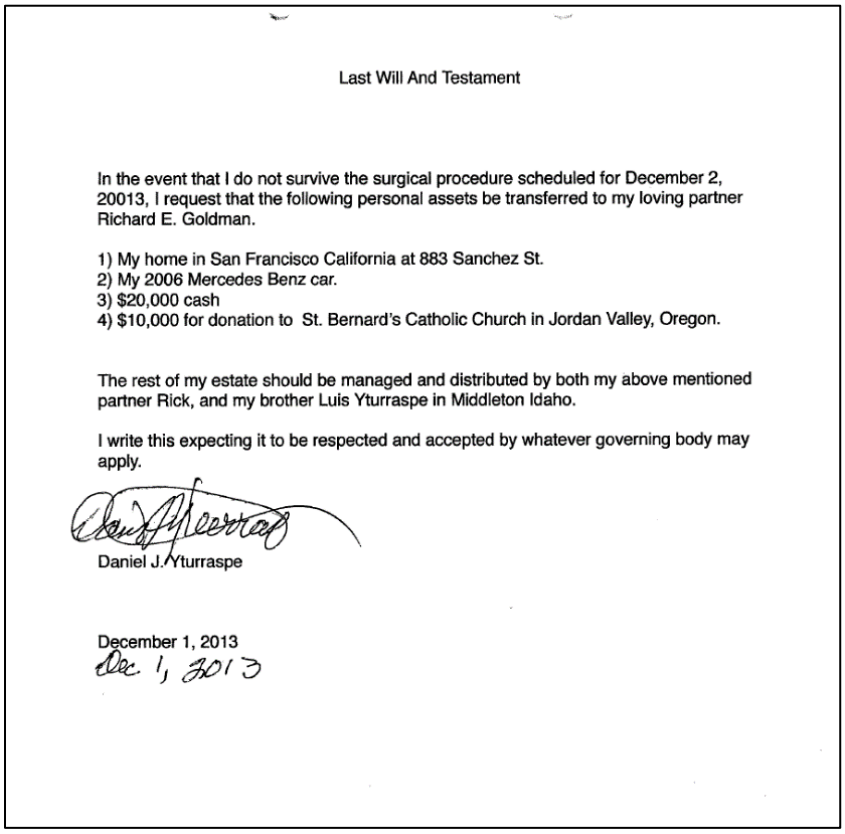
250. Moreover, in contrast to the favorable settlement amounts in intent/formalities cases summarized above in Table 11, no contestant confronted with the harmless error rule was able to negotiate a settlement.

251. In the remaining case, the testator executed a lawyer-drafted will that was signed by the testator and attested by two witnesses in 1957. *See* Petition for Letters of Administration with Will Annexed at 9, Estate of Yee, No. PES-16-299623 (Cal. Super. Ct. Mar. 24, 2016). By the time the probate opened in 2016, the witnesses were dead. *See* Second Supplemental Declaration to Petition for Probate at 2, Estate of Yee, No. PES-16-299623 (Cal. Super. Ct. May 17, 2016). Although California law permits wills to be proven by an affidavit either by a subscribing witness or someone with personal knowledge of the execution, *see* CAL. PROB. CODE §§ 8220(b), 8221(b)(2) (West 2021), no such documents existed. Nevertheless, the proponents of the will successfully argued that harmless error applied. *See* Supplemental Memorandum Re: Admission of Will Pursuant to Probate Code § 6110(c)(2) at 1–5, Estate of Yee, No. PES-16-299623 (Cal. Super. Ct. July 18, 2016); Order Appointing Administrator/Administratrix W/Will Annexed at 1, Estate of Yee, No. PES-16-299623 (Cal. Super. Ct. Aug. 3, 2016).

252. *See* Petition for Probate of Will and for Letters Testamentary at 10, Estate of Yturraspe, No. PES-14-297470 (Cal. Super. Ct. Feb. 4, 2014); Declaration of Luis Yturraspe at 1–2, Estate of Yturraspe, No. PES-14-297470 (Cal Super. Ct. Feb. 21, 2014).

the minutes of a meeting of a company that he owned.[253] Damir Frkovic put a short page inside an envelope on which he handwrote "[t]o be opened in case of my untimely demise."[254] John Kisbey printed out a will and taped it to his fridge.[255] None of these instruments would have been effective under orthodox wills law, but harmless error changed this cruel result.

