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Incentivizing Wills Through Tax

Margaret Ryznar*

In the movies, runaway pandemics do not raise trusts & estates issues.¹ Yet, as the COVID-19 pandemic barreled across the United States in Spring 2020, “some nervous citizens scrambled to purchase toilet paper, [while others] made telephone appointments with estate planning attorneys about drafting a will.”² In particular, many doctors, nurses, and other first responders rushed to complete their wills.³

The rush to estate plan during the pandemic arose because, by some estimates, less than half of Americans have a will.⁴ Although trusts and estates law seeks to protect testamentary freedom, many people do not take advantage of it.⁵ Some are reluctant to confront their mortality, while others are intimidated by the will-making process.⁶ This results in a problematic lack of wills in American society.

While default intestacy laws can reflect the property disposition a person wanted, they do not always.⁷ Trusts & estates law therefore encourages people to execute wills in order to avoid dying intestate.⁸ A will is important beyond disposing of lifetime possessions—for example,

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¹ See, e.g., *CONTAGION* (Warner Bros. 2011).

² Francesca Torres, Note, *Electronic Wills: COVID-19 Relief or Inevitable Trouble for California?*, 52 U. PAC. L. REV. 435, 436 (2021).

³ See Rachel Siegel, *As They Rush to Save Lives, Health Care Workers are Updating their Own Wills and Funeral Plans*, WASH. POST (Mar. 26, 2020), <https://www.washingtonpost.com/business/2020/03/26/healthcare-workers-coronavirus-end-of-life> [<https://perma.cc/C77J-A97W>].

⁴ See David Horton & Reid Kress Weisbord, Essay, *COVID-19 and Formal Wills*, 73 STAN. L. REV. 18, 18 n.1 (2020).

⁵ “The American law of succession and of donative transfers is based on the organizing principle of freedom of disposition.” Birney Brayton & Krystle Somers, Comment, *Let the Author Do the Talking: Why Wyoming’s Holographic Will Statute Does Not Currently Give the Testator Final Say*, 21 WYO. L. REV. 371, 374 (2021).

⁶ ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 64 (10th ed. 2017) (“Some people put off making a will to avoid the unpleasantness of confronting mortality.”); see also Reid Kress Weisbord, *Wills for Everyone; Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 903 (2012).

⁷ See, e.g., Horton & Weisbord, *supra* note 4, at 19.

⁸ See *id.*

people can also appoint in their wills a guardian for their minor children in the case of death.⁹

A pandemic complicates will executions, which require a gathering of people. “States have interpreted the Wills Act, in most cases, to require a physical document printed and signed by hand by a testator and witnesses. For centuries, these pillars of the law of wills have remained resolute and uncompromised.”¹⁰ The inability to gather during the pandemic in 2020 prompted some states to permit remote online notarization or witnessing for some documents.¹¹

One way to avoid this scenario in the future is to incentivize people to execute their wills before they need to do so. There are already tax incentives in estate planning, but there may need to be tax incentives to trigger the estate planning in the first place.¹²

Notable ways to facilitate wills include reducing will formalities to make them easier to execute or giving them a tax incentive, such as a tax credit. This Article argues for the latter, because it could be done quickly and on a federal level. It can also be done on a time-limited basis, such as to nudge American society towards a culture that values estate planning.

Even before the COVID-19 pandemic, commentators argued for the reduction of will formalities.¹³ The pandemic only heightened these calls.¹⁴ This is because will formalities contribute to “the complexity and unique burdens imposed by the testamentary process itself” that cause testamentary procrastination.¹⁵

However, reducing will formalities is difficult. As Professor Waggoner explained:

⁹ See, e.g., UNIF. PROB. CODE § 5-202 (UNIF. L. COMM’N amended 2019) (“A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future.”).

¹⁰ Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547, 547 (2019).

¹¹ See Kerry Hannon, *Estate Planning in the Time of the Coronavirus Pandemic*, AARP (Apr. 29, 2020), <https://www.aarp.org/retirement/planning-for-retirement/info-2020/guide-to-virtual-wills-estate-plans.html> [<https://perma.cc/R43L-WYUB>].

¹² See Jonathan G. Blattmachr et al., *Estate Planning for Persons with Less than \$5 Million*, 33 J. PENSION PLAN. & COMPLIANCE 36, 40-41 (2007).

¹³ See, e.g., James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 542 (1990).

¹⁴ Horton & Weisbord, *supra* note 4, at 19 (“This Essay argues that COVID-19 vividly highlights the shortcomings of formal wills. Indeed, the outbreak has exposed the main problem with the Wills Act: it renders will-making inaccessible. As a result, we urge lawmakers in states that cling to the statute to liberalize the requirements for creating a will.”).

