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Videotaping the Will Execution Ceremony - Preventing Frustration of the Testator's Final Wishes.

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ARTICLES

VIDEOTAPING THE WILL EXECUTION CEREMONY—PREVENTING FRUSTRATION OF THE TESTATOR'S FINAL WISHES

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I. INTRODUCTION

Many readers may remember a question on his or her Wills and Estates examination in law school that went something like this: "True or False—A testator is allowed to testify during the probate of his will." Of course, this desirable situation does not exist since at the time of a will contest or other probate action the testator[1] is enjoying his final reward. Modern technology has, however, provided us with an inexpensive, convenient, and reliable method of preserving a testator's testimony, namely videotape.[2]

Courts have long availed themselves of modern technology to assist in ascertaining the truth.[3] This practice helps the triers of fact to reach accurate conclusions. As long ago as 1860, the United States Supreme Court considered a daguerreotype[4] and in 1916 the first motion picture evidence was considered by an Ohio appellate court.[5] The impetus for the development of videotape came from the television industry which began with its first major telecast on April 7, 1927 and with regular network broadcasting following in 1939.[6] The Ampex Corporation invented videotape in 1956,[7] and on November 30, 1956, the first commercial use of videotape occurred during a news broadcast on CBS.[8]

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1. Since phrases like "testator or testatrix," "he or she," and "his or her" tend to disrupt the continuity of this article, the decision was made to use words importing the masculine gender. No sex bias is intended nor should be inferred from this decision.

2. Videotaping is a process whereby both visual and audio portions of an event are simultaneously recorded as electrical impulses on a magnetic tape. *See generally* 2 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 714 (1969 & Supp. 1980).

3. *See* United States v. Denton, 556 F.2d 811, 816 (6th Cir. 1977) (composite tape recordings allowed), *cert. denied,* 434 U.S. 892 (1977); People v. Hayes, 21 Cal. App. 2d 320, 321, 71 P.2d 321, 322-23 (Dist. Ct. App. 1937) (sound motion picture of defendant's confession admissible).

4. *See* Luco v. United States, 64 U.S. (23 How.) 515, 517-18 (1859). A daguerreotype is "a photograph made by an early method on a plate of chemically treated metal or glass." WEBSTER'S NEW WORLD DICTIONARY 355 (2d college ed. 1982).

5. *See* Duncan v. Kiger, 6 Ohio App. 57 (1916) (motion picture used to demonstrate plaintiff's inaccurate statements about his injured leg held inadmissible because of insufficient clarity).

6. *See* Kornblum, *Videotape in Civil Cases,* 24 HASTINGS L.J. 9, 10 n.5 (1972).

7. *See* Salvan, *Videotape for the Legal Community,* 59 JUDICATURE 222, 222-24 (1975). *But see* 2 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 714 (1969) ("Video tape was first demonstrated in 1951 and was in commercial use by 1954.").

8. *See, e.g.,* Kornblum, *Videotape in Civil Cases,* 24 HASTINGS L.J. 9, 10 n.5 (1972) (discussion of early uses of videotapes); Salvan, *Videotape for the Legal Community,* 59 JUDICATURE 222, 222-24 (1975) (historical perspective of uses of videotape in courtroom); Note,

It is not until the late 1960's, however, that the first documented instances of the use of videotapes in legal proceedings can be found.[9] Since then the use of videotape in the legal environment has expanded tremendously. Some courts even conduct entire trials, both civil and criminal, by videotape.[10] It thus would seem that serious consideration of using videotapes in a will situation is warranted.

This article will explore the uses of a videotape of the will execution ceremony and how such evidence could gain admission under current evidence law. The foundation which must first be laid will be detailed as will the substantive and technical contents of the videotape of the will execution ceremony. The benefits of, and possible difficulties with, the procedure will be detailed. Finally, the possibility that in the future a videotape could serve as the will itself will be discussed.

II. USES OF A WILL EXECUTION VIDEOTAPE

A carefully prepared videotape that records both visually and audibly the entire will execution procedure may prove indispensible should the will subsequently be contested. This procedure gives the testator greater assurance that upon his death the will shall take effect and operate in the manner anticipated; moreover, it allows a ready determination as to whether the various common law and statutory requirements for a valid will were satisfied.

A. *To Show Due Execution of the Will*

Proof of the due execution of the testator's will becomes more certain when substantiated by a video recording. For example, the videotape would show the testator declaring the instrument to be his last will and testament, the testator affixing his signature or mark upon the document, the required number of witnesses observing the

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Videotape: A New Horizon In Evidence, 4 J. MARSHALL J. PRAC. & PROC. 339, 340 n.4 (1971) (detailed history of videotape recording).

9. *See* Paramore v. Florida, 229 So. 2d 855, 858-59 (Fla. 1969) (videotaped confession of defendant admitted), *vacated on other grounds,* 408 U.S. 935 (1971).

10. *See, e.g.,* McCall v. Clemens, No. 39,301 (Erie County Ohio C.P. Court, Nov. 18, 1971) (first videotaped trial); McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand,* 11 U. TOL. L. REV. 239, 241-47 (1980) (description of videotaped civil trials); Symposium, *First Videotape Trial: Experiment in Ohio,* 21 DEF. L.J. 266, 266-79 (1972) (reaction of judge, attorney for plaintiff and attorney for defendant to videotaped trial).

will execution and their signing in the conscious presence of the testator.

B. *To Show Testamentary Capacity*

Establishing the main elements of testamentary capacity may be accomplished by having the testator answer certain questions on videotape which are intended to prove clearly and convincingly each of these elements. A large majority of the courts in the United States are in total agreement as to what the evidence must show.[11]

1. The testator must understand that he is executing a will. The testator explaining in front of a videocamera the nature of the act about to be performed is strong evidence of such an understanding.

2. The testator must understand the effect of making a will. A videotaped explanation by the testator that the purpose of the will execution is to provide for the distribution of his property upon death would demonstrate this requirement.

3. The testator must understand the general nature and extent of his property. The videotape can record the testator reciting the type and description of his property.

4. The testator must understand the persons who are the natural objects of his bounty. Explaining the details of his family situation on videotape is the type of evidence which is likely to curtail will contests by unhappy heirs.

5. The testator must be able to appreciate the above elements in relation to each other and to hold them in his mind long enough to form an orderly desire as to the disposition of his property. A video recording of the testator discussing the disposition made by the will would tend to prove this important element.

C. *To Show Testamentary Intent*

The writing which allegedly constitutes the testator's will fails unless it is shown that the instrument is the document by which the testator intended to make a posthumous disposition of his property.[12] The videotape would show not only the testator but also the

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11. *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 51 (1953).

12. *See, e.g.,* Hinson v. Hinson, 154 Tex. 561, 564, 280 S.W.2d 731, 733 (1955) (dealing with holographic will); *In re* Wilson, 539 S.W.2d 99, 100 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (terming this an essential element); First Church of Christ Scientist v. Hutchings, 163 S.E.2d 178, 179 (Va. 1968) (referring to this requirement as elementary). *See generally*

document itself. This would be practically irrebuttable evidence that the writing claimed to be the testator's will was the very writing held in his hand during the will execution ceremony.

D. *To Show Contents of Will*

Determining the contents of a written will may, at times, involve some difficulty. Although the actual will is produced at probate, portions thereof may have been tampered with or have otherwise become illegible. Additionally, the will may have been lost or destroyed so that evidence of the contents of the will is needed. A videotape can provide excellent evidence of a will's contents by showing the testator reading the entire will aloud and by having the will shown on camera large enough so that the viewer is able to read it. The execution procedure could also include close-ups of the testator and witnesses initialing each page of the will so that claims of page substitution are avoided.

E. *To Show Lack of Undue Influence or Fraud*

In his own words the testator would explain on the videotape that the disposition being made is a result of his free will and that the decision as to property disposition was not influenced by overreaching on the part of anyone. This is particularly important where an unusual disposition is being made, e.g., disinheriting a child or spouse or leaving large amounts to charity.

F. *To Assist in Will Interpretation and Construction*

The testator's statements made contemporaneously with will execution could prove very helpful in determining how various provisions of the will should be interpreted and construed. The testator could explain what he means by certain words, phrases, and other language so that in the event a dispute arises, clear evidence of the testator's intent is available.

III. ADMISSIBILITY OF EVIDENCE OF TESTATOR'S STATEMENTS MADE CONTEMPORANEOUSLY WITH WILL EXECUTION

Admissibility of the videotape of the will execution ceremony

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Annot., 40 A.L.R.2d 698 (1955) (discussion of use of letters written by testator as will or codicil).

may be essential in preventing the frustration of the testator's final wishes as detailed in his will. Accordingly, the threshold requirement of admissibility of the testator's statements made contemporaneously with will execution is explored in this section.

Before proceeding, however, the reader must note that the statements of the testator being considered here are only those made *at the time of will execution*. There is a great body of law dealing with the admissibility of statements made by the testator prior or subsequent to the time of will execution.[13] No attempt is made to discuss the admissibility or proof of these types of statements.

A. *General Rules at Common Law*

The basic difficulty that arises when an attempt is made to admit statements made by the testator contemporaneously with will execution is the possibility that they will be deemed hearsay. If the statements are offered to show the truth of the matter asserted, for example, where a witness to the execution ceremony testifies that the testator declared a particular document to be his will, then that statement would be inadmissible unless it fell under one of the hearsay exceptions.[14]

However, not all statements are offered for the truth of their contents. Evidence of the mental state or intent of the testator may be reflected by the testator's statements although not conditioned on

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13. For collections of cases dealing with the admissibility of testator's statements not made contemporaneously with will execution, see generally Annot., 5 A.L.R.3d 360 (1966) (mistake of fact); Annot., 62 A.L.R.2d 855 (1958) (genuineness and due execution); Annot., 41 A.L.R.2d 393 (1955) (due execution of lost will); Annot., 21 A.L.R.2d 319 (1952) (testamentary intent); Annot., 148 A.L.R. 1225 (1944) (undue influence); Annot., 126 A.L.R. 1139 (1940) (contents of lost will); Annot., 94 A.L.R. 26 (1935) (will interpretation); Annot., 79 A.L.R. 1447 (1932) (undue influence).

14. *See, e.g.,* Mattox v. United States, 156 U.S. 237, 249-50 (1895) (former testimony allowed if witness dies after first trial); Lambros v. Coolahan, 45 A.2d 96, 98 (Md. 1945) (oral admissions of a party opponent "are universally deemed admissible") (quoting J. WIGMORE, WIGMORE ON EVIDENCE § 1053 (3d ed. 1940)); *In re* Forsythe's Estate, 22 N.W.2d 19, 24-25 (Minn. 1946) (principle, older than the rule itself, is that "[d]eclarations made by a person since deceased as to facts relevant to the issue are admissible in evidence between third parties, when it appears that they were against his pecuniary interest and related to a matter of which he was personally cognizant, and that he had no probable motive to falsify the facts."). *See generally* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 246 (2d ed. 1972) (definition and explanation of hearsay); 79 Am. Jur. 2d *Wills* § 452 (1975) (admissibility of declarations of testator not made contemporaneously with will execution).

the statements' truthfulness. Thus, such utterances would not be subject to valid hearsay objections.[15]

At common law, statements deemed to be hearsay in these circumstances often gained admission under the vague and imprecise exception termed "res gestae."[16] A legal battle has been waged by the commentators and the courts for centuries on the appropriate use of the res gestae exception.[17] One writer has stated that "the courts have seized upon it [the res gestae exception] as a convenient tool which eliminates the necessity for the application of thought to problems of evidence."[18] A discussion of the myriad of facets of the great res gestae debate are well beyond the scope of this work. It is important, nonetheless, to note the two main reasons for allowing this exception. First, it allows a declarant to tell his story of the will execution ceremony in a natural and normal manner which lends itself to a disclosure of the truth. Second, its spontaneity gives such evidence a special trustworthiness.[19]

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15. *See* Lane v. Moore, 23 N.E. 828, 828-29 (Mass. 1890) (evidence of statements by testator received for purpose of showing state of mind of testator at time statements were made and held not hearsay); Maxwell v. Hill, 15 S.W. 253, 254-55 (Tenn. 1891) (declarations of illiterate testator admissible to show will was executed intelligently with no hearsay violation). *See generally* Note, *Testamentary Hearsay,* 38 HARV. L. REV. 959, 960 (1925) (when fact in issue is testator's mental state, declarations of testator not hearsay if fact of utterance provides basis for determining mental state).

16. *See* Sanders v. Sanders, 89 So. 261, 263 (Miss. 1921) (testator's declarations at time of execution admissible as res gestae); Hursh v. Crook, 292 S.W.2d 305, 312 (Mo. 1956) (testator's declarations, if not part of res gestae, are inadmissible as hearsay). *See generally* 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.27 (3d ed. Supp. 1982-83) (declarations of testator; admissiblity when part of res gestae); 79 Am. Jur. 2d *Wills* §§ 452-461 (1975) (discussion of admissibility of declarations of testator); 95 C.J.S. *Wills* § 399 (1957) (conditions under which declarations of testator will be admissible).

