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# ARTICLES

## INDIANA'S NEW VIDEOTAPED WILLS STATUTE: LAUNCHING PROBATE INTO THE 21st CENTURY

WILLIAM R. BUCKLEY\*

The use of a tape recording or other type of voice print as a testamentary instrument is a decision for the legislature to make. [The courts] will not enlarge, stretch, expand or extend the [state] will statute to include a testamentary device not falling within the express provisions of the statute.<sup>1</sup>

American courts have long exercised considerable caution in statutory interpretation to avoid broadening the scope of statutes beyond the distinct declarations of the legislature. The judiciary will not often embrace innovative concepts until a new proposal becomes law. This is perhaps the primary reason why videotape has rarely been utilized in the preparation and execution of wills. A videotape of a testator reciting a will cannot be admitted as a testamentary instrument, since the written will appears entrenched in virtually every jurisdiction.<sup>2</sup> Thus, most states do not even authorize video or audio recordings to document the proper execution of a will. Indiana, however, is now the pioneering exception.

In 1985 the Indiana General Assembly enacted House Enrolled Act 1913,<sup>3</sup> which specifically allows videotape to be admitted during probate to document that a will was executed according to statutory

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1. *In re Estate of Reed*, 672 P.2d 829, 833 (Wyo. 1983).

2. Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 51-52 (1983); Buckley & Buckley, *Videotaped Wills*, 89 CASE & COM. 3, 4 (Nov.-Dec. 1984) [hereinafter cited as *Videotaped Wills*]; Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271, 273-74 (1984) [hereinafter cited as Buckley & Buckley].

3. Act of April 13, 1985, House Enrolled Act No. 1913, Pub. L. No. 273-1985, 104th Gen. Ass., 1st Sess., codified at IND. CODE § 29-1-5-3(d) (Supp. 1985). Representative Sheila J. Klinker (Lafayette) introduced the resolution. The House co-sponsors were Representative Dennis T. Avery (Evansville) and Representative John J. Thomas (Brazil). The Senate co-sponsors were Senator Michael E. Gery (West Lafayette), Senator Joseph W. Harrison (Attica), and Senator Gregory D. Server (Evansville). The proposal passed in the House by a vote of 79-1 on March 4, 1985. The Senate approved the measure by a tally of 48-0 on March 28, 1985.

mandates. This article will review the new legislation and consider its probable consequences in estate practice. The potential future applications of videotape in probate proceedings will be posed, and suggestions offered as to how practitioners might incorporate videotape into a firm's estate planning.

#### A HISTORICAL VIEW OF VIDEOTAPE

Videotape<sup>4</sup> was perfected in 1956 by the Ampex Corporation and became increasingly more available for public use during the 1960's.<sup>5</sup> Not until the middle 1970's, however, did the general public gain affordable access to the medium. Within the past ten years the market for videocassette recorders (VCR's) has exploded. It has been primarily during this time period that videotape's role has expanded in the legal arena.<sup>6</sup> Unfortunately, probate has lagged noticeably behind in the adoption of this device. Although several commentators have suggested documenting wills and their executions with videotape,<sup>7</sup> the caselaw is barren of instances in which any magnetic media were submitted for such purposes.<sup>8</sup> By comparison, attorneys have been much more willing to embrace videotape to record will executions<sup>9</sup> than has

4. Audio and video images are magnetically bonded to videotape. This differs from chemically-treated negative film which relies upon light impressions. Videotape may be instantaneously viewed after recording, while most film must be processed into a positive image. C. SCOTT, PHOTOGRAPHIC EVIDENCE § 714 (2d ed. 1969); Merlo & Sorenson, *Video Tape: The Coming Courtroom Tool*, 7 TRIAL, Nov.-Dec. 1971, at 55, 57; Note, *Videotape Depositions: An Analysis of Use in Civil Cases*, 9 CUM. L. REV. 195, 201 (1978) [hereinafter cited as Note, *Videotape Depositions*]; Note, *Video Tape: It's [sic] Admissibility in Evidence and Other Uses*, 5 GA. ST. B.J. 393, 401 (1969).

