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Cross-Border Attestation and Interjurisdictional Wills

*Richard F. Storrow**

Imagine a car moving rapidly along an interstate highway in the northeast. Depending upon the location (and the level of traffic congestion), the car might move quickly between states. On Interstate 295, the car could travel swiftly from New Jersey to Delaware and on into Maryland. Further south, the same interstate will propel cars from Maryland, through Washington, D.C., and on into Virginia. Over to the west, cars on Interstate 81 enter Maryland from Pennsylvania and after 12 miles enter West Virginia. From there it is a mere 26 miles to the border of Virginia.

Imagine now that inside the car a will execution ceremony is taking place. The testator is sitting between the witnesses in the back seat, and the attorney-notary is seated up front, turned to face the occupants of the backseat and conducting the proceedings. On any of the hypothetical journeys described above, the testator might sign the will in the first state, the witnesses might sign in the second and third states respectively, and, if this journey is along I-81, the attorney might complete the notarization of the self-proving affidavit in yet a fourth state.

In a jurisprudential universe replete with numerous bizarre will execution quirks, a moving will execution ceremony is a fanciful way to conjure a particular execution-related and jurisdictional question that has arisen in will executions during the coronavirus pandemic: whether a will executed interjurisdictionally is admissible to probate. The question may have occurred to practitioners before the pandemic, but it is largely unfamiliar, and it arises now in the context of a changing legal landscape no one could have predicted. This essay will address what is likely to become a more familiar manner of will execution in a post-pandemic world by testing the admissibility of interjurisdictional wills to probate against existing rules of probate jurisdiction and choice-of-law norms.

I. FROM PRESENCE TO REMOTENESS

After over a year of effort to contain the coronavirus outbreak, remoteness is firmly embedded in the American psyche. At the beginning of the pandemic, people remained locked down in their homes. Every-

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day transactions became vectors of peril. The emphasis on presence in estate planning caused will execution ceremonies to grind to a halt at the precise moment many were confronting their mortality.

The workaround for remoteness in many areas of life has been teleconferencing. But with physical presence firmly embedded in the law of will execution, it has required a blizzard of emergency orders, legislation, and court rules to permit the temporary use of simultaneous audio-visual communication in the execution of wills.¹ Many of these rapid-response reforms include the requirement that the witnesses verify that they are “within the state” when the execution is taking place on-line.² Unijurisdictionality in will execution may have been widely practiced in the pre-pandemic world, but it was not a requirement under pre-pandemic law. It is surprising that unijurisdictionality is a feature of law reform aimed at embracing remoteness and unsettling that a remote witness who is “across the border” could render a will inadmissible to probate for failure of due execution.

II. JURISDICTION OR EXECUTION?

Whether the court will admit a will to probate is both a question of jurisdiction and execution. The jurisdictional question is relatively straightforward: the courts of a state have jurisdiction over a domiciliary's estate,³ and domiciliaries' property located in that state.⁴

The fact that a court has jurisdiction over an estate does not mean that a will intended to control its succession is valid in that court. That determination will depend on whether the manner of the will's execution falls within the state's choice-of-law provision. Some states are restrictive in the sense that they will admit a will to probate only if it was executed in conformity with that state's will execution requirements.⁵ Most states are more flexible, however. They will “recognize a will if it complies with one of the following: the local statute, the law of the place⁶ of execution of the will at the time of execution, or the law of the decedent's domicile.”⁷ In other words, the place of a will's execution makes no legal difference, as long as it conforms to at least one of sev-

¹ See, e.g., Brian M. Sweet, *Executing Wills and Trusts While Observing Distancing Guidelines*, NY COMM. TR. 1 (2020), https://www.nycommunitytrust.org/wp-content/uploads/2020/05/Pronotes_Special20_d.pdf.

² *Id.* at 2.

³ UNIF. PROB. CODE § 1-301(1) (UNIF. L. COMM'N amended 2019).

⁴ *Id.* § 1-301(2).

⁵ See, e.g., GA. CODE ANN. § 53-5-1 (2021).

⁶ The Uniform Probate Code specifies that “place” means “when [the will] is executed in another state or country.” UNIF. PROB. CODE § 2-506 cmt.