17. *See generally* 2 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES §§ 344, 347 (1913) ("res gestae is a law unto itself"); 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1734-1764 (J. Chadbourn rev. 1976) (delineates different classes of statements by testator which may be part of res gestae); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae,* 31 YALE L.J. 229, 229-31 (1922) (res gestae is a troublesome area of law owing its existence to inclination of judges and lawyers to substitute simple statement for careful analysis); Note, *Spontaneous Exclamations in the Absence of a Startling Event,* 46 COLUM. L. REV. 430, 430-41 (1946) (res gestae doctrine incapable of definition and analysis); Note, *In a Will Contest, When and For What Purpose Are the Statements of a Testator Admissible?,* 11 VA. L. REV. 601, 601-06 (1925) (discussion of admissibility of declarations of testator as part of res gestae).

18. Note, *Spontaneous Exclamations in the Absence of a Startling Event,* 46 COLUM. L. REV. 430, 430 (1946).

19. *See* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 288 (1972).

Below is a discussion of how the common law has handled the various situations in which the admissibility of evidence of the testator's statements made contemporaneously with will execution has been in issue.

1. Due Execution of Testator's Will

Any statement by the testator as to compliance with the formal requirements for a valid will is hearsay since it would be offered for its truth and not merely to show that the testator believed such things to be true. For example, if the testator tells a witness to the will execution that he was awake and watched when the witnesses attested to the will, the statement would be used to show that he actually was awake and watched, not that he believed he was awake. A valid will would exist only if the testator was indeed awake and otherwise in the conscious presence of the witnesses.[20]

The authorities agree that statements concerning a will's due execution made by the testator contemporaneously with the will execution are admissible.[21] This general rule gained recognition when the United States Supreme Court in *Throckmorton v. Holt*[22] held that the "declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become part of the res gestae, are not admissible as evidence in favor of or against the validity of the will."[23] Statements made at the time of the will execution are necessarily part of the res gestae of that execution and ergo would be admissible.[24]

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20. *See* Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (conscious presence defined as testator able to see attestation or able to see with slight movement).

21. *See generally* 3 S. GARD, JONES ON EVIDENCE § 16:46 (6th ed. 1972) (declarations of testator relating to accuracy and authenticity of will should be admitted); Annot., 62 A.L.R.2d 855 (1958) (general trend is toward admissibility of declarations of testator which bear on genuineness of purported will).

22. 180 U.S. 552 (1901).

23. *Id.* at 572.

24. *See, e.g.,* Hursh v. Crook, 292 S.W.2d 305, 312 (Mo. 1956) (res gestae does not mean short time after will made); *In re* Kennedy's Will, 60 N.E. 442, 444-45 (N.Y. 1901) (declarations accompanying the act are admissible); Ricketts v. Ricketts, 267 S.W. 597, 598-99 (Tenn. 1925) (declarations of testator are inadmissible unless part of res gestae) (quoting Throckmorton v. Holt, 180 U.S. 552 (1901)).

2. Testamentary Capacity

Facts pertinent to the testator's personal history which may shed light on testamentary capacity are generally admissible, including statements made by the testator at the time of the making of an alleged will.[25] The statements or actions of the testator indicating whether he was of sound and disposing mind, and thus capable of making a valid will, are uniformly held not to be hearsay since they are not offered to demonstrate the truth of the contents of such statements or actions. Some courts will even admit these statements without requiring that they be contemporaneous with the will execution.[26]

3. Testamentary Intent

One of the more common and useful types of extrinsic evidence offered and received upon the issue of testamentary intent is the declarations of the testator.[27] A vast majority of courts allow such statements by the testator to be admitted when made contemporaneously with the will execution to establish testamentary intent or the lack thereof when the instrument is ambiguous or otherwise creates doubt as to testamentary intent.[28] Additionally, most jurisdictions also admit such statements even when the instrument purported to

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25. *See In re* Burns' Estate, 52 S.W. 98, 99 (Tex. Civ. App.—1899, writ ref'd). *See generally* 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.63 (3d ed. Supp. 1982-83); Note, *In a Will Contest, When and For What Purpose are the Statements of a Testator Admissible?*, 11 VA. L. REV. 601, 604-05 (1925) (truth of statements not in issue; statements primary evidence of testator's state of mind); 94 C.J.S. *Wills* § 52 (1956) (evidence of testator's appearance, conduct, writings and declarations admissible as primary evidence of his state of mind if sufficiently close in time to will execution).

26. *See, e.g.,* Allman v. Malsbury, 65 N.E.2d 106, 114 (Ind. 1946) (court permitted evidence of actions and statements of testator regarding his divorce far prior to will execution to be admitted to determine mental state of testator); *In re* Knox's Will, 98 N.W. 468, 469 (Iowa 1904) (where sole issue to be proved is mental facility of testator, prior declarations admissible); Lindley v. Lindley, 384 S.W.2d 676, 682 (Tex. 1964) (evidence of statements of testator admitted to show mental state).

27. *See, e.g., In re* Spitzer's Estate, 196 Cal. 301, 304, 237 P. 739, 741 (1925) (prior and subsequent declarations admitted); Costello v. Costello, 73 A.2d 333, 335 (Conn. 1950) (jury question as to whether decedent's declaration that the deed he gave to his lawyer was as good as a will); Shiels v. Shiels, 109 S.W.2d 1112, 1114 (Tex. Civ. App.—Texarkana 1937, no writ) (court of civil appeals reversed trial court and held that jury should have been allowed to hear evidence that testator protested when required to make will as part of formal initiation into secret order).

28. *See generally* 80 Am. Jur. 2d *Wills* § 994 (1975), *quoted with approval in* Rice v. Henderson, 83 S.E.2d 762, 768 (W. Va. 1954).

be a will is in proper form and is validly executed.[29] These statements are admitted on one of two theories: first, they are not hearsay as they go to the testator's state of mind or intent; or second, they fall within an exception to the hearsay rule.[30] Courts are willing to admit extrinsic evidence concerning the execution of the document in order to adhere more closely to the testator's intended designs, be they testamentary or not.[31]

4. Contents of Will

The best evidence of an illegible, lost, or accidentally destroyed will would obviously be a copy thereof. If additional secondary proof is required, courts will admit evidence of the testator's declarations either to establish the contents of the will or to admit the will to probate.[32] These declarations may be deemed sufficient to establish the contents of the lost will, but courts often require other types of corroborating evidence unless there is evidence tending to show a wrongful suppression of the original.[33]

5. Undue Influence and Fraud

The statements made by a testator at the time of the execution of the will are generally admissible to prove whether or not fraud was practiced or undue influence was exerted upon him.[34] The ground

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29. *See generally* 80 Am. Jur. 2d *Wills* § 994 (1975) (extrinsic evidence admissible where instrument ambiguous regarding testamentary dispositive intent).

30. *See id.*

31. *See, e.g., In re* Sargavak's Estate, 35 Cal. 2d 93, 95, 216 P.2d 850, 852 (1950) (statements of testatrix admitted to show intent when instrument was executed); *In re* Brown's Will, 120 N.W. 667, 670 (Iowa 1909) (attesting witnesses allowed to testify as to statements made by testator when issue was validity of two separate wills); Shiels v. Shiels, 109 S.W.2d 1112, 1115 (Tex. Civ. App.—Texarkana 1937, no writ) (statements of testator admitted to show intent).

32. *See* Lane v. Hill, 44 A. 393, 397 (N.H. 1895) (for purpose of placing all credible evidence before jury, testimony of prior declarations of testator admissible); Glockner v. Glockner, 106 A. 731, 732 (Pa. 1919) (testator's declarations admitted to corroborate statements by witnesses); 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.162 (3d ed. Supp. 1982-83). *But see* Moore v. Parks, 84 So. 230, 237-38 (Miss. 1920) (testator's statements deemed hearsay). *See generally* 80 Am. Jur. 2d *Wills* § 1081 (1975) (declarations of testator generally deemed admissible subject to satisfaction of conditions precedent to admission of secondary evidence).

33. *See generally* 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.162 (3d ed. Supp. 1982-83).

34. *See, e.g.,* Smith v. Fenner, 22 F. Cas. 546, 546-47 (C.C.D.R.I. 1812) (No. 13,046) (declarations competent to evidence state of mind of testator); *In re* Arnold's Estate, 147 Cal.

for admission is that such statements are part of the res gestae.[35] Once the statements are admitted, most courts hold that they can be used for the purpose of showing verbal facts which indicate the motive or intent of the testator as well as primary evidence to establish the truth of the facts asserted.[36]

6. Will Interpretation

It is often stated as a general rule that the declarations of the testator, even those made contemporaneously with the making of the wills, are not admissible to affect its construction.[37] Many courts, however, add an important qualification or limitation to that rule. Such statements will be admissible if the will is ambiguous or if it contains an equivocation, for example, where a name or description of a specific bequest refers to two or more individuals or objects.[38]

583, 589, 82 P. 252, 259 (1905) (while statements of testator inadmissible to show either that undue influence was exerted or its probable effect, they are admissible to prove state of mind); Scott v. Townsend, 106 Tex. 322, 331-32, 166 S.W. 1138, 1142-43 (1914) (declarations of testator competent to prove mental state where mental capacity or undue influence at issue). *See generally* 79 Am. Jur. 2d *Wills* § 459 (1975); 94 C.J.S. *Wills* § 247 (1956); Annot., 79 A.L.R. 1447 (1932).

35. *See, e.g.,* Smith v. Fenner, 22 F. Cas. 546, 546-47 (C.C.D.R.I. 1812) (No. 13,046) (declarations competent evidence if sufficiently close in time); *In re* Arnold's Estate, 147 Cal. 583, 587, 82 P. 252, 256 (1905) (declarations made at time of will execution are admissible as part of res gestae); Scott v. Townsend, 106 Tex. 322, 331-32, 166 S.W. 1138, 1142-43 (1914) (declarations of testator admissible as a part of res gestae where issue is mental capacity); *see generally* 79 Am. Jur. 2d *Wills* § 459 (1975) (declarations of testator made at time of will execution admissible as part of res gestae); 94 C.J.S. *Wills* § 247 (1956) (declarations of testator made at or near time of will execution admissible to show state of mind or undue influence); Annot., 79 A.L.R. 1447 (1932) (evidence of declarations of testator, while hearsay, admissible where near enough in time).

36. *See* Sanders v. Sanders, 89 So. 261, 263 (Miss. 1921) (evidence of declarations of testator admissible as part of res gestae and as evidence of circumstances surrounding disposition). *But see In re* Burns' Estate, 52 S.W. 98, 99 (Tex. Civ. App.—1899, writ ref'd) (declarations not admissible as primary proof since regarded as hearsay). *See generally* 79 Am. Jur. 2d *Wills* § 459 (1975) (declarations admissible not only as evidence of state of mind but also for truth of fact asserted).

37. *See* Courtenay v. Courtenay, 113 A. 717, 719 (Md. 1921) (declarations of testator whether made before, contemporaneous with, or subsequent to the making of the will cannot be received to affect its construction). *See generally* 80 Am. Jur 2d. *Wills* § 1347 (1975) (declarations of testator often not allowed to aid in construction of will); Annot., 94 A.L.R. 26 (1935) (discussion of admissibility of extrinsic evidence in construing a will).

38. *See* Smith v. Nelson, 29 So. 2d 335, 338 (Ala. 1947) (use of word "heirs"). *See generally* 80 Am. Jur. 2d *Wills* § 1347 (1975) (testators' declarations admissible to clarify ambiguities); Annot., 94 A.L.R. 26 (1935) (discussion of admissibility of extrinsic evidence in construing a will).

The testator's contemporaneous statements may thus be employed to establish what the testator understood was meant by the language of the will.

B. *Federal Rules of Evidence and Jurisdictions with Similar Statutes*[39]

As under the common law, reports of statements made by the testator during will execution may often be classified as hearsay. Federal Rule of Evidence 801(c) defines hearsay as "a statement [defined in Rule 801(a) as an oral or written assertion or nonverbal conduct intended as an assertion] other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If the testator's statements are deemed hearsay in a particular situation, it may still be possible to gain their admission under one of the various hearsay exceptions contained in the Federal Rules.

1. Present Sense Impression

Under Rule 803(1),[40] a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition will not be excluded by the hearsay rule. Thus, a statement by a testator such as, "this document is my last will and testament" would be admissible as a present sense impression. This exception to the hearsay rule is based on the proposition that the substantial contemporaneousness of the event and the statement negates the likelihood of deliberate or conscious misrepresentation.[41]

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39. Jurisdictions having evidence rules similar to the Federal Rules include: Alaska (1979), Arizona (1977), Arkansas (1976), Colorado (1980), Delaware (1980), Florida (1979), Hawaii (1981), Maine (1976), Michigan (1978), Minnesota (1977), Montana (1977), Nebraska (1975), Nevada (1971), New Mexico (1973), North Dakota (1977), Ohio (1980), Oklahoma (1978), Oregon (1982), South Dakota (1978), Texas (1983), Washington (1979), Wisconsin (1974), Wyoming (1978).

40. The following (is) not excluded by the hearsay rule even though the declarant is available as a witness:

> *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

FED. R. EVID. 803(1).

41. *See generally* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.1 (1981).

2. Then Existing Mental Condition

Statements of a testator made contemporaneously with the execution of his will concerning the will's due execution or reflecting on testamentary capacity, testamentary intent, lack of undue influence and the like should fit within the hearsay exception contained in Rule 803(3).[42] This rule declares that a statement of declarant's then existing state of mind and emotion, including such things as intent, plan, motive, and design are admissible even if such statement is of memory or belief and is used to prove the fact remembered or believed. This is allowed as long as it relates to the execution, revocation, identification, or terms of the declarant's will.[43]

3. Catch-All Exception

If a court is unwilling to fit the testator's statements within one of the above exceptions, it may be possible to use the exception contained in Rules 803(24)[44] or 804(b)(5).[45] These rules are the same

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42. *See* FED. R. EVID. 803(3). Rule 803(3) provides:

The following [is] not excluded by the hearsay rule even though the declarant is available as a witness:

(3) *Then Existing Mental, Emotional or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed *unless it relates to the execution, revocation, indentification, or terms of the declarant's will.*

Id. (emphasis added).