5. Beyer, *supra* note 2, at 4-5; Salvan, *Videotape for the Legal Community*, 59 JUDICATURE 222, 222 (1975).

6. See Bermant, Chappell, Crockett, Jacobovitch, & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975 (1975) [hereinafter cited as *Juror Responses*].

7. See, e.g., 2A HENRY'S PROBATE LAW & PRACTICE 69 (J. Grimes & D. Falender 7th ed. Supp. 1984); Beyer, *supra* note 2, at 1-55; Buckley & Buckley, *supra* note 2, at 271-87; *Videotaped Wills*, *supra* note 2, at 3-6; McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 U. TOL. L. REV. 239, 249 (1980); Salvan, *supra* note 5, at 226; Nash, *A Videowill: Safe and Sure*, 70 A.B.A.J. 87-89 (Oct. 1984); Note, *Videotape As a Tool in the Florida Legal Process*, 5 NOVA L.J. 243, 248-49 (1981) [hereinafter cited as Note, *Videotape in Florida*]; *Getting It on Tape*, 90 TIME, Dec. 22, 1967, at 49; Buchanan & Bos, *The Lawyer as Producer*, Nat'l. L.J., May 23, 1983, at 14; Clark, *Video Wills Tell It Like It Is*, L.A. Daily J., Nov. 5, 1981, at 6, col. 2-3.

8. See, e.g., *In re Estate of Robertson*, 372 So. 2d 1138 (Fla. Dist. Ct. App. 1979), cert. denied, Robertson v. Gallagher, 383 So. 2d 1201 (Fla. 1980) (videotape); Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956) (audio recording); Hultquist v. Ring, 301 S.W.2d 303 (Tex. Civ. App. 1957) (audio recording); *In re Estate of Reed*, 672 P.2d 829 (Wyo. 1983) (audio recording); Beyer, *supra* note 2, at 18-19.

9. Beyer, *supra* note 2, at 22.

the judiciary. The absence of an enabling statute has been cited as the basis for rejecting magnetic recording for testamentary functions.<sup>10</sup>

Indiana courts have demonstrated a willingness to rely upon videotape as evidence of (1) defendants' statements<sup>11</sup> and confessions;<sup>12</sup> (2) line-ups;<sup>13</sup> and (3) law enforcement "sting" operations.<sup>14</sup> Indiana Trial Rules permit videotape to be used for recording depositions<sup>15</sup> and trial proceedings.<sup>16</sup> In view of this ever expanding acceptance, one might

10. *In re Estate of Reed*, 672 P.2d 829, 831-34 (Wyo. 1983). For an analysis of this case, see Note, *Probate—The Enforcement of Unwritten Wills. Estate of Reed*, 672 P.2d 829 (Wyo.), 20 LAND & WATER L. REV. 279 (1985).

11. See, e.g., *Riley v. State*, \_\_\_ Ind. \_\_\_, 441 N.E.2d 190 (1982); *Andrews v. State*, \_\_\_ Ind. \_\_\_, 441 N.E.2d 194 (1982).

12. See, e.g., *Smith v. State*, 272 Ind. 328, 397 N.E.2d 959 (1979); Cf. *Wall v. State*, \_\_\_ Ind. \_\_\_, 441 N.E.2d 682 (1982) (videotaped confession improperly admitted into evidence because police violated defendant's constitutional right to counsel during interrogation).

13. See, e.g., *Bruce v. State*, 268 Ind. 180, 375 N.E.2d 1042, cert. denied, 439 U.S. 988 (1978).

14. See, e.g., *Gross v. State*, \_\_\_ Ind. \_\_\_, 444 N.E.2d 296 (1983); *Williams v. State*, 178 Ind. App. 567, 383 N.E.2d 444 (1978).