⁷ See *id.*; Roger W. Andersen, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57, 58 (1994); see, e.g., 755 ILL. COMP. STAT. 5/7-1 (2021). And of course the law

eral permissible statutory regimes.⁸ Although most states have expansive choice-of-law provisions, some make nonconformity with the local will execution provisions expressly applicable only to wills “executed outside this state.”⁹

Choice-of-law provisions broaden the typical bases for admission to probate in other ways as well. Some include conformity either with the law at the time the will was executed or at the time the testator died.¹⁰ Still others recognize wills that have been admitted to probate in any other jurisdiction.¹¹ The similarity in will execution requirements across jurisdictions means that an individual will may be admissible to probate on several of these grounds. The policy is “to provide a wide opportunity for validation of expectations of testators.”¹² As such, the Uniform Probate Code does not limit its permissive stance to wills executed outside the state and in fact broadens it further to include the law of the state where the testator is domiciled, has a residence, or the country where he is a national.¹³ Under such broad and permissive choice-of-law provisions, a court with jurisdiction over an estate will admit to probate wills executed under varying will execution models.

III. *IN RE* ESTATE OF HOOK

Although not a will-execution-in-a-moving-car case, *In re Estate of Hook*¹⁴ does involve the cross-border completion of a will, even if the court did not see it that way. Bert Hook remained unmarried and childless throughout his life. At the time of his death, he was domiciled in Washington and had a residence in Arizona. His 1988 will, executed in Washington, bequeathed his entire estate to his brother Jerry. In 2012, while in Arizona, Hook prepared a new will benefiting Jerry and two friends. Hook’s signature was witnessed by a notary,¹⁵ but the second witness, Anna Levitte, did not sign the will until after Hook had passed

of the place of execution will include its own choice-of-law provision, rendering even that ground for admission to probate more permissive than it might at first appear.

⁸ See, e.g., WASH. REV. CODE § 11.12.020 (2021).

⁹ See, e.g., TENN. CODE ANN. § 32-1-107 (2021).

¹⁰ *Id.* § 11.12.020(1).

¹¹ 15 GUAM CODE ANN. § 1509 (2016).

¹² UNIF. PROB. CODE § 2-506 cmt.

¹³ *Id.* § 2-506; see, e.g., ALA. CODE § 43-8-135 (2021).

¹⁴ 374 P.3d 215 (Wash. Ct. App. 2016).

¹⁵ The attorney notarized the will, raising the issue of whether she had signed in the capacity of a witness or in her capacity as a notary. *Id.* at 218; see *In re Hammer’s Estate*, 72 N.Y.S.2d 636, 637 (Sur. Ct. 1946) (ruling that a notarization conducted to authenticate the testator’s signature did not satisfy the witnessing requirement). Under the Uniform Probate Code, the notarization of a will is sufficient by itself; witnesses are not required. UNIF. PROB. CODE § 2-502(a)(3)(B).

away.¹⁶ Moreover, she signed the will in Washington, which had jurisdiction over Hook's estate.

Washington law requires the witnesses to sign in the presence of the testator.¹⁷ Washington also recognizes wills that comply with the law either of the place of their execution or of the testator's domicile.¹⁸ Hook's will did not comply with Washington's will-execution ground rules, but it did comply with Arizona's, which allows witnesses to sign the will "within a reasonable time,"¹⁹ even after the testator has died.²⁰ The problem, though, the court reasoned, was that Arizona was not the place of the will's execution, Washington was. To reach this rather surprising conclusion about a will that was not signed by the testator in Washington, both the trial and appellate courts reasoned that a will is not executed until "the last formal act necessary to make the will valid" takes place.²¹ Necessarily, then, execution "comprises the acts of the witnesses as well as the act of the testator."²² This meant that Hook's will was not actually executed until Levitte signed it.²³ Since she did so in Washington, the will was *ipso facto* executed in Washington. And since Hook's will was not a foreign will in the courts' estimations, there was no exception: the will had to comply with Washington law or it could not be admitted to probate.

The *Hook* decision lacks rigor. First, the law of wills tells us little about *where* a will must be executed or if it must be executed in a particular place for it to be admitted to probate in a court with jurisdiction over some or all of a decedent's estate. Indeed, no will execution statute requires a will to be executed in the same state where it is presented for probate. Each state has a choice of law provision indicating the models of will execution it will accept as valid. Tellingly, only one of the choice-

¹⁶ See *In re Hook*, 374 P.3d at 217. The parties may have been under the mistaken impression that only notarization was required to validate the will, but the decision is unclear on this point. See also UNIF. PROB. CODE § 2-502 cmt.

¹⁷ See WASH. REV. CODE § 11.12.020 (2021).