43. *See generally* 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 443 (1980).

44. *See* FED. R. EVID. 803(24). Rule 803(24) reads as follows:

Hearsay Exceptions: The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

45. *See* FED. R. EVID. 804(b)(5). Rule 804(b)(5) reads as follows:

(b)Hearsay Exceptions—The following [is] not excluded by the hearsay rule, if the declarant is unavailable as a witness:

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing

except that Rule 804(b)(5) requires the declarant to be unavailable. The unavailability requirement is clearly met since the testator would be dead at the time such evidence is offered.[46] This hearsay exception will apply if the situation giving rise to the utterance has sufficient circumstantial guarantees of trustworthiness, the statement is offered as evidence of a material fact, the statement is more probative on the point for which it is offered than any other evidence which can be procured through reasonable efforts, and the general purposes of the Federal Rules and the interests of justice will best be served by the admission of the statement into evidence.[47]

IV. METHODS USED TO ADMIT EVIDENCE OF WILL EXECUTION CEREMONY

In the last section, it was demonstrated that in most fact patterns evidence of the testator's statements made contemporaneously with will execution constitutes admissible evidence. In addition, circumstances surrounding the execution of the will such as the testator's appearance, manner, and conduct are uniformly admitted.[48] Before exploring the admissibility of a videotaped will execution ceremony, the more traditional and established methods of gaining admission of testator's declarations will be discussed. This discussion will demonstrate that a videotape should be admissible since other less reliable means of proving these key items are permitted.

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exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

46. *See* FED. R. EVID. 804(a)(4) (definition of unavailability).

47. Proper notice to adverse parties is also required. *See* FED. R. EVID. 803(24) and 804(b)(5). Note that in Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607, 607-12 (D. Alaska 1977), the court admitted a day-in-the-life film pursuant to Rule 803(24). *See generally* Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule,* 57 N.Y.U. L. REV. 867 (1982).

48. *See generally* 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS §§ 29.61 and 29.132 (3d ed. 1961).

A. *Testimony by Subscribing Witnesses to the Will*

Generally, formal (non-holographic) wills require the signature of attesting witnesses.[49] The signatures create a presumption that the will is valid by impliedly certifying "to the truth of the facts which admit it to probate, including the sufficiency of execution, the capacity of the testator, the absence of undue influence, and the like."[50] If a contest arises as to the validity of a purported will, the primary evidence will often be testimony of the individuals who witnessed the actual will execution. Assuming availability and competence, these witnesses by their legal nature are the best evidence of the facts and circumstances surrounding the time period in question.[51] They were present during the will execution and may speak from first hand knowledge as to whether the will was duly executed, how the testator looked and behaved, what the testator said, and the general environment in which the will execution occurred.[52]

B. *Testimony by Other Witnesses to the Will*

Although the subscribing witnesses who were actually present at the will execution have the best opportunity to observe pertinent details which may later prove crucial in litigation, their observations and perceptions may not be available. Often other witnesses are utilized when, for one reason or another, corroborating testimony is desired by counsel.[53] Absent a statute limiting the evidence in a will

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49. *See, e.g.,* ILL. ANN. STAT. ch. 110 1/2, § 4-3 (Smith-Hurd 1978); OHIO REV. CODE ANN. § 2107.03 (Baldwin 1982); TEX. PROB. CODE ANN. § 59 (Vernon 1980).

50. 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.30 (3d ed. 1961).

51. *See, e.g.,* Berndtson v. Heuberger, 173 N.E.2d 460, 462-63 (Ill. 1961) (competency of attesting witness to testify to facts surrounding attestation measured at time of will execution); *In re* Cooks' Estate, 372 P.2d 520, 523-24 (Or. 1962) (testimony of attesting witnesses should be relied on when determining testamentary capacity); *In re* Phillips' Estate, 112 N.W.2d 591, 596-97 (Wis. 1961) (testimony of attesting witnesses rebutted inference of undue influence).

52. *See, e.g.,* Berndtson v. Heuberger, 173 N.E.2d 460, 462-63 (Ill. 1961) (witness has no interest in estate and is merely testifying as to acts of execution as mandated by statute); *In re* Cooks' Estate, 372 P.2d 520, 523-24 (Or. 1962) (attesting witness' testimony as to testatrix's conduct during will preparation should be relied upon as should be their testimony regarding execution); *In re* Phillips' Estate, 112 N.W.2d 591, 596-97 (Wis. 1961) (witness testimony as to will execution served to rebut inference of undue influence).

53. *See, e.g.,* Kerwin v. Bank of Douglas, 379 P.2d 978, 979 (Ariz. 1963) (incompetent witness); Strahl v. Turner, 310 S.W.2d 833, 836 (Miss. 1958) (witness may not testify if incompetent); *In re* Simms, 442 S.W.2d 426, 434 (Tex. Civ. App.—Texarkana 1969, writ ref'd n.r.e.) (corroboration testimony as to missing will).

contest case to testimony by the subscribing witnesses, "any competent witness who has knowledge of the facts may testify as to what occurred at the execution of the will."[54]

C. *Audio Recordings of Will Execution*

Audio recordings relating to otherwise competent evidence are almost universally admissible provided a proper foundation is first laid[55] showing, among other things, that the recording is a fair representation of the conversation.[56] There have only been a few cases, however, which have discussed the use of audio recordings of the testator in a will context.

The earliest case located where audio recordings were used in a will situation was the Illinois case of *Belfield v. Coop*.[57] The attorney who drafted the testator's will instructed Sara Grate to take his wire recorder[58] to the hospital where the testator was staying so that a recording of the conversations with the testator prior to the execution of the will could be made. Grate followed these instructions and made a recording which consisted of her reading the will to the testator, his statements, if any, at the end of each paragraph together with his responses to specific questions including whether the testator knew where he was, the number of farms he owned, and whether he wanted to sign the will. The Illinois Supreme Court indicated that the wire recording was admissible on the issues of testamentary capacity and undue influence provided a proper foundation was laid and no other grounds for exclusion existed.[59] The court then held that this recording was admissible even though Grate was a beneficiary under the will and would not be a competent witness under Illinois evidence law.[60]

Although not directly on point, the case of *In re Estate of Roth*[61] has much useful language. The decedent, apparently concerned that

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54. 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.11 (3d ed. 1961).

55. *See generally* Annot., 58 A.L.R.2d 1024 (1958) (discussion of admissiblity and use of sound recordings as evidence).

56. *See* Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex. 1980).

57. 134 N.E.2d 249 (Ill. 1956).

58. Wire recording is an older method of audio recording which has been displaced by magnetic tape. *See generally* J. TALL, TECHNIQUES OF MAGNETIC RECORDING 29-31 (1978).

59. Belfield v. Coop, 134 N.E.2d 249, 255 (Ill. 1956).

60. *See id.* at 255.

61. 170 N.E.2d 313 (P. Ct. Cuy. Co., Ohio 1960).

an attempt would be made to set aside some *inter vivos* transfers made shortly before his death, had his attorney bring a sound engineer with a wire recorder to his bedside. The decedent was slowly wasting away and he was conscious of his ultimate fate. Conversations were then recorded among the testator, the attorney, and some neighbors who had been called into the room. The conversations indicated that the decedent had a clearness of mind in declaring his unequivocal intention to make gifts although physically he was very weak. The court admitted the recording into evidence stating that it

> might be more reliable than the recollected word or the translation of notes made by human hand. The play-back enunciates the voices and other sounds picked up at the time of the recording. The inflections and accentuations of the voices are reproduced as though the individual were present in court. In some instances this attribute or detraction might have as much importance as the voice itself. Certainly it would produce an almost perfect witness, even though it be a voice from the grave and not subject to cross-examination.[62]

One court has held that an audio recording is inadmissible to show testamentary capacity. However, the circumstances of this case are readily distinguishable from the situation where the execution of the testator's will is recorded. In *Bruster v. Etheridge,*[63] a Tennessee Court of Appeals upheld the lower court's exclusion from jury consideration of a tape recorded speech the testator made over five months after the will was executed.[64] Not only was this recording made at a time too far removed from the time of the will execution, but the speech did not contain any discussion of will-related matters.[65] The court also held that such evidence was cumulative since the facts surrounding the speech had already been admitted.[66]

D. *Photographs of Testator*

Evidence of the appearance of the testator may be useful evidence to a jury in determining whether the testator had the requisite testamentary capacity. A witness who observed a testator's facial expression and general appearance is usually allowed to testify about these

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62. *Id.* at 315.
63. 345 S.W.2d 692 (Tenn. Ct. App. 1960).
64. *See id.* at 699.
65. *See id.* at 699.
66. *See id.* at 699.

traits as long as such testimony has a reasonable tendency to indicate the testator's mental condition at the time the will was executed.[67] Thus, with the development of modern technology, parties to a will action may try to gain admission of a photograph of the testator upon the same grounds.

This issue was first presented in 1898 when cases arose in Ohio and New Hampshire in which the courts were confronted with pictures of a testator. An Ohio Circuit Court in *Varner v. Varner*[68] ruled that a photograph was inadmissible on the issue of the soundness of testator's mind. The court did not believe that the jury had the power to, in effect, become psychologists and mind-readers to determine from the looks and features of the testator his degree of mental capacity and his power of disposing memory.[69] The lack of cross-examination of the picture persuaded the court to hold against its admissibility as did the fear that the photograph would make impressions on the jurors which would be beyond the reach of argument.[70]

The New Hampshire Supreme Court in *Pritchard v. Austin*[71] took a different approach in a case where photographs of the testator were offered to show the character, vigor, temperament, and disposition of the testator as touching on the question of undue influence.[72] Although the exact time when the pictures were taken was unknown, the court admitted them into evidence since there was other evidence that the photographs correctly represented the testator.[73]

About eleven years later the Supreme Court of Iowa faced a

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67. *See, e.g.,* Batson v. Batson, 117 So. 10, 15 (Ala. 1928) (not error to allow witness to testify regarding testator's facial expression and appearance); *In re* Estate of Wolf, 344 P.2d 37, 41 (Cal. Dist. Ct. App. 1959) (testimony by witness as to testator's conduct and appearance not error so long as it reasonably tends to indicate his mental state at time will was executed); *In re* Evan's Estate, 86 N.W. 283, 284 (Iowa 1901) (testimony by witnesses to will execution proper to evidence mental state of testator).

68. 16 Ohio C.C. 386 (1898).

69. *See id.* at 392.

70. This discussion of the use of the picture is probably dicta since a proper foundation for the picture was not presented. The photograph was taken about two years after will execution and there was no evidence as to the accuracy of the picture or to what degree it resembled the testator either at the time it was taken or at the time of will execution. *See id.* at 390.

71. 46 A. 188 (N.H. 1898).

72. *See id.*

73. *See id.* at 188-89.

similiar issue in *Spiers v. Hendershott*.[74] The court allowed a photograph showing the testatrix in poor health to be admitted into evidence as tending to show her physical health and degree of emaciation.[75] The court also mentioned that the jury would be instructed not to determine the testatrix's mental condition from her appearance on the photograph.[76] Although citing neither *Varner* nor *Pritchard*, the *Spiers* court ruling clearly differentiated between the fact patterns and holdings of these cases. A general rule of admissibility to show physical state but not to show mental state seemed to be emerging.

The well-known and frequently cited Illinois Supreme Court case of *Brownlie v. Brownlie*[77] appears consistent with this trend. A will was being contested on the grounds of lack of testamentary capacity and undue influence which required a determination as to the physical condition of the testatrix at the time the will was executed. The court indicated that

> [i]t was therefore competent to make proof of her personal appearance during the period under investigation. A photograph shown to be a correct representation of the testatrix during such period of time is competent as tending to show her appearance, her vigor, temperament and apparent strength of character as shown by the picture of herself.[78]

The only other case located where a picture of a testator was used during a will contest action was a 1955 Texas Court of Civil Appeals case. In *In re Estate of Gray*,[79] issues involving undue influence and mental capacity were raised which led to a dispute concerning the admissibility of a recent picture of the testatrix contained in an Eastern Star booklet.[80] The court did not definitely state the purpose for which the picture was introduced. Citing the *Brownlie* case the court stated that "[p]ictures of testators have been held admissible, and we find nothing in the exhibit to warrant any error in submission."[81]

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74. 120 N.W. 1058 (Iowa 1909).
75. *See id.* at 1061.
76. *See id.* at 1061.
77. 191 N.E. 268 (Ill. 1934).
78. *Id.* at 272 (citing Pritchard v. Austin, 46 A. 188 (N.H. 1898)).
79. 279 S.W.2d 936 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.).
80. *See id.* at 942.
81. *Id.* at 942.

E. *Motion Pictures of Testator*

No case concerning the use of a motion picture of the testator executing his will was located.

F. *Videotape of Testator*

Commentators have often suggested that a videotaped recording of a will execution ceremony would be extremely useful evidence.[82] The practice is rapidly gaining in popularity and acceptance.[83] Nonetheless, no reported case was located where a videotape of the testator's will execution ceremony was used in a probate action.