15. IND. R. TR. P. 30(B)(4) (regarding non-stenographic recordation of depositions). Over half of the states have formulated rules similar to Indiana's, which is also comparable to FED. R. CIV. P. 30(b)(4). *Murray, Videotaped Depositions: Putting Absent Witnesses in Court*, 68 A.B.A.J. 1402, 1403 (1982). See also ALA. R. CIV. P. 30(b)(4); ARIZ. R. CIV. P. 30(b)(4); COLO. R. CIV. P. 30(b)(4); DEL. SUPER. CT. CIV. R. 30(b)(4); D.C. R. CIV. P. 30(b)(4); FLA. R. CIV. P. 1.310(b)(4); GA. CODE ANN. § 81A-130(b)(4) (1978); IDAHO R. CIV. P. 30(b)(4); IOWA R. CIV. P. 140(b)(4); KAN. STAT. ANN. § 60-230(b)(4) (1976); KY. CIV. R. 30.02(2)(b)(4) (1983); ME. R. CIV. P. 30(b)(4); MASS. CIV. R. 30(b)(4); MINN. R. CIV. P. 30.02(4); MISS. CODE ANN. § 13-1-230(b)(4) (Supp. 1983); MONT. R. CIV. P. 30(b)(4); N.D.R. CIV. P. 30(b)(4); VA. SUP. CT. R. 45(b)(4); WASH. CIV. R. 30(b)(4); WIS. STAT. ANN. § 804.05(2)(c) (1977); WYO. R.P. 30(b)(4). See also Note, *Videotape Depositions*, supra note 4, at 209 n.125.

16. See, e.g., IND. R. TR. P. 74(A) (recording of trial proceedings "by mechanical devices"). This rule frequently has been applied to audio recordings of trials. This procedure is not as extensive as the pre-recorded videotaped trials (PRVTT's) with which several states, including Ohio, California, New York, and Vermont, have experimented. Ohio pioneered this frontier in 1971. See generally *McCrystal & Young, Pre-Recorded Videotape Trials—An Ohio Innovation*, 39 BROOKLYN L. REV. 560 (1973); *McCrystal, Videotaped Trials: A Primer*, 61 JUDICATURE 250 (1978); *McCrystal, The Videotaped Trial Comes of Age*, 57 JUDICATURE 446 (1974). For an evaluation of videotaped trials, see *Doret, Trial by Videotape—Can Justice be Seen to be Done?*, 47 TEMP. L.Q. 228 (1974); Note, *Videotape in Florida*, supra note 7, at 251-60. For studies of juror responses to such trials and other psychological considerations, see *Juror Responses*, supra note 6, at 975-95; *Bermant & Jacobovitch, Fish Out of Water: A Brief Overview of Social and Psychological Concerns About Videotaped Trials*, 26 HASTINGS L.J. 999 (1975).

well ponder why videotape has not received a warmer reception when the courts don their probate robes.

This apparent contradiction stems from the restrictive evidentiary requirements within which estate litigation operates. In other fields of law many events and circumstances must be documented by a myriad of techniques so that the trier-of-fact may render an intelligent decision. If technological progress has improved the proof process, then these newer methods are gradually absorbed into the rules of evidence. With wills, as with any written instruments, it is *the writing itself* that bears much of the burden of proof. Judges regularly invoke the "four-corners" doctrine and exclude parole or extrinsic evidence establishing or supplementing facts which are clearly expressed upon the face of the written document.<sup>17</sup> Prior to the Videotaped Will Act, Indiana courts likely would have followed the Wyoming Supreme Court in renouncing magnetic media in probate,<sup>18</sup> since the written will must voice the testator's desires. Thus, there is little wonder why videotape and estate planning have been passing ships in the night.