FIGURE 3: DANIEL YTURRASPE'S WILL



Last Will And Testament

In the event that I do not survive the surgical procedure scheduled for December 2, 20013, I request that the following personal assets be transferred to my loving partner Richard E. Goldman.

1) My home in San Francisco California at 883 Sanchez St.
2) My 2006 Mercedes Benz car.
3) $20,000 cash
4) $10,000 for donation to St. Bernard's Catholic Church in Jordan Valley, Oregon.

The rest of my estate should be managed and distributed by both my above mentioned partner Rick, and my brother Luis Yturraspe in Middleton Idaho.

I write this expecting it to be respected and accepted by whatever governing body may apply.

Daniel J. Yturraspe

December 1, 2013
Dec 1, 2013

Remarkably, harmless error achieved this goal without making the succession process either more expensive or slower. As noted above, commentators have expressed concern that harmless error will overload the probate system by making it impossible for judges to identify "documents as

253. *See* Declaration of Sandra H. Marsh in Response to Probate Examiner's Notes Re: Proof of Will at 1–4, *In re* Estate of Mason, No. PES-16-299572 (Cal. Super. Ct. Apr. 12, 2016) ("Resolved [that the company's] Operations Manager is authorized to pay the equivalent of the average preceeding [sic] 3 months pay to each of the following Harry Mason Inc. [e]mployees in the event of Harry Mason's death . . . .").

254. Last Will & Testament of Damir Frkovic at 2, Estate of Frkovic, No. PES-15-298643 (Cal. Super. Ct. Apr. 20, 2015).

255. *See* Petition for Probate of Will and for Letters Testamentary at 8–11, Estate of Kisbey, No. PES-16-299596 (Cal. Super. Ct. Mar. 17, 2016) (Nolo Press electronic will); Declaration of Dave Burleigh at 1, Estate of Kisbey, No. PES-16-299596 (Cal. Super. Ct. Mar. 18, 2016).

wills solely on the basis of readily ascertainable formal criteria."[256] But we did not find that to be the case. Indeed, most proponents of defective wills simply attached affidavits to their petitions for probate that satisfied harmless error's evidentiary threshold. For example, in *Estate of Soubelet*, the testator filled out a form will, but only obtained the signature of one witness: her daughter, Aline.[257] After the testator died, Aline filed a short declaration that explained the absence of a second witness:

> I obtained the form "Last Will and Testament" from an office supply store and took it to my mother. I filled out the form as my mother instructed, and then she initialed and signed the form . . . . Neither of us realized that the form had spaces for additional witnesses or a notary on the back of the third page and we did not know that it might be necessary to have another person act as a witness.[258]

The court upheld the document without a contest.[259] Because so many harmless error matters were cut from the same cloth, Table 14 reveals that none led to an award of extraordinary attorneys' fees, and the mean case length was just 427 days, more than 100 days *shorter* than average case length of uncontested wills.

Table 14: Harmless Error: Costs and Case Length

Type of Case	N	Mean Extraordinary Attorneys' Fees†	N	Mean Days in Probate†
No Will Contest or Harmless Error	364	$765	366	528
Will Contest (Excluding Harmless Error)	15	$ 24,474*** (p = 0.000)	13	722* (p = 0.017)
Harmless Error (Including Contested Cases)	10	$0 (p = 0.549)	10	427 (p = 0.265)
Total	389	$1,660	389	532

Notes:
(1) † T-tests measure the difference in means against the baseline of cases with no will contest or harmless error.
(2) Fifty-four estates are missing information about the amount of extraordinary fees awarded or the length of the probate matter.
(3) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

256. Mann, *supra* note 89, at 1036; *see also supra* text accompanying notes 101–03.

257. *See* Petition for Probate of Will and for Letters Testamentary at 8, Estate of Soubelet, No. PES-16-300016 (Cal. Super. Ct. July 22, 2016).

258. Declaration of Aline S. Salguero in Support of Petition for Probate of Will Dated September 3, 2010 (Probate Code Section 6110(c)(2)) at 2, Estate of Soubelet, No. PES-16-300016 (Cal. Super. Ct. July 22, 2016).