V. ADMISSIBILITY OF VIDEOTAPE OF WILL EXECUTION CEREMONY

Videotapes are quickly becoming indispensible in various courtroom situations. Both attorneys and judges have begun to realize that video technology is extremely useful and sometimes essential. Videotapes can convey the evidence to a jury clearly, accurately, and completely while at the same time reflecting the ultimate search for the truth. A videotape's admissability generally depends on the following considerations: 1) relevance; 2) fairness and accuracy; 3) the exercise of discretion as to whether the probative value of the recording outweighs the prejudice or possible confusion it may cause; and 4) other evidentiary considerations such as the presence of hearsay.[84]

A jury is often more comfortable in allowing or denying recovery if it can be sure the evidence supports its decision. For example, if the jury would become more familiar with the scene of the event or accident by viewing a videotape which accurately portrays the pertinent area involved, then courts are willing to allow attorneys to

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82. *See, e.g.,* Hurley, *Taking Stock of Videotape Technology,* 17 DOCKET CALL 5, 5 (Fall 1982) (visual aids would help accurately to record will execution); McCrystal & Maschari, *Will Electronic Technology Take The Witness Stand?,* 11 U. TOL. L. REV. 239, 249 (1980) (audio-visual aids will help clarify and correct faulty memories); Comment, *Videotape As a Tool in the Florida Legal Process,* 5 NOVA L.J. 243, 248 (1981) (videotaped will execution would "preserve the intent, competence and volition of the parties").

83. *See* Dickerson, *Video-taped Wills Offer Deceased the Last Word,* Miami Herald, Nov. 12, 1980, § EP (Magazine), at 3, col. 3; Shearer, *The Zanuck Inheritance Fight,* San Antonio Light, March 13, 1983, Parade (Magazine), at 10.

84. *See generally* 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1294 (2d ed. 1969 & Supp. 1980).

present this type of videotape evidence.[85] Another example is where there is disagreement between the plaintiff and defendant as to whether the goods in a contract case conform to the written agreement. Explaining to the jury what the goods were to be, as per contract, and then showing a videotape of a warehouse full of the nonconforming goods actually sold to the plaintiff would do more to convince a jury than any amount of oral testimony.[86]

The admissibility of videotape in these types of situations leads to the conclusion that videotape evidence of a will execution should be admissible. Precedent already exists for admitting evidence of the testator's statements made contemporaneously with will execution and evidence of the testator's manner, appearance, and conduct. Courts have already allowed audio recordings and pictures into evidence in will situations. What better combination of all these acceptable evidentiary techniques than a videotaped recording? A videotape is not subject to the vagaries of a witness' fading memory and it presents a more comprehensive "picture" of the testator and his situation at the time of the will execution than does a piecemeal tendering into evidence of testimony by witnesses, audio recordings, or photographs.

Videotape should not be viewed as a new *type* of evidence, but rather, as a new *method* of presenting evidence which is more reliable and comprehensive than traditional methods such as live witness testimony. Videotape evidence is now commonly used in situations demanding a greater degree of reliability than a testamentary disposition.[87] Accordingly, the door is wide open to the use of videotapes of testators executing their wills.[88]

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85. *See, e.g.,* Golston v. Lincoln Cemetary, Inc., 573 S.W.2d 700, 708 (Mo. App. 1978) (videotape of shallow gravesite in action for mental anguish); Mize v. Skeen, 468 S.W.2d 733, 736 (Tenn. Ct. App. 1971) (motion picture showing visibility from accident victim's point of view); City of Lubbock v. Tice, 517 S.W.2d 428, 432-33 (Tex. Civ. App.—Amarillo, 1974, no writ) (videotape of nuisance). *See generally* Stone, *Use Of Videotape In The Legal Profession,* 45 OHIO B. 1213, 1216 (1972) (use of videotape in courtroom to place before jury evidence edited of objectionable material would expedite judicial process).

86. *See* Hurley, *Taking Stock of Videotape Technology,* 17 DOCKET CALL 5, 5 (Fall 1982).

87. *See, e.g.,* United States v. Tibbetts, 646 F.2d 193, 194-95 (5th Cir. 1981) (tax evasion); Allen v. State, 247 S.E.2d 540, 541 (Ga. Ct. App. 1978) (burglary); Williams v. State, 383 N.E.2d 444, 445 (Ind. App. 1978) (selling stolen goods). For commentary on videotapes being admitted in criminal cases, see generally Annot., 60 A.L.R.3d 333 (1974) (use of videotape evidence in criminal trials).

88. *See generally* Dombroff, *Videotapes Enter the Picture As Demonstrative Evidence*

VI. FOUNDATION FOR ADMITTING VIDEOTAPE OF WILL EXECUTION CEREMONY

The foundation required to gain the admission of a videotape into evidence has its history in the cases which developed the foundations required for more familiar mechanical recording devices. Since videotapes are simultaneous recordings of audio and visual events, the courts have drawn heavily from the law governing the admissibility of audio tape recordings, photographs, and motion pictures when formulating the standards for the admissibility of videotape recordings.[89] Although jurisdictions differ and may not enumerate a complete list of foundation elements,[90] there is basic agreement as to seven elements which must be shown to gain the admission of a videotape recording.[91]

A. *Device Capable of Taking Testimony*

The first step to gain the admission of a videotape is to show that the video recorder and the videotape were in proper working order at the time the recording was made so that both audio and visual events were properly recorded. This may be shown by testimony of people present at the recording who are familiar with the equipment used. The operator of the equipment would probably be the most likely individual to be able to provide this testimony. If this is not

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Tool, NAT'L L.J., Nov. 23, 1981, at 24 ("the use of videotape is limited not so much by the rules of evidence as by the lawyer's imagination.").

89. *See* Paramore v. State, 229 So. 2d 855, 859 (Fla. 1969) (photographs), *vacated on other grounds,* 408 U.S. 935 (1972); Allen v. State, 247 S.E.2d 540, 541-42 (Ga. Ct. App. 1978) (audio recordings); People v. Heading, 197 N.W.2d 325, 329 (Mich. Ct. App. 1972) (audio recordings plus motion pictures); State v. Johnson, 197 S.E.2d 592, 594 (N.C. Ct. App. 1973) (photographs); Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980) (audio recordings).

90. *See, e.g.,* Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) ("truly and correctly depicted the events and persons shown"); State v. Thurman, 498 P.2d 697, 700 (N.M. Ct. App. 1972) (for picture portion, "true and accurate as to what it purported to represent"); State v. Johnson, 197 S.E.2d 592, 594 (N.C. Ct. App. 1973) ("fairly and accurately recorded the actual appearance").

91. *See, e.g.,* Allen v. State, 247 S.E.2d 540, 541 (Ga. Ct. App. 1978) (list of seven elements which must be present) (quoting Solomon, Inc. v. Edgar, 88 S.E.2d 167 (Ga. Ct. App. 1955)); Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980) (applying seven-pronged test for admission of sound recordings first set out in Edwards v. State, 551 S.W.2d 731, 733 (Tex. Crim. App. 1977)); State v. Hewett, 545 P.2d 1201, 1204 n.4 (Wash. 1976) (lists seven elements required to lay foundation for admission of videotapes to perpetuate testimony) (citing State v. Williams, 301 P.2d 769 (Wash. 1956)).

feasible, it may be possible to infer that the videotape recorder and videotape were capable of taking and recording visual and audio events from testimony by a person who observed and recorded the event, or who observed the event and a recording thereof, that the recording is a fair representation of what actually took place.[92]

B. *Operator of Device Was Competent*

It is also necessary to show that the operator of the videotape equipment was competent. Evidence as to the operator's training and experience would help make a strong showing of this foundation element.[93] It is probably not necessary to show that the operator was an expert provided he is well-trained in operating the equipment.

It may be possible to infer this element from testimony of a person who observed the will execution that the recording is a fair representation of that event.[94] Additionally, it has been held that it is not necessary that the videotape equipment operator has a high degree of skill or extensive training provided the proponent of the tape is able to come forth with evidence showing that the recording clearly and accurately reflects the events which it purports to represent.[95]

C. *Authenticity and Correctness*

The key element to the admission of videotaped evidence is to show that the recording truly and correctly depicts the events and persons shown. The video portion should be clearly in focus and the audio portion should be loud and clear enough so that it is understandable and not misleading. It is extremely helpful to have someone who was present when the recording was made view the videotape and state that it is a fair and accurate representation of

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92. *See* Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980) (videotape of defendant's transactions with police posing as fences showing the unloading of goods, price negotiations, and acceptance of money).

93. *See* Holland v. State, 622 S.W.2d 904, 906-07 (Tex. App.—Fort Worth 1981, no writ) (witness to taping testified as to equipment operator's training).

94. *See* Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980) (videotape of defendant's transactions with police posing as fences showing the unloading of goods, price negotiations, and acceptance of money).

95. *See* People v. Mines, 270 N.E.2d 265, 267 (Ill. App. Ct. 1971). *See generally* Note, *Evidence—Admission Of Video Tape,* 38 MO. L. REV. 111, 119 (1973).

what actually took place.[96]

D. *No Changes, Additions, or Deletions*

For the successful introduction of a videotape into evidence, it must be shown that no changes, additions, or deletions were made. Testimony of those present during the taping may establish this element. If no such person is available, expert testimony may be relied on to show that after physical inspection and various sophisticated electronic tests that no evidence of alteration existed.[97] The placing of a digital clock where it will always be in the camera's field of view or the use of a time-date generator (a device which continuously records both the time by seconds and the date on the videotape itself) will reduce or eliminate claims that the tape was spliced, erased, or otherwise altered.[98] It is also a good practice to make simultaneous audio recordings which may prove useful should a claim of alteration arise.[99]

E. *Manner of Preservation*

The manner of preservation of the videotape is also a key element of a complete foundation. It is advisable to keep a detailed record of the chain of custody of the tape.[100] Use of a safe deposit box with its entry records may be helpful in this regard. One court has held in a case involving a videotape of the defendant's confession, that continuity of possession does not have to be shown provided other evidence demonstrates "that the videotape was an accurate reproduction of the entire interview between the defendant and the

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96. *See, e.g.,* Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) ("truly and correctly depicted the events and persons shown"); State v. Thurman, 498 P.2d 697, 700 (N.M. Ct. App. 1972) (for picture portion, "true and accurate as to what it purported to represent"); State v. Johnson, 197 S.E.2d 592, 594 (N.C. Ct. App. 1973) ("fairly and accurately recorded the actual appearance"); *see also* Apache Ready Mix Co. v. Creed, No. 16,710 (Tex. App.—San Antonio, May 13, 1983) (not yet reported).

97. *See* 17 Am. Jur. PROOF OF FACTS *Tape Recordings as Evidence* §§ 14-21 (1966) (by analogy, discussion of audio tape alteration detection).

98. *See generally* 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery* § 30 (1976) (discussion of precautions which should be taken to prevent accidental erasure and to minimize possibility of intentional alteration).

99. *See* Symposium, *First Videotape Trial: Experiment in Ohio,* 21 DEF. L.J. 267, 277 (1972).

100. *See* Holland v. State, 622 S.W.2d 904, 906-07 (Tex. App.—Fort Worth 1981, no writ) (witness testified videotapes constantly in custody of police department since they were produced).

police officer."[101] It would seem likely that a court could take the same approach in the will execution ceremony context since the burden of proof in civil actions is considerably less than that in the criminal setting. Nonetheless, a good chain of custody record would be advisable and would also help to show the previously discussed element of lack of changes, additions, or deletions.

F. *Identification of the Speakers*

It should be quite easy to demonstrate this element of the foundation for the admission of a videotape into evidence since identification of the parties may be made from both visual and audio information. Although audio and visual senses could be deceived by an extremely competent actor, such deception is unlikely. Individuals familiar with the parties should be able to identify those parties present at the will execution ceremony.

G. *Statement Voluntarily Made*

The last element of the foundation for a videotape is to show that the testimony was voluntarily made without any type of improper inducement. The fact that a testator videotaped the execution of his will usually implies a voluntary transaction. The entire setting can be seen on the videotape which should disspell claims of involuntary statements, although, of course, someone could be standing out of camera range with a gun, could be holding the testator's family hostage, or could in some other manner be using undue means to secure the videotaped will execution ceremony. Some courts have indicated when dealing with audio tapes that "the voluntary nature of the testimony may be inferred from the facts and circumstances of each case."[102] This is even more likely to be the case with videotapes since "they convey a greater indicia of reliability than audio tapes."[103]

VII. Substantive Contents of Will Execution Videotape

A properly prepared videotape of the will execution ceremony has at least six potential uses, that is, to show: 1) due execution of the

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101. Paramore v. State, 229 So. 2d 855, 859 (Fla. 1969), *vacated on other grounds,* 408 U.S. 935 (1972).

102. Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex. 1980).

103. Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980).

will; 2) testamentary capacity; 3) testamentary intent; 4) the contents of the will; 5) lack of undue influence or fraud; and 6) to assist in will interpretation and construction. Careful thought and planning must go into the substantive content of the will execution ceremony in order to increase the chances of successfully using the videotape in court should the necessity arise. Below is an outline of a suggested format which attempts to include the major elements needed to utilize fully the advantages of a videotaped will execution ceremony.[104]

1. Before entering the room where the videotaping is to be done, make certain the soon-to-be testator is familiar with how the recording of the will execution procedure is to be conducted. The testator should be comfortable and at ease with the situation; the more natural the testator appears and sounds the better.