¹⁸ The words "executed without this state" to describe these other wills appeared in the 1917 version of the statute, 1917 Wash. Sess. Laws 649, survived revisions in 1929 and 1965, 1929 Wash. Sess. Laws 19; 1965 Wash. Sess. Laws 1448, but then were expressly stricken from the statute in 1990, WASH. REV. CODE § 11.12.020(1) (1990). It bears noting that "foreign wills" appears as a heading as early as 1917 but does not appear in the statutory text. The heading inexplicably remained in place after the 1990 revision, which appears to render the "foreignness" of a will irrelevant. In any event, section headings in Section 11 of the Washington Revised Code are not part of the law. WASH. REV. CODE § 11.02.001.

¹⁹ ARIZ. REV. STAT. ANN. § 14-2502(A)(3) (2021).

²⁰ See *In re Estate of Jung*, 109 P.3d 97, 101 (Ariz. Ct. App. 2005).

²¹ *In re Hook*, 374 P.3d at 216-17.

²² *Id.* at 219.

²³ See *id.* at 216-17, 219-20.

of-law bases described by Professor Andersen²⁴ for probating a will suggests a will might have a legally significant “place of execution” at all. Neither compliance with the local law nor compliance with the law of the testator’s domicile is predicated on the will’s having a particular place of execution. Linking all three grounds is the basic notion that a will needs to be in compliance with a statute somewhere. Washington’s law reflects this understanding by eliminating any distinction between wills executed within and without the state.²⁵ It is thus unfathomable that the resolution of *Hook* boiled down to an irrelevant discussion of whether the will could be admitted to probate as a foreign will.

Second, the court’s first-impression analysis that “execution” has such a specific meaning that the moment it occurs can be pinpointed with precision is the weakest link in its reasoning. It fails to acknowledge the nuances inherent in the terms “executed” and “execution.” These terms do not have fixed meanings in either legislation or jurisprudence and are especially indefinite when unmodified by “complete,” “valid,” “effective” or other words of similar effect that the *Hook* court uses copiously throughout the decision with no acknowledgment either of their significance or that they do not appear in the statute. Even the lost wills statute the court looks to for support requires proof of both the execution *and* the validity of the lost will.²⁶

To most practitioners, a will execution connotes a process, as in a will execution ceremony consisting of all the steps necessary to make a will legally enforceable upon the death of the testator.²⁷ “Executed,” by contrast, connotes completion, but this completion can refer to the completion by the testator of his signature, as where we speak of a testator’s executing his will,²⁸ after which we might say that the witnesses have witnessed or attested the execution of the will²⁹ or that they themselves

²⁴ See Andersen, *supra* note 7.

²⁵ See WASH. REV. CODE § 11.12.020 (1990) (noting that Washington expunged the descriptor “executed without the state”); see also WASH. REV. CODE § 11.20.100 (2020) (stating that there shall be no distinction between domestic and foreign wills once probated, and appearing to define a foreign will as one that has been probated elsewhere, not necessarily executed elsewhere).

²⁶ WASH. REV. CODE § 11.20.070(1).

²⁷ *Turlington v. Neighbors*, 24 S.E.2d 648, 650 (N.C. 1943) (“The ‘execution’ of a deed means . . . all acts which are necessary to give effect thereto.”) (citation omitted).

²⁸ See, e.g., *In re Estate of Phillips*, 112 N.W.2d 591, 596 (Wis. 1961); *In re Estate of Picillo*, 99 A.3d 975, 978 (R.I. 2014) (“The testatrix executed the will that night.”); *In re Will of Carter*, 565 A.2d 933, 934 (Del. 1989); *In re Hackney*, 707 So. 2d 1302, 1306 (La. Ct. App. 1998).

²⁹ See, e.g., *Amerson v. Pahl*, 734 S.E.2d 399, 400 (Ga. 2012); *Phillips*, 112 N.W.2d at 596; *In re Kelly’s Will*, 174 S.E. 453, 454 (N.C. 1934); *In re Estate of Holloway*, 235 P. 1012, 1016 (Cal. 1925); *In re Tayrien’s Estate*, 246 P. 400, 401 (Okla. 1926); *In re Estate of Horowitz*, No. 92-T-4710, 1993 WL 150487, at *3 (Ohio Ct. App. Mar. 26, 1993).