259. *See* Order Appointing Executor/Executrix at 1, Estate of Soubelet, No. PES-16-300016 (Cal. Super. Ct. Aug. 17, 2016).

B. Do-It-Yourself Wills

We reach a mixed verdict on self-made wills. Traditional do-it-yourself wills—homemade attested instruments, holographs, and forms—simultaneously democratize estate planning and cause headaches during probate. Software wills, by contrast, seem to boast these positive attributes without as many of the negatives.

For the most part, our research is consistent with both sides of the debate over do-it-yourself wills. California is hospitable to lawyer-less estate planning: it recognizes holographs and publishes free statutory form wills.[260] These devices facilitate will-making among people who are poorer, isolated, or ill.[261] For example, as Table 15 reports, the average value of the estates of people who used form wills ($717,079) is dramatically less than the mean wealth of those who hired attorneys ($1,905,236).[262] Likewise, the mean number of days between will execution and the testator's death was lower by a statistically meaningful margin for every kind of do-it-yourself will when compared to professionally drafted instruments.

A few estates vividly illustrate the flexibility that DIY mechanisms provide. One testator handwrote his wishes in case "anything happens to me before I am able to get to an attorney,"[263] and another holograph author "was known to have a[n] aversion to lawyers."[264] In these ways, homemade wills are useful for "persons who are unable or unwilling to secure the assistance of counsel."[265]

260. *See* CAL. PROB. CODE §§ 6111(a), 6240 (West 2021).

261. *Cf.* Horton, *DIY Wills*, *supra* note 194, at 2386–91 (reaching similar conclusions from a version of the same dataset that includes pour over wills).

262. Admittedly, this difference is not statistically significant. In addition, as we noted *supra* note 211, we only have access to the gross value of the testator's probate estate. Thus, we do not know whether the individuals in our dataset owned life insurance, property held in joint tenancy or in trust, or other nonprobate assets.

263. Petition for Probate of Will and for Letters Testamentary at 5, Estate of Ennon, No. PES-16-299693 (Cal. Super. Ct. Apr. 14, 2016).

264. Declaration Re Execution of Will at 2, Estate of Llewellyn, No. PES-14-297673 (Cal. Super. Ct. Apr. 15, 2014).

265. *In re* Estate of Teubert, 298 S.E.2d 456, 460 (W. Va. 1982).

Table 15: Self-Made Wills: Testator Wealth and Timing

Type of Will	N	Mean Value of Estate†	N	Mean Days Between Will and Death[266]†
Lawyer-Drafted	304	$1,905,236	302	4,151
Homemade/ Attested	36	$890,959 (p = 0.213)	36	2,125** (p = 0.002)
Holograph	58	$1,579,148 (p = 0.625)	56	2,562** (p = 0.004)
Form	20	$717,079 (p = 0.276)	20	1,560** (p = 0.003)
Software	25	$1,005,373 (p = 0.357)	25	1,932** (p = 0.005)
Total	443	$1,675,695	439	3,538

Notes:
(1) † T-tests measure the difference in means against the baseline of lawyer-drafted wills
(2) Two lawyer-drafted wills and two holographs are either missing information about the date of execution or the date of death.
(3) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Nevertheless, these wills also exhibited the flaws that have prompted some lawmakers and scholars to conclude that they are more trouble than they are worth.[267] As noted, even when we control for a range of variables through regression analyses, homemade attested instruments are linked to a statistically significant spike in the odds of formalities/intent claims.[268] Moreover, forms are correlated with both kinds of will contests by a statistically significant margin.[269] Finally, Table 16, which tracks the length and cost of estates involving DIY wills, shows that holographs take longer and are more expensive relative to lawyer-drafted wills by a statistically significant (or almost statistically significant) margin.

266. For reasons mentioned *supra* text accompanying note 232, we treated any will with a codicil as though it had been executed on the date of the codicil.

267. *See supra* Section II.B.2.

268. *See supra* Section III.B.3.