2. The testator needs to be reminded that everything he does or says during the will execution ceremony will be recorded. Persons using this technique need to be alert for any potentially annoying habits or traits of the testator such as biting fingernails or constant brushing of hair. These could "appear in an exaggerated form on a video monitor and thus distract from the overall presentation of the testimony."[105] In addition, the testator's overall appearance needs to be considered.

> For example, if a male witness has an unusually heavy beard, his face may appear darkened. This is not to say that a video tape [will execution] should be treated as a movie production with unnecessary lighting or makeup, which would be inappropriate and misleading. However, as in the case of in-court testimony, counsel who is offering the witness at trial should take appropriate steps to insure that any testimony is presented in the most favorable manner.[106]

3. The equipment operator should be consulted to assure that everything is ready in the room where taping is to be conducted. The testator should not be brought into a room where preparatory

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104. Special appreciation for ideas for this procedure is given to Adjunct Professor Robert Jorrie of the St. Mary's University School of Law. Some of the elements discussed in this section are adapted from a procedure used by Professor Jorrie in videotaping will execution ceremonies. For information on will execution generally, see J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 285 (2d ed. 1978).

105. 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery,* § 46 (1976).

106. *Id.*

work is still being done; it would detract from the solemness of the occasion as well as appearing unprofessional.

4. The appropriate persons should be gathered together in the room where the taping is to be done. Normally, the only persons present will be the testator, the attorney, two or three witnesses, the equipment operator, and a notary (if the particular jurisdiction permits the use of self-proving affidavits). No beneficiaries under the will should be present during the taping in order to reduce claims of overreaching and undue influence. In addition, no one should enter or leave the room until the will execution ceremony is completed.

5. The attorney should appropriately position all the individuals in the room. The room, desks, tables, and so forth should be neat and uncluttered; avoid anything which may detract from the testator's words and acts. Particulars of the ceremony which need special emphasis or which were omitted from prior discussions with those involved should be explained. When there are no further questions, the actual taping may begin.

6. When taping begins, someone (usually the attorney in charge of the ceremony) should identify the situation, explain where the taping is taking place, state the date and time (use a time-date generator, if possible), and briefly describe what is about to transpire.

7. The camera should pan the entire room and each person should give his name and address as well as the role which he is to perform in the will execution ceremony.

8. The videocamera should then focus on a dialogue between the testator and the attorney. This should include the testator identifying himself and explaining the function of a will, i.e., a document which will dispose of his property upon death. The testator should also indicate an awareness that the will execution ceremony is being videotaped with his full knowledge and consent.

9. The testator should identify the actual will document as being his final wishes regarding the disposition of property at death. The entire will should be read aloud by the testator. If the testator cannot read, the attorney may read the will and have the testator agree to its contents. Additionally, the camera should focus on each page of the will in such a fashion as to make the will legible when the tape is played back over an average size television monitor. Having the will read aloud and having the will carefully videotaped is necessary to ensure that the document probated is the same as the one executed during this procedure. A testator may object to this since it

removes the secrecy of the contents of his will. This is not a significant problem since the witnesses and other personnel could leave the room during the reading of the will. At the conclusion of the reading of the will, the testator should state that he understands it and agrees with its dispositive and administrative provisions.

10. The testator should discuss his family situation so it can be established that he understands the natural objects of his bounty. If the testator is or ever has been married, details concerning the marriage(s) should be given, including the spouse's name and the current condition of the marriage or how former marriages ended (divorce, death, etc.). Details, such as names, ages, and addresses, of the testator's children, if any, should be given as well as information regarding any other close family members (e.g., parents, siblings, grandchildren). It is especially important to explain the family situation when a spouse, a child, or other close relative is being disinherited in favor of a distant relative, friend, or charity.

11. The videotape of the will execution should also establish that the testator understands the nature and extent of his property. Thus, it would be helpful if the testator explains the types and approximate value of the property he owns. Avoidance of claims that the testator made a will believing the size of his estate to be vastly different from what it actually is, indicating a lack of testamentary capacity, may thus be achieved.

12. It is important to establish that the testator understands the disposition that the will makes of his property. The testator should explain his disposition plan and perhaps give reasons for the various bequests and devises. This may be of great assistance and importance when close relatives are being excluded from the testator's dispositive scheme.

13. It is also important to show that the testator was not unduly influenced by someone to make this particular disposition of his property. Questions can be asked of the testator to determine if others have been badgering him to make a will in a certain manner and if any of them are present at the time of will execution. If there are any such people present, they should be asked to leave. The testator should be asked whether anyone threatened either to withold medicine, food, or love or to exert physical force if the will was not written in a certain way. The possibility of such things being done to a third person should also be explored. After these matters are discussed, it should become clear to the viewer of the videotape that

the will contains the testator's disposition plan and not that of someone else.

14. If the testator is making any unusual dispositions of property, these should be explained in detail. This will help rebut claims of lack of capacity based on the peculiarity of a will's dispositive provisions.

15. The videotaped will execution is usually done to avoid the testator's wishes from being frustrated by a successful will contest action (or even an unsuccessful one that costs the estate money and delays the disposition of estate funds to the intended beneficiaries). Accordingly, the testator should explain any fears he may have concerning a potential will contest action. The possible grounds for these contests and the reasons behind them should be detailed.

16. Any other information which may be relevant should now be elicited from the testator.

17. The attorney should then ask the testator if he requests the particular witnesses to attest to the signing of the will. The testator should answer "yes" in an audible voice.

18. The witnesses should be located so that all of them can see the testator sign. The testator should then sign the will at the end and initial or sign each page. The camera should focus on the testator affixing his signature or initials to each page.

19. The attorney should read the attestation clause aloud.

20. With the camera carefully following the action, the witnesses should each sign the will and write their addresses in the space provided. The first witness to sign should write under the spaces provided for the witnesses' signatures a statement to the effect that the foregoing attestation clause was read and is accurate. This witness should then initial immediately below this line as should the other witnesses when they sign. The testator and the other witnesses should watch as each witness signs and the videotape should clearly show that these parties watched each other sign. To help avoid claims of page substitution, the witnesses should also initial each page with the camera accurately recording these acts.

21. If the will is being executed in a jurisdiction that permits the use of self-proving affidavits, the attorney or the notary public should read aloud the self-proving affidavit after the will has been signed by the testator and the attesting witnesses. The notary then should take the oath of the testator and the attesting witnesses, all of

whom subsequently sign the affidavit. The notary should then sign and affix his or her notary seal to the affidavit.

22. This would conclude the will execution procedure. The time should be stated and the recording stopped.

23. To make certain the ceremony went well, that the appropriate words and actions were recorded, and video portions are clear, the tape should be rewound and played. This will also help establish various elements of the evidence foundation such as the ability of the recorder to take testimony, the competency of the operator, and the correctness of the recording.

24. An affidavit signed by the camera operator concerning the type of equipment used, the kind of tape used, whether or not the equipment functioned normally during the session and the like should be executed. This would be helpful in the event various foundation elements need to be shown and the camera operator or other witnesses are unavailable to come into court.

25. The videotape of the will execution ceremony should then be placed in a secure location where it will be protected from fire, theft, and accidental erasure and so that it may be readily obtained upon the death of the testator. A safe deposit box may be used to tremendous advantage since its entry records are useful in showing the tape's chain of custody.

VIII. Technical Aspects of Videotaping Will Execution Ceremony

Once the decision is reached to have the will execution ceremony preserved on videotape, attention should be focused on the various technical aspects of videotaping. The first decision which needs to be made is who is going to do the actual recording. Two basic options are open to testators and their attorneys; they can either hire someone to do the taping or acquire their own equipment and record it themselves.

A. *Hiring Professional Videotaping Services*

Many attorneys may prefer the ease of having all the videotaping work performed for them and thus will hire a professional videotaping firm. Most large cities have businesses that engage in various videotape services and many have firms that specialize in video services for attorneys. Checking the telephone directory or a legal

periodical may yield a wide selection of professional video firms. As with hiring any outside firm, careful investigation should be made of the business to ascertain the quality and dependability of its work. Besides the convenience, professional firms will usually have trained personnel and the equipment necessary to produce a quality recording.[107] "[T]hese professionals often develop artistic skills and methods of taping the subject matter so as to enhance the dramatic effect on the viewer. Their suggestions as to the proper background, changes in the camera angle, may prove invaluable."[108] Taping costs generally range from $90 to $250 per hour which includes technician time and the cost of the videotape.[109]

B. *Owning Video Equipment*

Over recent years, the cost of videotape equipment has been declining rapidly, making it feasible for small firms and even sole practioners to own their own equipment.[110] An employee of the firm can be trained in taping procedures or a professional operator may be hired. The basic equipment required is a videotape recorder, a video camera, microphones, and a video monitor.[111] In addition, several items of auxiliary equipment are desirable.

1. Videotape Recorder

A videotape recorder is the device that takes the electronic video signals transmitted to it via a connecting cable from the camera and the audio signals from the microphones and places them on magnetic videotape for later replay. During the past twenty years, the field of videorecording has been in a tremendous state of flux and

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107. *See generally* Murray, *Videotaped Depositions: Putting Absent Witnesses in Court,* 68 A.B.A. J. 1402, 1404-05 (1982) (considerations of lawyer in his role as "producer").

108. Stewart, *Videotape: Use in Demonstrative Evidence,* 21 DEF. L.J. 253, 256 (1972).

109. *See, e.g.,* McCrystal & Maschari, *PRVTT: A Lifeline For The Jury System,* 19 TRIAL 70, 72 (March 1983) (average cost approximate $185 per hour in major metropolitan cities); Short, Florence & Marsh, *An Assessment of Videotape in the Criminal Courts,* 1975 B.Y.U. L. REV. 423, 458-63 (average commercial costs range from $165 per hour for single camera system to $220 per hour for multicamera system); Comment, *Videotape As A Tool In The Florida Legal Process,* 5 NOVA L.J. 243, 245 (1981) (current commercial videotaping costs run from $90-250 per hour).

110. *See* Miller, *Choosing Video Equipment for the Law Office,* 69 A.B.A. J. 898, 899 (1983).

111. *See generally* Murray, *Use Of Videotape In The Preparation And Trial Of Lawsuits,* 11 FORUM 1152, 1155-56 (1976) (discussion of three basic equipment ensembles).

has seen various types of video recorders come and go.[112] The industry has seemed to settle, at least for the present, on three basic formats: ¾-inch U-matic, ½-inch Beta, and ½-inch VHS.

Professional firms that provide video recording services typically use the U-matic system which uses ¾-inch wide tape.[113] The U-matic equipment is bulkier than equipment using the other two formats but the wider tape does produce a very high quality picture.[114] The U-matic recorders and tapes are, however, more expensive and it may be difficult to find compatible equipment and tapes in some locations.

Most individuals are more familiar with one of the two ½-inch formats used by home video recorders: Beta and VHS. These systems are not compatible but technologically they are basically the same although each does have some advantages and disadvantages.[115] The big advantages of these formats are their lower cost and ready availability. Although picture quality may be less than with the U-matic format, it should be of a sufficiently high quality to make an impressive recording in most situations.[116]

2. Video Camera

The video camera translates the light images it receives into electronic impulses which are sent via cable to the videotape recorder for storage on the tape. It is probably the most important component of a video system since the quality of the camera will tremendously affect the ultimate quality of the playback.[117] The camera should be mounted on a sturdy tripod to assure stable pictures. In addition, the

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112. *See generally* M. MURRAY, THE VIDEOTAPE BOOK (1974).

113. *See* Hurley, *Taking Stock of Videotape Technology,* 17 DOCKET CALL 5, 25 (Fall 1982); Miller, *Choosing Video Equipment for the Law Office,* 69 A.B.A. J. 898, 899 (1983).

114. *See* Miller, *Choosing Video Equipment for the Law Office,* 69 A.B.A. J. 898, 899-900 (1983); Preiser & Hoffman, *'Day-in-the-Life' Films—Coming of Age in the Courtroom,* 17 TRIAL 41, 42 (1981).

115. *See generally* Miller, *Choosing Video Equipment for the Law Office,* 69 A.B.A. J. 898 (1983); *Video Cassette Recorders,* 47 CONSUMER REPORTS 230 (1982).

116. Note that several tape speeds are available. The best recording takes place with the fastest speed since the greater the speed of the tape passing the recording heads, the wider the spectrum of frequencies that can be recorded. *See* Note, *Evidence—Admission Of Video Tape,* 38 MO. L. REV. 111, 112 (1973).

117. *See generally* Murray, *Videotaped Depositions: Putting Absent Witnesses in Court,* 68 A.B.A. J. 1402, 1404-05 (1982) (camera must be of quality sufficient to assure clear and accurate playback).

camera should be equipped with a high quality zoom lens so that close-up shots are possible.

3. Microphones

A microphone translates audio signals into electronic impulses which are then transmitted via cable to the video recorder for storage on the tape. "Lapel microphones are preferable to table-based microphones since table varieties have a greater tendency to pick up the sounds of rustling papers or objects being placed (or slid) on the table."[118] The individuals involved in the will execution ceremony should be instructed to speak clearly and loudly enough to make a good recording. Attention should be given to outside sources which could hinder a good audio recording such as low-flying jets and construction equipment.