¹⁵ Weisbord, *supra* note 6, at 903.

In broad form, the statutory formalities for executing a valid will have remained unchanged throughout American history. The will must be (1) in writing, (2) signed by the testator, and (3) witnessed by attesting witnesses. These three requirements, which are derived from the English Statute of Frauds of 1677 and the English Wills Act of 1837, are continued in the American wills statutes, including the UPC. The Restatement (Third) of Property states that the purpose of the statutory formalities “is to determine whether the decedent adopted the document as his or her will.”¹⁶

These formalities are strict. For example, the validity of a will can come down to the configuration of the witnesses and testator at a dinner party or in a bank lobby.¹⁷

Nonetheless, some states have eased these formalities over the years by permitting holographic wills, which are handwritten by the testator and do not need attestation by witnesses. A few states allow nuncupative wills, made orally, under very limited circumstances.¹⁸ The self-proved will, popularized by the 1969 UPC, also “allows the testator to execute a will and simultaneously or later attach an affidavit to the will, notarized and signed by the testator and the attesting witnesses.”¹⁹ Finally, state courts have started to recognize curative doctrines, such as the harmless error rule and the doctrine of substantial compliance.²⁰

Yet, there are several important functions of will formalities that make them difficult to eliminate. The evidentiary function of formalities supplies satisfactory evidence to the court that this is the testator’s will.²¹ The ritual/cautionary function entails a ceremony to impress upon the testator the significance of his statements.²² The protective function safeguards the testator’s intent.²³ Finally, the channeling function simplifies form administration.²⁴

¹⁶ Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83, 83 (2008).

¹⁷ See, e.g., *Stevens v. Casdorff*, 508 S.E.2d 610, 614 (W.Va. 1998); *In re Groffman* [1969] 2 All ER 108 at 111 (Eng.).

¹⁸ For example, in Indiana a nuncupative will may be made only by a person in imminent peril of death who died as a result of that particular peril. It must be declared before two disinterested witnesses, one of whom must then write it down within 30 days. Finally, it can only dispose of personal property worth up to \$1,000 except for those in active-duty military service. IND. CODE § 29-1-5-4 (2021).

¹⁹ Waggoner, *supra* note 16, at 83.

²⁰ See *id.*

²¹ Ronald J. Scalise, Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 LA. L. REV. 1331, 1335 (2020).

²² *Id.*

²³ See *id.*

²⁴ See *id.* at 1336; see also SITKOFF & DUKEMINIER, *supra* note 6, at 144.

Furthermore, despite the calls to reduce will formalities, it is not with ease that trusts & estates law changes.²⁵ Without a doubt, “[t]he law of wills is arguably one of the oldest and most archaic areas of modern law.”²⁶

Compared to age-old trusts & estates law, however, tax law is nimble.²⁷ It has been used to address public policy issues, particularly in the last decade. For example, tax law recently addressed the housing crisis, natural disasters, and the lack of health insurance among the public.²⁸ Most recently, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) aimed to alleviate the economic hardships caused by the coronavirus epidemic, permitting a limited above-the-line charitable deduction and a withdrawal of up to \$100,000 from retirement savings without the typical 10% penalty for early withdrawal.²⁹

At first glance, tax may seem to raise revenue to pay for public goods, but it is also one of the most effective ways to incentivize behavior.³⁰ Tax, in many ways, is a policy field. There is a strong case that tax laws can incentivize individuals to act in a particular way.³¹ This is be-

²⁵ Many proposed reforms aim to modernize will formalities, particularly when it comes to digital wills. *See, e.g.*, Bridget J. Crawford, *Blockchain Wills*, 95 IND. L.J. 735, 738 (2020).

²⁶ *See* Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 116 (2008).

²⁷ However, a complete overhaul of the tax laws occurs more rarely. For example, “[t]he 2017 Tax Cuts and Jobs Act (TCJA), the largest overhaul of the tax code since 1986, is an example of this phenomenon, with its many sunset provisions, phase-ins, and revenue-forced policies.” Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS. 61, 61 (2018).

²⁸ *See, e.g.*, Thomas A. Barthold, *Tax Policy in the 21st Century: Challenges and Changes from the Time of Larry Woodworth*, 37 OHIO N.U. L. REV. 1, 3 (2011) (“[I]n more recent times we may see a greater number of examples of tax legislation borne of crisis. The Housing Assistance Tax Act of 2008 was motivated by the economic collapse in the housing sector. This was followed in 2009 by the Worker, Homeownership, and Business Assistance Act of 2009 as Congress attempted to address the continuing weakness in housing markets. The devastation of hurricanes set in motion the tax changes of the Katrina Emergency Tax Relief Act of 2005 and the Gulf Opportunity Zone Act of 2005 and tornados and floods led, in part, to the Emergency Economic Stabilization Act of 2008.”); *see also id.* at 2.