269. *See supra* Section III.B.3. The correlation between forms and will contests requires some explanation. As mentioned, one of us has published a symposium piece that employed a similar analysis to see whether the various types of self-made wills were correlated with litigation. *See* Horton, *DIY Wills*, *supra* note 194, at 2392–95. That paper found no link between forms and conflict. *See id.* at 2392–93. However, that paradoxical-seeming outcome almost certainly stems from the difference between the symposium article and this Article's definition of "litigation." The symposium contribution defined "litigation" crudely as *any* dispute. *See id.* at 2391. Conversely, this Article breaks "litigation" down into sub-categories. Thus, it can detect that forms are related to will contests but not fiduciary litigation.

Table 16: Self-Made Wills: Costs and Case Length				
Type of Will	N	Mean Extraordinary Attorneys' Fees†	N	Mean Days in Probate†
Lawyer-Drafted	265	$1,278	265	516
Homemade/Attested	33	$483 (p = 0.572)	32	517 (p = 0.993)
Holograph	54	$4,589* (p = 0.031)	55	597 (p = 0.053)
Form	16	$2,710 (p = 0.491)	16	513 (p = 0.961)
Software	21	$0 (p = 0.466)	21	601 (p = 0.160)
Total	389	$1,660	389	532

Notes:
(1) † T-tests measure the difference in means against the baseline of lawyer-drafted wills
(2) Fifty-four estates are missing information about the amount of extraordinary fees awarded or the length of the probate matter.
(3) $^{*}\ p < 0.05$, $^{**}\ p < 0.01$, $^{***}\ p < 0.001$

Finally, software wills are a bright spot in the San Francisco files. Not only do they rival attorney-drafted wills in terms of drafting sophistication,[270] but they are not linked to any species of litigation. In fact, the total amount of extraordinary attorneys' fees in matters with these next-generation instruments is $0. Thus, at least in our data, assertions by the estate planning bar that these products leave a decedent's loved ones "in court, spending thousands of dollars" are unfounded.[271]

C. Living Probate

As mentioned, there has been a recent rise in interest in antemortem probate. There is no data about how well these systems function, and we cannot fill that gap. But as this Section explains, we can contribute to this debate by highlighting three findings about traditional post-mortem will contests.

First, the relative strength of the will contests in our data casts doubt on the strike suit thesis. The proposition that challenges to the validity of a will are usually designed to obtain an undeserved settlement is a pillar of the living probate movement.[272] But we largely did not find this account to be accurate.

270. *See supra* Section III.B.2.

271. *Where You Can Go Wrong with a Do-It-Yourself Will*, *supra* note 41. Of course, it is also possible that the testators who choose a software will are more organized or legally astute than people who use the older kinds of self-made wills.

272. *See supra* Section II.B.3.

Admittedly, only two of ten contestants won in disputes that did not settle, and an additional two challengers settled weak claims for only about 10% of their value. But the remaining lawsuits were hardly frivolous. Indeed, of the twelve settlements that allowed us to calculate a contestant success rate, nine settled for more than 40% of their value, and five settled for an eyebrow-raising 80% or more of their value. The absence of blackmail allegations raises the possibility that antemortem probate is a solution in search of a problem.

Second, we discovered that there was often a significant lapse of time between will execution and the filing of a contest. As Table 17 exhibits, an average of nearly a decade passed between the date the testator signed the instrument and the inception of litigation. This cuts both ways. On the one hand, it suggests that supporters of antemortem probate may be correct that the process improves the quality of proof offered at trial.[273] Indeed, in our dataset, factfinders were not only hindered by the worst evidence rule, but they were forced to answer complex psychological questions about the testator based on dusty exhibits and witnesses with faded memories. But on the other hand, the temporal gulf between the creation of the will and the testator's death might deter contestants from participating in a living probate proceeding. Even if a challenger prevails, our data suggest that they must usually wait about a decade for the testator to die and their inheritance to become available. And, of course, during this time, the testator's assets may dwindle, or she may execute a new will, making the lawsuit a fool's errand.

Table 17: Days Between Will and Contest

Type of Contest	N	Mean	Median
Formalities/Intent	8	4,803	3,871
Incapacity/Undue Influence	7	1,745	269
Both Kinds of Contests	8	3,893	2,042
Total	23	3,555	1,716

Notes:
(1) Two estates are missing information about the date of the will contest.
(2) For estates that involved more than one contested will, we used the date of the execution of the most recent instrument.
(3) We only used the date of a codicil as the execution date if the codicil was contested.