4. Video Monitor

A video monitor (television) converts the electrical impulses recorded on the tape and transmitted to the monitor via a cable back into recognizable sounds and pictures. At least one monitor should be located in view of the attorney during the will execution so that the attorney can make certain a proper camera angle is being used and that the picture is properly focused. During playback in court, sufficient monitors of adequate size should be used so that the jury and the judge have a good view of the recorded material.

5. Auxiliary Equipment

Several other items of equipment may be extremely useful to record properly a will execution ceremony. Additional lighting may be required if the taping is being done in a location with insufficient natural or normal light. It is important to have a sufficient light level so that the picture quality is high.[119] A time-date generator which continuously records date and time information in digital format on the videotape is helpful to establish that no alterations were made to

118. *Id.* at 1405.

119. *See generally* Short, Florence & Marsh, *An Assessment of Videotape in the Criminal Courts,* 1975 B.Y.U. L. REV. 423, 430 (while high light intensity needed for quality recording other factors also may effect lighting decision); 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery* § 53 (1976) (high light levels necessary to the production of an acceptable picture).

the tape. Various switching units are also needed when more than one camera or microphone is being used. It is also advisable to make simultaneous audio recordings since they may prove useful in rebutting claims that the videotape has been altered.[120]

C. *Camera Techniques*[121]

When beginning the videotaped will execution recording, the camera should give a long shot of the entire room to establish the setting and the people in attendance. During the substantive portions of the execution ceremony, it is most important that the testator be portrayed on tape the same as if the testator were actually present. In this manner, it is most like having the deceased testator as a witness in court.[122] Care must be taken that the production does not become boring by having only an unchanging view of the testator. Variations between close-ups and medium range shots of the testator are recommended.

Caution should be exercised to ensure that the camera's capability is not used to over-editorialize or distort what is being recorded. Extreme close-ups, for example, are not desirable since

> they may place undue emphasis on facial features, create an inaccurate or misleading image of the [testator], or curtail the ability of a jury to appreciate and a [testator] to use gestures, body movements, and other nonverbal indicators. At the other extreme, a shot that is too long may fail to capture for the trier of fact nuances of demeanor that may be important.[123]

When the attorney asks questions, it would be helpful if the camera viewed both the attorney posing the questions and the testator watching the attorney. As discussed earlier, it is important that a detailed close-up of the will is taken and that the tape clearly show the actual execution and attestation of the will.

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120. *See* Symposium, *First Videotape Trial: Experiment In Ohio,* 21 DEF. L.J. 267, 277 (1972).

121. *See generally* Short, Florence & Marsh, *An Assessment of Videotape in the Criminal Courts,* 1975 B.Y.U. L. REV. 423, 433 (discussion of production techniques).

122. In the future, advances in technology may make the three-dimensional viewing of the testator feasible through the process of holography which is a lenseless photographic method using laser light to create three dimensional images.

123. Murray, *Videotaped Depositions: Putting Absent Witnesses in Court,* 68 A.B.A. J. 1402, 1405 (1982).

D. *Playback in the Courtroom*

When the videotape of the testator's will execution ceremony is played at trial, a sufficient number of monitors should be arranged so that the judge, the jury (if there is one), the attorneys, and the parties can both see and hear the recording clearly. Usually one monitor is used for the judge and two or three for the jury with others placed in strategic locations. It may also be possible to use a video projection system so that all participants view one large screen.[124]

IX. Benefits of Videotaping Will Execution Ceremony

A carefully prepared videotape of the will execution ceremony has many potential uses such as those discussed in Section II. The common thread binding these uses is that it allows an accurate portrayal of the will execution ceremony to be presented in court, thereby increasing the chance that the testator's dispositive scheme will be carried out as he intended. The advantages of videotapes over other methods of obtaining evidence of the will execution ceremony are discussed in this section.

A. *Accuracy*

The accuracy of a properly recorded and preserved videotape is indisputable. Everything that occurs in front of the camera is recorded visually and audibly and when the jury views the tape they see and hear the exact event in question, the will execution ceremony. A witness, on the other hand, gives only impressions of what he believes to have occurred during the execution of the testator's will. A witness cannot be expected to convey to the jury everything that transpired; memories fade and impressions are altered with the passage of time.[125] A videotape does not depend on the vagaries of the human memory for its accuracy and thus one commentator has stated that an "electronic recording presents the most credible wit-

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124. *See generally* 23 Am. Jur. Trials *The Use Of Videotape In Civil Trial Preparation & Discovery* § 88 (1976) (presenting all participants at trial with a clear view of a monitor is essential).

125. *See generally* McCrystal & Maschari, *Will Electronic Technology Take The Witness Stand?,* 11 U. Tol. L. Rev. 239, 249-52 (1980) (potential inaccuracies of human memory are what create inconsistencies, bias, prejudice and inaccuracy and slow administration of justice).

ness possible."[126] The videotape shows everything from the color of the testator's shirt to the inflection of his voice—it forgets nothing.[127]

The videotape is also more accurate than a stenographic recording since it does not depend on the human ear to hear correctly and then transcribe what was said. Additionally, the videotape may be replayed to allow for the preparation of an accurate, verbatim transcript of the will execution ceremony.[128]

B. *Better Evaluation of Testator*

Even if a witness to the will execution ceremony accurately reported the words and actions of the testator, the judge and jury would still be receiving the information second hand. A videotape allows the judge and jury to make a first hand evaluation of the ceremony.[129] A major advantage to videotaping the testator executing his will is that it accurately preserves the demeanor of the testator which may prove indispensible in showing that the requirements of a valid will were satisfied, such as, that the testator had testamentary capacity. The testator's actual voice with all its inflections, tones, and emphasis is preserved along with facial expressions, gestures, and other non-verbal acts. Thus not only does the videotape give the fact-finder evidence with which to make its decision but it provides access to a greater amount of evidence than is available through any other technique.[130]

C. *Decreased Chance of Will Contest Action*

The videotape of the will execution ceremony is bound to have a significant impact on the jury, especially if it shows the testator dis-

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126. *Id.* at 249.

127. *See generally* Kornblum, *Videotape in Civil Cases,* 24 HASTINGS L.J. 9, 10-15 (1972).

128. *See generally* 23 Am. Jur. TRIALS *Videotape In Civil Trial Preparation & Discovery* § 28 (1976) (there is "no question that an unaltered electronic recording is more accurate than a traditional stenographic recording").

129. *See generally* Hurley, *Taking Stock of Videotape Technology,* 17 DOCKET CALL 5, 6 (Fall 1982) (videotape could turn mundane testimony to dynamic testimony which would leave greater impact on jurors); Kornblum, *Videotape in Civil Cases,* 24 HASTINGS L.J. 9, 12-14 (1972) (videotape provides efficient, dynamic and accurate means of presenting testimony).

130. *See generally* Kornblum, *Videotape in Civil Cases,* 24 HASTINGS L.J. 9, 11-14 (1972) (removal of objections and technically inadmissible evidence from videotape prior to presentation in court allows more meaningful evidence to be placed before fact finder).

cussing the reasons he believes a will contest action may be brought.[131] The voice from the grave detailing the testator's last wishes is strong jury evidence. An attorney contemplating filing suit to contest a will for his client is less likely to go to court once counsel for the deceased's estate plays the videotape showing the testator's unequivocal assertions. The cost of videotaping the will execution would be more than offset by the expenses saved if a will contest action is avoided.

D. *Preparation of Evidence During Testator's Lifetime*

One of the major advantages of videotaping the execution of a will is that it may be used as part of a preventative estate plan. If a testator fears that his will is going to be contested after death, evidence can be prepared while the testator is still alive which may be used to defend such a contest action.

It is especially important to prepare this evidence if the testator is elderly or operating under some type of disability (e.g., blindness, illiteracy, sickness) which legally has not removed testamentary capacity but which may still give unhappy heirs the incentive to contest the will. For example, when establishing that the testator understands the disposition the will makes of his property, the natural objects of his bounty and the like, questions can be phrased so they may be answered with one word or by a gesture, such as raising a finger, nodding the head, or blinking an eye. This is particularly helpful if, for instance, the testator has suffered a stroke which has affected normal speech but has otherwise left him in normal mental condition.

E. *Elimination of Inadmissible Statements*

Prior to showing a videotape of a will execution to the jury, the judge and opposing counsel would view the tape to ascertain whether any statements or actions are inadmissible.[132] Objections

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131. *See generally* M. DOMBROFF, USING DEMONSTRATIVE EVIDENCE IN CIVIL TRIALS 242 (Litigation Course Handbook No. 202, 1982) (videotapes allow an accurate reflection of life valuable to a jury).

132. *See* Roy v. State, 608 S.W.2d 645, 650 n.6 (Tex. Crim. App. 1980) (videotapes "should first be viewed by the trial judge to determine relevancy before they are admitted"). Although admissibility may be decided in-chambers, the attorney using the videotape may still wish to go through the foundation elements in front of the jurors to impress them with the tape's accuracy.

may be carefully considered by the judge and, if need be, ruled on after consulting applicable precedents and authorities. This will reduce the chance for error since instantaneous rulings will not be needed. An added benefit is reduced trial delay since time-consuming objections and bench conferences will be reduced.

Although the making of inadmissible statements by the testator or others should be carefully guarded against during the taping, something inadmissible may possibly nonetheless be recorded. These inadmissible portions should be edited out of the tape before it is shown to the jury.[133]

Deleting objectional portions of the tape is a better approach than having the jury see and hear the inadmissible matter and then being told to disregard the material. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[134] Experimental studies have shown that what people are told to ignore, they tend to remember.[135] Thus, a pretrial view of the videotape would help prevent this problem.

F. *Videotape v. Film*

Videotape recordings are considerably different from the traditional sound motion picture.[136] A sound motion picture records a large number of individual pictures or frames on film which is then played at a high rate of speed to produce the illusion of motion.[137] With videotapes, however, there are no individual pictures or frames—"the image and the sound are both recorded in the form of electronic impulses on a magnetic tape. Like a sound tape [but unlike a sound motion picture] these videotapes require no processing

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133. *See* People v. Heading, 197 N.W.2d 325, 330 (Mich. Ct. App. 1972) (failure to edit out portion of videotaped lineup in criminal case held harmless error); State v. Thurman, 498 P.2d 697, 700 (N.M. Ct. App. 1972) (hearsay portions of videotape of incriminating evidence in criminal case stricken). Of course, the original tapes must always be preserved.

134. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

135. *See generally* Note, *On Camera—The Advent Of The Video Tape Trial,* 40 ALB. L. REV. 367, 373-74 (1976) (and studies cited therein).

136. *See generally* 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1294 (2d ed. 1969) (problems of admissibility of videotape evidence); Preiser & Hoffman, *'Day-in-the-Life' Films—Coming of Age in the Courtroom,* 17 TRIAL 41 (1981) (extensive discussion of film versus videotape debate).

137. *See generally* C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1294 (2d ed. 1969) (admissibility of videotape evidence).

and can be played back immediately."[138]

Although motion picture film could be used to record the will execution ceremony, this article has continually referred to the use of videotape. As mentioned earlier, no reported cases were located which dealt with motion picture will executions. It seems unlikely that such a case will arise because of the considerable advantages that videotape has over film in this type of situation.

1. Lower Cost

Costs of a film camera, projector, screen, film, and especially processing tend to inhibit the use of film recordings except in potentially large verdict situations.[139] The costs of videotape equipment has been declining rapidly in recent years[140] and considerable savings occur since videotapes need no costly processing.

2. Instant Replay

Videotapes do not need to be processed. There are no development procedures as there are with photographs and motion pictures. Rather than waiting days for movie film to be processed, a videotape need only be rewound.[141] Thus, once the act of recording is complete, even as to a particular segment, the operator may immediately play back what has been recorded. The results can then be analyzed to see whether all relevant words and actions were accurately recorded. If errors or defects appear, a new will execution ceremony could be conducted and recorded.

3. Greater Flexibility

In addition to the instant replay feature discussed above, videotapes are in other ways much more flexible than film. Video equipment and videotapes are now designed to be lightweight and compact. The camera and recording device may be operated and

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138. *Id.*

139. *See generally* Stewart, *Videotape: Use in Demonstrative Evidence,* 21 DEF. L.J. 253, 255 (1972).

140. *See generally Video Cassette Recorders,* 47 CONSUMER REPORTS 230 (1982).

141. *See generally* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 552 (1981) (use of videotape evidence under Federal Rules of Evidence 1001, 1002: videotape has advantage over film in that it may be replayed immediately after filming); 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery* § 95 (1976) (instant replay capability of videotape eliminates processing time).

transported by a single person and such equipment is readily available for rent as well as purchase. The videotapes themselves are protected by their own hard plastic case. They store easily, each being no larger than an average book. Although the tapes should be kept at an even temperature and humidity and need to be kept free from strong magnetic fields,[142] such conditions can easily be obtained and the tapes should thus stand up well over time.

In addition, videotape players have the ability to freeze the picture on the screen. This may be very useful in viewing the will execution ceremony. For example, the view of the will could be stopped so that the will may easily be read.