#### THE NEW VIDEOTAPED WILLS STATUTE

House Enrolled Act 1913 states that, "subject to the applicable Indiana rules of trial procedure, a videotape may be admissible as evidence of the proper execution of a will."<sup>19</sup> The legislation also reiterates the Code's current execution requirements and acknowledgment provisions.<sup>20</sup>

As originally introduced by Representative Sheila J. Klinker of Lafayette, House Bill 1913 would have authorized videotape to record the execution and self-proof of the will. The original resolution would have established several content requirements that were subsequently

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17. See, e.g., *Brown v. Union Trust Co. of Greensburg*, 229 Ind. 404, 98 N.E.2d 901 (1951); *State ex rel. Emmert v. Union Trust Co. of Indianapolis*, 227 Ind. 571, 86 N.E.2d 450 (1949); *Grise v. Weiss*, 213 Ind. 3, 11 N.E.2d 146 (1937); *Forth v. Forth*, \_\_\_ Ind. App. \_\_\_, 409 N.E.2d 1107 (1980); *In re Estate of Saltzman*, 145 Ind. App. 488, 251 N.E.2d 595 (1969); *Bilger v. Trinity Evangelical & Reformed Church of Indianapolis*, 136 Ind. App. 320, 199 N.E.2d 855 (1964). See generally 29 INDIANA LAW ENCYCLOPEDIA *Wills* §§ 174, 193 (1960 & Supp. 1984). In the construction of wills, this principle has survived refinement by Indiana courts for nearly 150 years. See *Judy v. Williams*, 2 Ind. 449, 450-51 (1851).

18. *In re Estate of Reed*, 672 P.2d 829 (Wyo. 1983).

19. Act of April 13, 1985, House Enrolled Act No. 1913, Pub. L. No. 273-1985, 104th Gen. Ass., 1st Sess., *codified at* IND. CODE § 29-1-5-3(d) (Supp. 1985).

20. IND. CODE § 29-1-5-3(a)-(c) (Supp. 1985).

deleted by the House Judiciary Committee.<sup>21</sup> These limitations would have insisted that the videotaping be conducted in one continuous session, that the testator be filmed reciting the entire document, that the testator and witnesses "remain in the picture during the entire session of publishing and executing the will," and that the witnesses read aloud the self-proving language of the instrument.<sup>22</sup>

The elimination of these constraints extensively broadened the variety of approaches one might apply in recording execution ceremonies with videotape. However, the initial proposal's language would have served to incorporate the will, as spoken by the testator, into the production, and this in turn would have provided a compelling and probative corroboration of the written counterpart. The "continuous session" rule would have provided superior protection against videotape tampering, since any erasure or "dubbing over" of a single uninterrupted filming would obviously disrupt the recorded sequences. Under the final version of the Act, one could record in disjointed segments which, when viewed collectively, would display visible starts and stops. Witnesses might wander in and out of the camera's field of vision. Such results could undermine the integrity of the videotape.

The early version of the bill would also have guided courts in deciding whether videotape was appropriately utilized under the law, and therefore, whether it should be allowed into evidence. The vagueness of the Act as enacted could result in numerous appeals "to fill the gaps" and judicially establish the standards for videotape admissibility under the statute. Also, the Act in its present form could preclude the introduction of videotape into evidence if more than the execution ceremony were filmed. For example, if the testator recited the entire will onto videotape, in addition to the execution, and counsel introduced this to demonstrate proper execution, the court might exclude the recording altogether because the new statute does not expressly authorize videotape to record more than the execution itself. The testator's soliloquy would therefore be rendered extraneous surplusage fatal to the offered proof.

Such an interpretation of the Act is unduly restrictive. The statute does not confine the recording to any particular events during the execution process. "A videotape may be admissible."<sup>23</sup> Conse-

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21. House Judiciary Committee, Report on House Bill No. 1913 (Feb. 26, 1985).