273. *See, e.g.*, Langbein, *supra* note 44, at 67 ("[S]ince the substantive question is capacity as of the time of execution of the testament, execution would be the ideal time to determine capacity.").

Third, nonadversarial methods of resolving will contests are worth exploring. Recall that the conservatorship and administrative models of antemortem probate allow a guardian ad litem to investigate the will's validity.[274] Thus, they "permit full development and ventilation of evidence . . . but not in the exaggerated mold of adversary contest, which has such unpleasant implications for family harmony and for the human values at stake."[275] This would be a welcome change. Many of the litigated San Francisco estates are riddled with disturbing facts that the parties did not hesitate to weaponize. For example, to illustrate that one beneficiary had abandoned the testator—and therefore did not deserve to inherit—a contestant alleged that the "decedent's body was in [such] an advanced state of decomposition when he was discovered . . . that [his] fingerprints were unable to be obtained. . . ."[276] Likewise, other pleadings describe family members who assault each other,[277] a wife who alleged that her husband was "unsophisticated" and "easily persuaded,"[278] and testators who do not change their six cats' litter boxes,[279] whose "communication [is] limited to uttering a few simple words and hand gestures,"[280] and who were too feeble even to sign their will with an "X."[281] It is easy to see why these details can tear families apart and soil a decedent's reputation. Thus, the conservatorship and administrative models—which are designed to mitigate hostilities—could make living probate more palatable for testators and their families.

D. Attorney Executors

Finally, we found that fiduciary litigation sometimes stemmed from attorneys who drafted wills that named themselves executor. As a result, we suggest that lawmakers take a harder line against this practice.

Recommending a suitable executor is "[o]ne of a lawyer's [most] important responsibilities in providing estate planning for h[er] client. . . ."[282] It has long been an open secret, however, that some attorneys reserve this plum role for

274. *See supra* text accompanying notes 142–49.

275. Langbein, *supra* note 44, at 79. *But see* Fellows, *supra* note 44, at 1074–75 (arguing that the guardian ad litem would not change the essentially "adversarial and potentially acrimonious" nature of a living probate proceeding under the conservatorship model).

276. Supplement to Contest and Grounds of Objection to Probate of Purported Will at 2, Velikanje v. Castillo (Estate of Nash), No. PES-16-300045 (Cal. Super. Ct. Oct. 20, 2016).

277. *See* Declaration of Petition Rosemary Orlando in Support of Ex Parte Application—Special Administration and Response to Domenic Tallerico's Declaration Regarding Status of Estate Property and Objection to the Appointment of Rose Maria Carroccio at 5–6, Estate of Tallerico, No PES-16-2998796 (Cal. Super. Ct. Aug. 26, 2016).

278. Declaration of Anna Chen in Support of Cross-Petition of Anna Chen to Determine Heirship and to Revoke Will at 2, Estate of Lui, No. PES-16-300382 (Cal. Super. Ct. Dec. 21, 2016).

279. *See* Declaration of Petition Rosemary Orlando, *supra* note 277, at 6.

280. Will Contest and Objection to Probate Will at 19–20, Auer v. Auer (Estate of Auer), No. PES-15-298908 (Cal. Super. Ct. Aug. 10, 2015).

281. *See* Petitioner Ana Samuel's Declaration in Support of Petition for Probate and Issuance of Letters of Administration at 2, 3–4, Estate of Suslovsky, No. PES-14-297640 (Cal. Super. Ct. Apr. 3, 2014).

282. ABA Comm. on Ethics & Prof. Resp., Formal Op. 02-426 (2002).

themselves.[283] Especially in states like California, which, as mentioned above, entitle the executor to a percentage of the value of the estate as compensation,[284] the perception is that these fees can be "astronomical in relation to the time spent . . . on the matter."[285] In fact, there are lawyers who consider estate planning to be a "loss leader": an activity that is not intrinsically profitable, but which opens the door to participate in "the lucrative probate which follows the client's death."[286]

There has long been a split of opinion over the propriety of lawyers granting themselves executorships. There is no question that the practice can sometimes be in the client's best interest:

> Good reasons exist for the nomination of the lawyer/draftsman as fiduciary. A lawyer may have served as the client/testator's lawyer for many years and may have become familiar with the testator's family, personal interests, and financial affairs. When such a level of familiarity and intimacy exists, the lawyer—as a trusted advisor—may very well be the logical person to appoint as executor or trustee.[287]