The videotapes are also convenient to use at trial. The courtroom need not be darkened as with motion pictures.[143] Only one screen is used for projecting motion pictures so all those viewing the movie must sit in such a position as to be able to see the screen. With videotape, however, many television monitors may be strategically placed throughout the courtroom so that a convenient and clear view is available to everyone present.[144]

G. *Psychological Benefits*

1. To Testator

During the videotaping of the will execution ceremony, a testator may also be given the opportunity to express his feelings for those who may survive him. Additionally, suggestions on how to handle the death of the testator may be made. Although some of this may be irrelevant in a will contest action, great psychological benefits may be obtained. The testator may be pleased to know he has made a permanent record of his emotions and that he has said those things that he never had the courage or the chance to say during life.[145]

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142. The ideal temperature would be 70°F plus or minus 5°F, and the ideal humidity would be 40% plus or minus 10%. *See* Short, Florence & Marsh, *An Assessment of Videotape in the Criminal Courts,* 1975 B.Y.U. L. REV. 423, 440.

143. *See* Dombroff, *Videotapes Enter the Picture as Demonstrative Evidence Tool,* NAT'L L.J., Nov. 23, 1981, at 24.

144. *See id.*; Preiser & Hoffman, *'Day-in-the-Life' Films—Coming of Age in the Courtroom,* 17 TRIAL 41 (1981).

145. *See* Dickerson, *Video-Taped Wills Offer Deceased the Last Word,* Miami Herald, Nov. 12, 1980 § EP (Magazine), at 3, col. 3; Hurley, *Taking Stock of Videotape Technology,* 17 DOCKET CALL 5, 5 (Fall 1982).

2. To Survivors of Testator

There may also be substantial psychological benefits to the survivors. They may replay the tape as often as they like and perhaps gain some comfort and support from the testator's words and appearance. A videotape view of the testator may provide a better rememberance than a final look at the testator before the lid of the coffin is closed.

3. To Jury

Jurors are familiar with television in their daily lives in contrast to the unfamiliarity of courtroom activities. There is an inherent trust in material viewed on a video screen. "People in general are comfortable with the medium and are accustomed to receiving, in most instances, reliable information from it. Accordingly, a major advantage of videotape resides in the psychological effect of the medium itself."[146] In addition, the presentation of videotaped evidence "focuses the juror's attention on the witness [testator] and enhances, rather than detracts from, his testimony."[147]

X. Possible Difficulties With Use of Videotaped Will Execution

Besides failing to lay a proper predicate, there are several obstacles which may hinder the admission of a videotape of the will execution ceremony. This section details some of the possible objections that may be raised when a videotape of the will execution is offered into evidence. A person contemplating using this technique needs to be aware of these possible difficulties and take steps prior to and during the taping to reduce or eliminate them.

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146. Dombroff, *Videotapes Enter the Picture as Demonstrative Evidence Tool,* NAT'L L.J., Nov. 23, 1981, at 24.

147. Kornblum, *Videotape in Civil Cases,* 24 HASTINGS L.J. 9, 14 (1972); *see, e.g.,* Murray, *Use Of Videotape In The Preparation And Trial Of Lawsuits,* 11 FORUM 1152, 1157 (1976) (jurors interviewed have indicated preference for videotaped testimony); Miller, Bender, Boster, Florence, Fontes, Hocking, & Nicholson, *The Effects of Videotape Testimony in Jury Trials: Studies On Juror Decision Making, Information Retention, And Emotional Arousal,* B.Y.U. L. REV. 331, 371 (studies indicated that jurors watching videotape testimony retained more trial-related information than jurors watching live testimony); Note, *On Camera—The Advent Of The Videotape Trial,* 40 ALB. L. REV. 367, 381-87 (1976) (studies indicate jurors reactions to videotape trials mixed).

A. *Hearsay*

1. The Videotape Recording Itself

The claim may be advanced by the side opposing the admission of a videotape of the will execution ceremony that the recording itself is hearsay since it is an unsworn mechanical witness which is not subject to cross-examination.[148] This argument is usually rejected since the risks of hearsay testimony such as inaccurate perception, faulty memory, narration, and insincerity[149] are reduced or avoided by the foundation which must first be laid.

2. Contents of Videotape

It is possible that some of the statements recorded on the videotape of the will execution ceremony may be deemed inadmissible as hearsay. This should not lead to the exclusion of the entire tape since the inadmissible portions could be edited before being shown to the jury. As a technical consideration, counsel should keep the original tape intact and only do editing on a copy so that any portions taken out may be put back into the tape if the need arises or the court so orders.

In meeting the hearsay objection it is helpful to look at the analogous situation found in *Grimes v. Employers Mutual Liability Insurance Co. of Wisconsin*[150] where a day-in-the-life videotape was held admissible under the exception to the hearsay rule provided for in Federal Rule of Evidence 803(24). Admissibility was granted because the film was "more probative of the material issues of pain and suffering and loss of enjoyment of life than any other evidence which the plaintiff could produce through reasonable efforts."[151] It would follow that a videotape of the testator stating his desires for the distribution of his property is the most authoritative evidence available in determining what the testator actually intended.

B. *Unfair Prejudice*

Relevant evidence may still be excluded under the common

148. *See* State v. Simon, 174 A. 867, 867 (N.J. Sup. Ct. 1934) (audio recordings), *aff'd*, 178 A. 728 (N.J. 1934).

149. *See generally* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.1 (1981).

150. 73 F.R.D. 607 (D. Alaska 1977).

151. *Id.* at 611.

law[152] and the Federal Rules of Evidence[153] (and evidence rules based thereon) if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or risk of misleading the jury. Particular uses of videotape recordings may have a persuasive and dramatic impact on the jury.[154] Videotapes are often used to show the extent and severity of the plaintiff's pain and suffering in personal injury suits.[155] Admissibility depends on the accuracy of the depiction and the professionalism of the production.[156]

In *Johnson v. William C. Ellis & Sons Iron Works, Inc.*,[157] the court refused to allow the jury to view a motion picture which showed the operation of a cotton compress, the type of machine that had fatally injured the plaintiff. The court held that the prejudicial effects outweighed its probative value as the film only showed the part of the machine that killed the plaintiff, not the whole machine.[158] It would be important, therefore, for the testator's attorney to make sure that objectivity is maintained throughout the videotaping process and to allocate sufficient on-camera time for each aspect of the will execution. Additionally, courts often refuse to admit videotaped evidence if its admission would destroy the objectivity of the jury.[159] When motion pictures or videotapes are excluded,

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152. *See generally* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972) (relevant evidence not admissible under certain circumstances).

153. *See* FED. R. EVID. 403.

154. In United States v. Murphy, 642 F.2d 699 (2d Cir. 1980), the jury probably intently watched videotapes showing United States Congressmen taking bribes from federal agents posing as wealthy Arabs during the ABSCAM sting operation. *See generally* United States v. Knohl, 379 F.2d 427, 440 (2d Cir.) (sound recordings), *cert. denied,* 389 U.S. 973 (1967); Thomas v. C. G. Tate Constr. Co., 465 F. Supp. 566, 571 (D. S.C. 1979) (videotape of a plaintiff moaning and grimacing in extreme pain during physical therapy session excluded since such evidence was unfairly prejudicial and other means could be used to show his suffering).

155. *See* Apache Ready Mix Co. v. Creed, 653 S.W.2d 79, 84 (Tex. App.—San Antonio 1983, no writ) (videotape of rehabilitation treatments and extent of physical and mental infirmity admissible when taped accurately and correctly depicts people and scene shown); M. DOMBROFF, USING DEMONSTRATIVE EVIDENCE IN CIVIL TRIALS 231 (Litigation Course Handbook No. 202, 1982).

156. *See* Haddad v. Kuriger, 437 S.W.2d 524, 525-26 (Ky. 1968) (inadmissible because photograph presented distorted perspective).

157. 604 F.2d 950 (5th Cir. 1979).

158. *See id.* at 958.

159. *See* Thomas v. C. G. Tate Constr. Co., 465 F. Supp. 566, 571 (D. S.C. 1979) (videotape of burn victim undergoing painful physical therapy would destroy jury's objec-

it is generally not because of the type of evidence being offered but because the attorney failed to meet the basic rules of admissibility applicable for that type of evidence.[160]

The voice of the testator from the grave is bound to impress the jury.[161] Merely because such evidence is prejudicial as well as highly probative, however, is no reason to exclude it unless there is something "unfair" about it.[162] Below are a few of the potential "unfair" aspects of a videotape of the will execution ceremony.

1. Staged

A will contestant fearing the detrimental introduction of videotaped evidence of the testator executing the will may claim that the probative value of testator's self-serving statements is outweighed by the fact that the evidence was staged or posed. This objection, however, is not unique to videotape evidence.[163] The mere statements of a witness can be rehearsed many times before they are finally given under oath on the stand.[164] But a witness in court is subject to cross-examination while a videotape and its principal (the testator) cannot be cross-examined. The event being recorded, however, is a staged event in the first place, unlike a reenactment or a demonstration, and thus this objection should be of little effect. Further, there is no chance to cross-examine a will when it comes to court as a mere writing.

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tivity and unfairly prejudice the average person; "no amount of testimony . . . could possibly offset the dramatic effect of the audio-video tape in question").

160. *See, e.g.,* Finn v. Wood, 178 F.2d 583, 584 (2d Cir. 1950) (film excluded which did not throw light on any disputed issue in case); De Camp v. United States, 10 F.2d 984, 984-85 (D.C. Cir. 1926) (insufficient proof of reliability and exclusion was discretionary); Pandolfo v. United States, 286 F. 8, 16 (7th Cir.), (insufficient proof of reliability and motion pictures were cumulative; exclusion within discretion of trial judge), *cert. denied,* 261 U.S. 621 (1922).

161. *See* State v. Smith, 540 P.2d 424, 431-32 (Wash. 1975) (jury impressed by audio recording of victim being murdered).

162. *See generally* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 403.1 (1981).

163. *See* Culpepper v. Volkswagon of America, Inc., 109 Cal. Rptr. 110, 117-18 (Ct. App. 1973) (staged demonstration of rollover tendencies of automobile recorded on film admissible).

164. Woodshedding is a technique every competent trial lawyer attempts to make a practice. *See generally* R. KEETON, TRIAL TACTICS AND METHODS 30-42 (2d ed. 1973) (thorough preparation of prospective witness "is not only entirely proper, but is essential to fulfilling your duty to present your client's case in the most persuasive fashion").

2. Distortion

Videotape cameras may be used so that the image recorded is misleading or distorted.[165] This distortion may be accidental or intentional. A videotape may tend to make a testator look "rougher" than he would in person; scars and blemishes may be accented or shadows may be created under the eyes.[166] On the other hand, the distortion may be intentional. For example, the camera could avoid showing some of the testator's traits which would negatively reflect on testamentary capacity or could show events from unusual camera angles. Light can be filtered to create either a gloomy or an upbeat environment and various lighting gels can be used to highlight certain colors.[167]

The best way to avoid such difficulties is to have the ceremony presented as it would be viewed by a person actually there. Additionally, it may be possible to obtain testimony from someone present who can substantiate the correctness of the recording. Photographs showing the position of the camera, lights, participants, and the like would also help ensure accuracy and authenticity.[168]

C. *Poor Appearance of Testator*

Although a situation may otherwise seem ripe for the use of a videotaped will execution, the testator's attorney may be reluctant to expose the testator to the jury. The attorney may fear that a jury would think the testator to be incompetent or be somehow biased against the testator because of his outward appearance. Annoying habits, age, race, sex, disfigurements, and the like may have a negative impact on certain jurors. "The videotape camera may have the tendency to pick out and magnify unpleasant mannerisms."[169]

Since most facts concerning the testator would come out during the will contest action anyway, this problem should not be a fre-

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165. *See* Preiser & Hoffman, *'Day-in-the-Life' Films—Coming of Age in the Courtroom,* 17 TRIAL 26 (1981). *See generally* 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery* § 100 (1976).

166. *See* Hendricks v. Swenson, 456 F.2d 503, 508 (8th Cir. 1972) (Heavey, J., dissenting). *See generally* Note, *Evidence—Admission Of Video Tape,* 38 MO. L. REV. 111, 116 (1973).

167. *See* Preiser & Hoffman, *'Day-in-the-Life' Films—Coming of Age in the Courtroom,* 17 TRIAL 26 (1982).

168. *Id.*

169. Hendricks v. Swenson, 456 F.2d 503, 508 (8th Cir. 1972) (Heavey, J., dissenting).

quent concern. The jurors would be able to form their own opinions after viewing the videotape, rather than relying on the impressions of someone else. Of course, if the fear of bias against the testator is justified, the procedure should not be used.

D. *Cumulative*

The common law[170] and the Federal Rules[171] (and evidence rules based thereon) also prohibit the introduction of relevant evidence when its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. A dissatisfied heir may make the claim that the witnesses to the will are sufficient and that there is no need to "waste" the court's time with a videotape. This argument is flawed since the videotape is more accurate and reliable than the memories of the witnesses. Moreover, it may be the best evidence and thus the trier of fact should take advantage of scientific aids and have such important evidence readily available to it.[172]

In *Grimes v. Employers Mutual Liability Insurance Co. of Wisconsin*,[173] the court held that a film showing a day-in-the-life of the insured plaintiff was not cumulative but merely evidence which supplemented the medical testimony by showing the extent of the plaintiff's pain.[174] Following this reasoning, a videotape of the will execution is not cumulative but rather may supplement both the testimony of the witnesses and the will document itself.

E. *Alteration*

1. Accidental

Critics of the use of videotape often raise the issue of the potential

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170. *See generally* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972) (if probative worth of material evidence is overbalanced by countervailing considerations it should be excluded).

171. *See* FED. R. EVID. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time. Rule 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Id.

172. *See* People v. Hayes, 21 Cal. App. 2d 320, 71 P.2d 321, 323 (Dist. Ct. App. 1937).