²⁹ Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281, 340-343 (2020).

³⁰ “Tax avoidance is as American as apple pie. Each year, individuals, families, and businesses alter their behavior in ways meant to decrease their federal, state, or local tax liabilities.” Jeremy M. Wilson, *Statutory Interpretation in Wal-Mart Stores East, Inc. v. Hinton and Why North Carolina Courts Should Apply Anti-Tax Avoidance Judicial Doctrines in Future Cases*, 88 N.C. L. REV. 1471, 1471 (2010).

³¹ For the argument that economic incentives drive women’s behavior, see Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1040-41 (1993) (arguing that Congress should lower mar-

cause “[m]any people strongly dislike taxes” and will act to avoid them.³² There are several ways to incentivize behavior through the taxation system by providing either 1) a tax deduction that reduces taxable income³³ or 2) a tax credit that reduces tax liability dollar for dollar.³⁴

A tax incentive for wills in the form of a credit could be compelling for several reasons.³⁵ A tax credit is simple to administer and understand. It would remind people to execute a will each year they do their taxes. It would also encourage them to seek professional help to do so. Executing one’s own will is difficult given the many nuanced rules in trusts and estates law, including will formalities, which, if not followed, make a will invalid.³⁶ The tax credit to incentivize estate planning would offset the costs of making a will or trust.

One model on which to base such a tax credit is the federal first-time homebuyer tax credit, which was established as a response to the 2008 financial crisis.³⁷ The credit could be limited to first-time estate planning for only a specific number of years, nudging people to create an estate plan.³⁸ It could help engrain estate planning in American cul-

ried women’s tax rates to encourage both marriage and married women’s participation in the labor force); see also Jennifer L. Venghaus, *Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?*, 37 U. RICH. L. REV. 1213, 1220 (2003) (suggesting that the tax code can change society’s behavior).

³² Kathleen DeLaney Thomas, *Taxing Nudges*, 107 VA. L. REV. 571, 621 (2021).

³³ “An example [on tax deductions] may be helpful here. Assume . . . A . . . [has] paid \$1000 under [a] local property tax. Taxpayer A is an itemizer whose income places him in a 15% marginal rate bracket. . . . Because A is able to take the [\$1000] deduction, A will not have to pay \$150 in income tax. A’s property tax expense has been subsidized by the federal treasury” Mildred Wigfall Robinson, *It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding*, 17 RICH. J.L. & PUB. INT. 549, 582 (2014).

³⁴ “Unlike an income tax deduction, a credit is taken after tentative federal income tax liability has been determined. It is a dollar-for-dollar reduction of federal tax liability that would otherwise be borne.” *Id.* at 583.

³⁵ Adele Robinson, *Risky Credit: Tuition Tax Credits and Issues of Accountability and Equity*, 11 STAN. L. & POL’Y REV. 253, 254 (2000) (“From a tax policy perspective, tax credits add to the complexity of tax law and can undermine fairness in the distribution of tax burdens.”).

³⁶ See, e.g., Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 100 (2006) (noting the various problems with home-made wills).

³⁷ I.R.C. § 36 (2006 & Supp. IV 2010); Rickie Houston, *What is the First-Time Homebuyer Credit? Does it Still Exist?*, SMARTASSET (Sept. 13, 2021), <https://smartasset.com/taxes/first-time-homebuyer-tax-credit> [<https://perma.cc/29CB-ERBM>].

³⁸ A nudge “is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.” RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008).

ture.³⁹ Estate planning is not a tradition for many American families, but a nudge could help make it so.

In sum, there have been recent calls to loosen will formalities in order to facilitate more will executions, the importance of which has been highlighted by the COVID-19 pandemic. The reduction of necessary will formalities can be successful in expanding the use of wills, as can potential tax incentives for creation of wills, such as a tax credit. However, there are advantages to using tax to prompt change.

Tax law is far more dynamic than trusts and estates law, changing every year and allowing for quicker updates. Furthermore, tax law can accomplish change at the federal level, unlike trusts and estates law, which differs across states. Financial incentives are useful, and tax law is particularly effective for incentivizing behavior.

³⁹ “[T]ax legislation is increasingly shaped by budget pressures.” Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1158, 1165-66 (2021).