Nevertheless, there are also reasons to be suspicious of self-serving nominations. For starters, ethical rules forbid lawyers from soliciting business.[288] Attorneys may violate these maxims if they encourage the testator to appoint them as executor.[289] Unfortunately, because the testator will be dead by the time of the probate, it may be impossible to tell who raised the issue.[290] In addition, during discussions about selecting an executor, there can be a conflict of interest

283. *See, e.g.*, Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 86 (1984) ("The practice exists among attorneys in certain areas of the country to name themselves as executors in wills that they draft."); *cf.* Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107, 1167 (1984) (reviewing probate files from five jurisdictions and finding that attorneys served as personal representative in between less than 1% to 14% of estates).

284. *See supra* text accompanying note 208.

285. NORMAN F. DACEY, HOW TO AVOID PROBATE! 24 (5th ed. 1993) (internal quotation omitted).

286. *Id.*; Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 304–05 (1988) ("In a typical estate practice setting, the usual charge for drawing a will is quite low, while the fee for serving as a fiduciary is much higher."); Johnston, *supra* note 283, at 87 ("An attorney [serving as an] executor can, in a particular estate, 'earn' a fee that is well beyond what that same attorney might receive for the performance of comparable legal services involving the same expenditure of time and effort."); Charles F. Robinson, *The Future of the Elder Law Practice*, 17 NAELA Q. 20, 21 (Winter 2004) ("We believed our will files would 'mature' in due time and that our probate practice would make up for the loss-leader wills we prepared.").

287. Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357, 1374 (1994); Paula A. Monopoli, *Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest*, 66 U. PITT. L. REV. 411, 437 (2005) (explaining that "[l]awyers are often the most appropriate choice for clients selecting a personal representative" because "[e]lderly clients often have long relationships with, and great confidence in, their lawyers").

288. *See* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2020) ("A lawyer shall not solicit professional employment by live, by mail, person-to-person contact, when a significant motive for the lawyer's doing so is the lawyer's [] pecuniary gain.").

289. *See* deFuria, *supra* note 286, at 300 ("[L]awyers who indulge in the practice of naming themselves as executor, trustee, or attorney, or any combination thereof, under wills they draft run the risk of appearing to solicit business from their clients.").

290. *See* Johnston, *supra* note 283, at 89 ("The actual facts in a particular will-drafting situation are often difficult to ascertain . . . .").

between counsel and client. Even if the testator would be better off with someone else in charge, the lawyer has a financial incentive to carry the torch.[291] Finally, there is a gaping information asymmetry between the parties. People simply may not know that they can entrust the task to a friend or family member, that the executor will earn a commission, or that the job "hardly requires a law degree."[292]

Despite these issues, states either permit or loosely police self-appointments. In general, "there is no per se rule prohibiting a lawyer from preparing a document that designates the lawyer as fiduciary."[293] Although a few jurisdictions bar drafting attorneys from actively seeking executorships, the difficulty of reconstructing what was said during estate planning meetings takes the teeth out of these regulations.[294] Likewise, a handful of courts treat a lucrative fiduciary position as a "benefit" under an instrument that can give rise to undue influence.[295] California exemplifies this scattershot system: although it presumptively nullifies clauses selecting the drafting attorney as a trustee,[296] it has no such proscription for executors.[297]

Our data suggests that lawmakers should apply stricter scrutiny to attorneys who effectively appoint themselves as executor. For one, bootstrap executorships are somewhat common. Testators nominated an attorney as the primary executor eighteen times (4.1%).[298] But more importantly, some of these self-serving nominations led to conflict. For example, in *Estate of Shea*, a beneficiary alleged that the drafter took advantage of the testator's dependence

291. *See* Monopoli, *supra* note 287, at 414–15 ("In the area of estate planning, an attorney named as a fiduciary stands to gain financially not only from her role as attorney for the client, but in her separate role as fiduciary.").

292. *See* deFuria, *supra* note 286, at 300; *see also* Johnston, *supra* note 283, at 90 ("[T]he testator may have little or no information on the size of the commissions that can be earned for services rendered in that capacity.").

293. *Report of the Special Study Committee on Professional Responsibility, Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary*, 28 REAL PROP., PROB. & TRUST J. 803, 815 (1994).