173. 73 F.R.D. 607 (D. Alaska 1977).

174. *See id.* at 610.

danger of accidental erasure or alteration.[175] This danger may be eliminated if proper caution is exercised. Videotape is composed of various substances that are magnetically arranged into patterns on the tape. If the tape is exposed to a strong magnetic field the contents of the tape can be damaged or lost completely.[176] Thus, proper storage of the tape is required to avoid subjecting the tape to conditions or people who may cause accidental erasure. Additionally, a small tab may be removed from the back of most modern video cassette tapes which will prevent accidental erasure by making it impossible to depress the record button should the tape inadvertently find itself back in a videorecorder. If the tape is accidently rendered unusable, the situation is no worse than if no tape had been made and thus nothing will have been lost by using the videotape procedure, except for the minimal cost to the testator.

2. Intentional

There is always the possibility that the videotape will be tampered with. "Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted, or rearranged. Yet, if the editing is skillful, such modifications can rarely, if ever, be detected."[177] The chance for such alteration may be minimized, however, if appropriate steps are taken.

Careful safekeeping and a detailed chain of custody of the videotape can assist in establishing that it has not been altered. Use of a safe deposit box with its entry records may be helpful in this regard. The placing of a digital clock where it will always be in the camera's field of view or the use of a time-date generator will also reduce or eliminate claims that the tape was spliced, erased, or otherwise altered.

F. *Camera Operator Bias*

Another concern with the use of videotape evidence of the will

175. *See generally* 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery* § 30 (1970).

176. *See id.* at § 77; Note, *Evidence—Admission Of Video Tape,* 38 MO. L. REV. 111, 118 (1973).

177. United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976) (discussing sound recordings). *See generally* 17 Am. Jur. PROOF OF FACTS *Tape Recordings as Evidence* §§ 14-24 (1966) (discussion of intentional alteration of audio tape).

execution ceremony is that the camera operator may use his skills to depict the testator in a particularly favorable or unfavorable light. Camera movements can affect the recording by increasing or decreasing the attention the viewer will give to what is going on. "For example, a tight close-up shot of testator's hands may overemphasize his apparent nervousness or calm."[178]

This potential problem should not be too significant since one of the required foundation elements is to show that the recording truly and correctly depicts the events and persons shown. As the technique gains in popularity, courts, legislatures, and bar associations may develop guidelines for videotape will executions to minimize the effects of possible camera operator bias.[179] In addition, an independent expert could examine the equipment used, the setting where the recording took place, the actual videotape and the like, and testify whether he or she believes the camera operator substantially affected the appearance of the will execution ceremony.

G. *Mechanical Failure*

If any of the videotape equipment should malfunction during the recording of the will execution, substantial wasted effort would result. Some malfunctions may not be noticed until the tape is played[180] so that the entire ceremony would have to be redone if a videorecording was still desired. Some of these problems can be avoided if the videorecorder is sufficiently sophisticated so that it permits the direct monitoring of what is being recorded.[181] Another solution would be to record the ceremony simultaneously on two or more recorders but since the danger of total equipment failure is small, especially if the equipment is well maintained, this elaborate and costly procedure seems unwarranted.[182] If a backup system is desired, an audio recorder could be used. Then, if the video system failed, at least the audio portion would be available and may be useful even though demeanor evidence, view of the will, signing and

178. *See* Benowitz, *Legal Applications of Videotape,* 48 FLA. B.J. 86, 88 (1974).

179. *See* Miller & Fontes, *Trial by Videotape,* PSYCHOLOGY TODAY 92, 98 (May 1979); *see also* 23 Am. Jur. TRIALS *The Use Of Videotape In Civil Trial Preparation & Discovery* § 31 (1976).

180. *See generally* 23 Am. Jur. TRIALS *The Use Of Videotape in Civil Trials Preparation & Discovery* § 32 (1976).

181. *See id.*

182. *See id.*

witnessing, and the like would be lost.[183]

H. *Codicils Should Be Videotaped*

If the testator desires to make changes in his will which was originally videotaped, the codicil to the will should also be taped since it will be important to show all the elements of testamentary capacity and intent at the time the codicil is executed. In situations where all the testator wants to do is to change, for example, the beneficiary of a small portion of the estate, the problem is not as pressing. If he desires to make a significant change, a new and complete videotaped will execution procedure is needed. Thus, to obtain the advantages of this procedure, subsequent changes to the will should be comprehensively videotaped. Although this does result in some limited flexibility on the testator's part, it will better assure that the changes to the will are carried out.

XI. THOUGHT FOR THE FUTURE: USING THE VIDEOTAPE OF WILL EXECUTION AS THE WILL ITSELF

In the past few decades society has become more and more technologically oriented, the result being that many transactions which were formerly done and/or preserved on paper are now routinely done electronically. Electronic storage of information has proliferated in many areas including the legal profession. Many law offices often keep client account records on computer and generate letters, contracts, trusts, wills, and other documents from computer memory banks. Legal research aids such as LEXIS and WESTLAW have also gained in popularity.

This growth of technology may logically point to the use of a videotape as the will itself rather than merely as evidence of testamentary capacity, testamentary intent, and the like. This section explores the potential of using a videotape as the will itself and the adaptation of established law to that use.

A. *Requirement That Will Be in Writing*

Originally in England both the ecclesiastical law and the common

183. *See id.*

law recognized wills made by oral declaration.[184] This was a sensible arrangement at a time when only few persons could read and write. It was not until the passage of the English Statute of Wills[185] that devises of real property were required to be in writing. Real property that was devisable under local custom, however, could still be devised orally as could personal property.[186]

As learning progressed and literacy became commonplace, the necessity for oral wills lessened. Nuncupative wills fell into disfavor as a result of the fraudulent practices which developed from their use.[187] Due to these frauds and perjuries, the English Statute of Frauds was enacted.[188] This statute and subsequent revisions thereof have done away with practically all oral testamentary dispositions of property. This has carried over into modern times where all wills must be in writing except in some cases where the testator was in extremis or in last sickness or in cases of soldiers' and seamen's wills.[189]

B. *Definition of Writing*

The term "writing" has been defined in many different ways by the courts and legislatures.[190] The definition of "writing" also varies depending on the context.[191] One typical definition has been

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184. *See In re* Dreyfus's Estate, 175 Cal. 417, 417, 165 P. 941, 941 (1917); Irwin v. Rogers, 157 P. 690, 691 (Wash. 1916).

185. 32 Hen. VIII, ch. 3. *See generally* 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.2 (3d ed. 1961) (prior to Wills Act a freehold estate in land could not be devised).

186. *See generally* 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.2 (3d ed. 1961) ("Wills Act had no application to lands devisable by local custom").

187. *See* Irwin v. Rogers, 157 P. 690, 691-92 (Wash. 1916).

188. 29 Car. II, ch. 3. *See generally* 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS §§ 19.2-19.3 (3d ed. 1961).

189. *See In re* Dreyfus's Estate, 175 Cal. 417, 165 P. 941, 941 (1917). *See generally* 2 W. BOWE & D. PARKER, PAGE ON THE LAWS OF WILLS § 19.5 (3d ed. 1961); Bordwell, *The Statute Law Of Wills,* 14 IOWA L. REV. 1, 10 (1928).

190. *See, e.g.,* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854 (5th Cir. 1979) ("motion pictures are unquestionably 'writings' under the Copyright Act"); Pace v. Hickey, 370 S.W.2d 66, 67 (Ark. 1963) (use of printed sticker affixed to ballot constitutes "writing under statute authorizing write-in votes); Spencer-O'Neill House, Inc. v. Denbeck, 243 N.W.2d 767, 769 (Neb. 1976) (typewriting constitutes "writing" within contemplation of statutory law governing documents with typed and handwritten portions).

191. *See, e.g.,* Alpers v. United States, 175 F.2d 137, 138-39 (9th Cir. 1949) (obscenity), *rev'd,* 338 U.S. 680 (1950); People v. Marcus, 107 Cal. Rptr. 264, 265-66, 31 C.A.3d 367 (1973) (best evidence rule); People v. Fury, 279 N.Y. 433, 433, 18 N.E.2d 650, 650 (1939)

adopted by all states in the Uniform Commercial Code. This representative definition includes within the term "printing, typewriting or any other intentional reduction to tangible form."[192]

The major obstacle in trying to fit a videotape within this type of definition stems from the deep-seated historical use of the word "writing"as referring to something which can be read by the human eye.[193] A videotape, obviously, cannot be "read" since it needs the aid of a videotape playback unit and a video monitor to be understandable although it is in tangible form.

There appears to be two approaches that the courts or legislatures could take in allowing a videotape to act as the will itself. First, the formal requirements of a valid will could be altered to include videotaped wills, or second, the definition of "writing" could be expanded to include videotaped recordings. Although there have yet to be any steps to change the requisites of a will in this manner, some jurisdictions have expanded the types of things encompassed by the term "writing."

The Uniform Rules of Evidence and the Federal Rules of Evidence have expanded the term writing to include "letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."[194] Although it could be argued that a videotape fits within this definition since tapes are magnetic impulses which compile data, such an argument is unlikely to succeed since the rules specifically include videotapes within the separate definition of "photographs."[195] Thus, a still further broadening of the scope of the word "writing" is required.

(counterfeiting federal reserve bank notes). Note that the Uniform Probate Code does not contain a definition of "writing."

192. U.C.C. § 1-201(46) (1977). Note that the Texas Code Construction Act defines the term "written" to include "any representation of words, letters, symbols, or figures." TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 1.04(11) (Vernon Supp. 1982-1983). No cases were located which construed this definition.

193. *See* Clason v. Bailey, 14 Johns. 484 (N.Y. 1817); 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.6 (3d ed. 1961).

194. UNIF. R. EVID. 1001(1); FED. R. EVID. 1001(1) (varies from Uniform Rule only in that word "sounds" is omitted).

195. *See* UNIF. R. EVID. 1001(2); FED. R. EVID. 1001(2). Note that at least two states that have adopted similar rules have omitted the reference to videotapes: NEV. REV. STAT. §§ 52.185—52.225 (1973); WIS. STAT. ANN. § 910.01 (West 1975).

Such a broadening has occurred in several jurisdictions. For example, the California Evidence Code defines a writing as "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."[196] It is clear that a videotape is a writing under this expansive definition.[197] Some other jurisdictions have already impliedly indicated they would deem videotapes to be writings by holding audio tapes[198] or motion pictures[199] to be writings. Although none of the cases located involved a will contest action, some were in criminal settings where the necessity for accuracy is greater than in a will situation.

C. *Videotaped Wills Satisfy Policies Behind Writing Requirement*

A more important consideration than fitting a videotape within the definition of a writing is satisfaction of the policy behind requiring a will to be a written document with symbols visible to the eye.

> The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others, after he is dead, to change or add to his will or to show that he intended something not set out in, or different from, that set out in his will.[200]

A videotape is much more difficult to alter than a written document which can be fairly easily "touched-up." Thus, a videotape affords greater protection to a testator's final requests. Not only are the testator's words available for examination by the trier of fact, but so too are his actions and appearance. This additional evidence can corroborate a testator's last wishes and his capacity to make them in ways a mere written will cannot.

If it is accepted that videotaped wills satisfy the logic behind the writing requirement, then the courts, or preferably the legislatures,

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196. CAL. EVID. CODE § 250 (Derring 1966).

197. *See* People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413, 420 (1974) (videotape of main prosecution witnesses' preliminary hearing testimony deemed a "writing").

198. *See* People v. Purify, 253 N.E.2d 437, 441 (Ill. 1969) (audio recording of defendant's confession); State v. Beach, 231 N.W.2d 75, 78-79 (Minn. 1975) (incriminating audio tapes of accused).

199. *See* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854 (5th Cir. 1979) (motion picture as writing under Copyright Act).

200. Huffman v. Huffman, 161 Tex. 267, 273, 339 S.W.2d 885, 889 (1960).

need to make specific provisions for them.[201] This will be necessary since even though a videotape may be deemed to satisfy the writing requirement, difficulties will continue to exist because of the other elements of will execution such as the signatures of the testator and, if required, signatures of the attesting witnesses.[202] These problems arise partly because the concept of videotape was far beyond the imaginations of those who so long ago formulated the requirements of a valid will that are still in use today.

The legal profession has often moved slowly in adopting new technologies. Scriveners were used until 300 years after the development of the Gutenberg flatbed press.[203] Videotape and its related developments can add significantly to the successful implementation of a person's testamentary desires. The law should move forward to gain maximum benefit from these intent-effectuating techniques.[204]

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201. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 63 (2d ed. 1953); Miller & Fontes, *Trial by Videotape,* PSYCHOLOGY TODAY 92, 98 (May 1979). Some jurisdictions have already formulated detailed rules and guidelines for the use of videotape in other contexts. *See* OHIO SUPERINTENDENCE RULE 12(A) (videotape depositions); OHIO SUPERINTENDENCE RULE 12(B) (videotape trials). No state has yet enacted the Uniform Audio-Visual Deposition Act.

202. *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 63 (2d ed. 1953).

203. *See* Salvan, *Videotape for the Legal Community,* 59 JUDICATURE 222, 229 (1975).

204. *See* People v. Hayes, 21 Cal. App. 2d 320, 322, 71 P.2d 321, 322-23 (1937) (in reference to motion pictures, the court stated that the courts should "avail themselves of each and every aid of science for the purpose of ascertaining the truth").