have executed it.³⁰ “Executed” can also refer to the completion of the ceremony, after which we might say that the will is “fully” rather than “partially” executed.³¹ In one particularly odd use of “executed,” the testator is said to have executed a will “which she did not sign.”³² “Execution” can even have more far-flung definitions, as when it refers to the will’s taking effect at the testator’s death³³ or even to the executor’s execution of the directions in the will.³⁴ Even “due execution” may have a meaning that extends beyond the observance of will execution to encompass a probate court’s sense of the will’s genuineness.³⁵

The *Hook* decision exhibits unawareness of these varying usages, but more important is its lack of understanding of will execution as a process whose point of focus is the moment the testator signs the document. The testator’s signature evidences his resolve to render the appointive and dispositive provisions he has included in the document legally enforceable should he then die. The witnesses’ primary role is to perceive this essential moment of the will’s execution. When they sign, they thus attest to something they *already* have done. Where or when they sign the document is really beside the point, as statutes that allow witnesses to sign within a reasonable time recognize. Bolstering this understanding are statutes that define the “place of execution” of a will as “the place where the testator is physically present when the testator executes the will.”³⁶ The *Hook* court’s declaration that Levitte’s signature in Washington made the will *ipso facto* executed in Washington when nothing else of importance had occurred there is supported by none of these principles. The execution process in *Hook* took place over several weeks and interjurisdictionally. Concluding that it was executed in Washington was analytically lazy: it made no sense doctrinally or as a matter of policy. The court’s myopia prevented it from seriously considering either that the will was executed in Arizona or, more importantly, that it was an interjurisdictional will, executed, as it were, across borders and neither solely in Arizona nor solely in Washington.

³⁰ See, e.g., *In re Estate of Yelvington*, 280 So. 2d 497, 498 (Fla. Dist. Ct. App. 1973); see also *Hendry v. Wilson*, 151 S.W.2d 683, 684 (Ark. 1941).

³¹ Compare *In re Estate of Goodwin*, 18 P.3d 373, 375 (Okla. Civ. App. 2000) (contending that every will, except a holographic or nuncupative will, must be subscribed at the end by the testator, or another person, within his presence and by direction, must subscribe his name), with *Swain v. Lee*, 700 S.E.2d 541, 543 (Ga. 2010) (stating that a will is partially executed, and thus invalid, if it is not attested and subscribed in the presence of two witnesses).

³² *Durell v. Martin*, 110 S.W.2d 316, 318 (Tenn. 1937).

³³ See *Cent. Nat’l Bank v. Stevenson*, 16 A.2d 114, 115 (Del. Ch. 1940).

³⁴ See *In re Richardson’s Will*, 229 N.Y.S. 299, 300 (Sur. Ct. 1928).

³⁵ See *In re Estate of Huston*, 27 N.W.2d 26, 28 (Iowa 1947).

³⁶ See, e.g., ARIZ. REV. STAT. ANN. § 14-2506(B) (2021).

Determining where Hook's will was executed was of no importance to the outcome of the case. This is not to argue that *Hook* was wrongly decided. Washington admits to probate wills executed under a number of different models. The 2010 will did not satisfy any of these models for reasons having nothing to do with where it was executed.

IV. REMOTE ATTESTATION AND ELECTRONIC WILLS

The primary distinction between the fanciful will-execution-in-a-moving-car hypothetical and *Hook* is that the hypothetical describes a will execution *ceremony*, an event at which the execution of the will is completed in one sitting. Pre-pandemic it was difficult to conceive of such a ceremony occurring across borders. In *Hook*, the will execution was not a ceremony but was performed piecemeal, of a sort allowed by statutes that do not require the testator to sign the will in the presence of the witnesses but instead to "acknowledge" his signature to them later.³⁷ It probably happens very seldom, but it is easy to imagine the components of a will executed in this fashion to be completed in different jurisdictions. Indeed, in *Hook* this is precisely how it happened, with the testator executing the will in one jurisdiction and one of the witnesses attesting his signature in another.

Now that simultaneous audio-visual communication is a widely accepted emergency measure for conducting will execution ceremonies, it is easy to imagine a will execution ceremony occurring across jurisdictional borders. Moving will execution ceremonies into cyberspace makes it a distinct possibility that the testator and the witnesses will not all be in the same jurisdiction when the will is executed. Executive orders have addressed this possibility in different ways. Maine's, for example, specifies that the witnesses must verify that they are in the state,³⁸ Arkansas's does not.³⁹ Maryland's requires that the witness "be physically located

³⁷ See, e.g., *id.* § 14-2502(A)(3).