294. *See, e.g.*, Comm. on Pro. Ethics & Conduct of the Iowa State Bar Ass'n v. Jackson, 492 N.W.2d 430, 434 (Iowa 1992) (holding that an attorney did not improperly influence a client to name the attorney as executor even though they had just met); State v. Gulbankian, 196 N.W.2d 733, 736–37 (Wis. 1972) (reaching a similar conclusion despite evidence that attorneys regularly served as executors for their clients).

295. Several courts apply the undue influence doctrine to fiduciaries who are technically not beneficiaries but receive a "substantial personal benefit" from their position. Zeigler v. Coffin, 123 So. 22, 23 (Ala. 1929); *In re* Estate of Nelson, 232 So. 2d 222, 224 (Fla. Dist. Ct. App. 1970); Estate of Vollbrecht v. Pace, 182 N.W.2d 609, 613 (Mich. Ct. App. 1970); *In re* Estate of LeVin, 615 A.2d 38, 44 (Pa. Super. Ct. 1992). However, the "substantial benefit" standard usually requires more than "the emoluments to be derived from [the] position as executor," Zinnser v. Gregory, 77 So. 2d 611, 614 (Fla. 1955), such as being "given significant latitude or discretion in distributing [the d]ecedent's assets." *In re* Bosley, 26 A.3d 1104, 1110 (Pa. Super. Ct. 2011).

296. *See* CAL. PROB. CODE §§ 15642(b)(6), 21380(a)(1) (West 2021) (mandating the removal of the drafting attorney as trustee unless an independent attorney subject to several exceptions, including when "the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud or undue influence").

297. However, California does prohibit an attorney-executor from collecting both executors' and attorneys' fees unless the testator specifically authorizes double compensation. *See In re* Estate of Thompson, 328 P.2d 1, 2–3 (Cal. 1958).

298. In a similar study of 249 wills probated in Sussex County, New Jersey, only one attorney was appointed as executor. *See* Weisbord, *supra* note 215, at 2589 tbl.1. We were not able to determine from the information available in the cases whether the attorney also wrote the will. However, ten executor/lawyers also served as one of the witnesses, which strongly suggests that they were the draftsperson.

on painkillers to weasel his way into an executorship.[299] In an even more egregious matter, *Estate of Kreiss*, counsel reportedly pressured the testator to execute a will, rather than a trust, to sidestep California's rule against drafters serving as trustees.[300] He then bypassed the fixed fee schedule by specifying that he could receive 10% of the value of the estate for his services as executor and paid himself $200,000 without court authorization.[301] When confronted, he replied that he had handled "six additional estates in the same manner" and that "[h]e did not care what happened as '[he was] dying anyway.'"[302] Thus, whether it be through a "nudge" like mandatory disclosures or a more draconian measure such as undue influence, an intervention could both help testators make informed choices and minimize friction.[303]

V. CONCLUSION

For decades, scholars have noted that "[t]he laws of succession have often evolved without the benefit of empirical support"[304] and that "[c]onclusions have been drawn and reforms proposed on the basis of certain assumptions . . . for which there has been absolutely no supporting data."[305] This Article takes a step toward remedying this omission. By collecting information from 443 recent testate estates, it has attempted to sharpen our understanding of the causes and consequences of probate litigation.

299. *See* Objection of Denise Grayson to Petition for Probate of Will and for Letters Testamentary at 2–4, Estate of Shea, No. PES-15-299254 (Cal. Super. Ct. Jan. 14, 2016).

300. *See* Petition to Suspend Powers and for Removal of Executor; To Appoint Special Administrator; For Protective Orders; For Surcharge; And for Return of Estate Property or, Alternatively, For an Order Shortening Time at 2, Estate of Kreiss, No. PES-14-297868 (Cal. Super. Ct. May 29, 2015).

301. *See id.*

302. *Id.* Likewise, as mentioned in the Introduction, another self-nominated executor stole the testator's assets in *Estate of Dati*. *See supra* text accompanying notes 18–23.

303. *See Report of the Special Study Committee on Professional Responsibility, Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary*, *supra* note 293, at 822.

304. Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2521 (2020).

305. Schoenblum, *supra* note 25, at 607.