³⁸ Me. Exec. Order No. 79 (Apr. 8, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/EO37.pdf>; see also COLO. CODE REGS. § 1505-11 (2020) (effective March 30, 2020 through December 31, 2020); Kan. Exec. Order No. 20-20 (Apr. 9, 2020), <https://governor.kansas.gov/wp-content/uploads/2020/04/EO-20-20-Executed.pdf>; Mo. Exec. Order No. 20-14 (Sept. 3, 2020), <https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2020/20-14.pdf>; Act to Provide Aid to North Carolinians in Response to the Coronavirus Disease 2019 (COVID-19) Crisis, § 4.2(a), 2019 N.C. Sess. Laws 34 (requiring the will to state "the county [in the State of North Carolina] in which each remote witness was physically located when witnessing execution of the record"); Tenn. Exec. Order No. 72 (Feb. 26, 2020), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee72.pdf>.

³⁹ Ark. Exec. No. 20-12 (Mar. 30, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-12_.pdf.

in the United States at the time the document is witnessed.”⁴⁰ Michigan’s hybrid approach requires in-state presence of the witness unless the document relates to a matter over which Michigan has jurisdiction.⁴¹ Clearly, remote attestation has sparked a robust dialogue about the importance of the location of the witnesses when they attest the will.

Given that the location of the attesting witness made little difference pre-pandemic, it must be the new availability of remote attestation that makes the witnesses’ location a matter of such concern in the present moment. In light of the traditionally liberal choice-of-law principles described above, any insistence on unijurisdictionality seems a step in the wrong direction. In *Hook*, the court seemed incapable of characterizing the will as interjurisdictionally executed. Had the court done so the will may well have been admitted to probate. Under some executive orders permitting remote attestation during the pandemic, though, it would not. Had Hook executed his will pursuant to one of these orders, with Levitte attesting his will from a different state, the will would fail for lack of due execution. This need for unijurisdictional execution under pandemic-related emergency orders seems not in keeping with the need to address urgent estate planning imperatives with more remoteness rather than less. It also introduces an unnecessary obstacle to validating wills for probate within a legal landscape where the location of the witnesses has traditionally assumed no significance.

In parallel with the ongoing experiment with remote attestation is the longstanding interest in electronic wills. Before the pandemic, a few states had moved sluggishly in that direction.⁴² Remote attestation has brought renewed interest, possibly because pairing remote attestation with electronic wills would be a boon to estate planning and possibly because many associate on-line execution with electronic wills, although the two are distinct. Until recently, at least in general, an electronic will could not be remotely attested, and remote attestation could not be used to complete an electronic will.

New legislation suggests that states may be poised to embrace, on a permanent basis, one or both of these reforms. Washington, for example, has moved rapidly to embrace both electronic wills and remote attestation along with expansive choice-of-law rules that make *Hook* look like an anachronism best forgotten. The legislation, which takes effect in

⁴⁰ Md. Exec. Order No. 20-04-10-01 (Apr. 10, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/04/Remote-Witnessing-4.10.20.pdf>.

⁴¹ Mich. Exec. Order No. 2020-74 (May 5, 2020) https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-528192--,00.html [<https://perma.cc/7SKP-KG2Z>] (rescinded).

⁴² *Will Electronic Wills Be the New Normal?*, ELDER LAW ANSWERS (Jan. 6, 2021), <https://www.elderlawanswers.com/will-electronic-wills-be-the-new-normal-17935> [<https://perma.cc/8JVA-7QQZ>].

January of 2022, validates an electronic will that conforms to the law of the jurisdiction where the testator executed it or was domiciled or resided either at the time of execution or at the time of death.⁴³ No attempt is made in the legislation to draw a meaningless distinction between a “Washington” and a “foreign” will. Unfortunately, these reforms do not apply to pen-and-paper wills⁴⁴ so that in the short term at least there will be two separate and unequal avenues for evaluating the admissibility of wills to probate, at least if *Hook* continues to be good law. Practitioners may well have to cope with this dual-track in the choice-of-law realm for the foreseeable future. There is, however, no way back. Legislative activity will eventually confirm that the place of a will’s execution has no legal significance and that a probate court with jurisdiction over a testator’s estate should look with favor upon the execution requirements of whatever jurisdictions the testator had significant contacts with.

⁴³ S.B. 5132, 67th Leg., 2021 Reg. Sess. (Wa. 2021).

⁴⁴ *Id.*