22. House Bill No. 1913 (1985) (original version).

23. Act of April 13, 1985, House Enrolled Act No. 1913, Pub. L. No. 273-1985, 104th Gen. Ass., 1st Sess., codified at IND. CODE § 29-1-5-3(d) (Supp. 1985) (emphasis added).

quently, *any* part or *all* of the will-making process may be filmed, including the testator reading the will, and the courts could still enter this evidence in the record to document satisfactory execution.

There are several advantages to the enacted version of the resolution. By expunging the specific filming precepts, the legislature greatly increased the flexibility with which lawyers may employ the medium in probate. This should encourage attorneys to use videotape experimentally with suitable clients. The following section will elaborate on the additional advantages videotape offers.

#### THE BENEFITS OF VIDEOTAPING WILLS AND EXECUTION CEREMONIES

Subject to the judge's sound discretion, recordation of the testator's presentation along with the execution ceremony could provide the court with valuable extrinsic evidence of testamentary intent and capacity,<sup>24</sup> as well as firmly establish the authenticity of the written will and signatures.<sup>25</sup> There could be little question as to the presence and proximity of the testator and the witnesses if the court could *see* the events occurring. With videotape a visual nexus would be fashioned between the testator and the written will. The testator's state of mind and desires at the time of execution would be permanently captured on videotape, enabling the tribunal to travel through time "to meet" with the decedent and share her aspirations. Numerous will contests could be summarily squelched with such supplemental proof, particularly if the writing were somewhat ambiguous or tentative. This would expedite estate administration and help to unclog seriously congested court dockets. Of course, courts might refuse to consider videotape beyond the clearly indicated statutory purpose—namely, to document "the proper execution of a will."<sup>26</sup> Strictly speaking, videotape under the Act may prove *only* correct execution. The written will still speaks for itself. However, entirely outside of the statute, the courts could accept additional videotaped events as extrinsic evidence in the same fashion as is presently permitted with other offers of proof.<sup>27</sup> In this way videotape would merely

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24. Beyer, *supra* note 2, at 6-7; Buckley & Buckley, *supra* note 2, at 278-80; *Videotaped Wills*, *supra* note 2, at 4.

25. Beyer, *supra* note 2, at 5, 7; Buckley & Buckley, *supra* note 2, at 274-75; *Videotaped Wills*, *supra* note 2, at 4.

26. Act of April 13, 1985, House Enrolled Act No. 1913, Pub. L. No. 273-1985, 104th Gen. Ass., 1st Sess., *codified at* IND. CODE 29-1-5-3(d) (Supp. 1985).

27. For instance, extrinsic evidence has been admitted: (1) to explain a latent ambiguity in the writing, *see, e.g., Hertford v. Harned*, 185 Ind. 213, 113 N.E. 727 (1916);

extend the courts' current queries when the will wobbles during litigious squabbling.

Videotaping the testator's recitation further fortifies the written will from the risk of physical manipulation. By matching paper varieties and type styles, one could replace portions of the written will, although the testator's initialing of each page provides some protection. Despite the tactical complexities of such tampering, writings remain vulnerable to this type of fraud. With a videotape of the testator reading the *true* will, any false implants would become amusingly conspicuous.

The videotape itself offers its own safeguards against outside interference. By using a video camera equipped with a time/date generator, the exact time sequence during which the will was recorded is directly displayed upon the videotape.<sup>28</sup> Usually the clock appears in the corner of the picture when replayed on a television. If one erases or records over the existing contents, this time flow would be mortally severed. Even without the time/date feature, erasing videotape destroys the continuity of the filmed series of events and is therefore readily detectible.<sup>29</sup>

Perhaps videotape might facilitate the court's investigations into fraud and undue influence in the making or execution of the will.<sup>30</sup> In the detection of fraud and undue influence, courts have had to

(2) to correct a mistake on the face of the will, *see, e.g.*, *Pocock v. Redinger*, 108 Ind. 573, 9 N.E. 473 (1886); (3) to elucidate circumstances surrounding the preparation of the will, *see, e.g.*, *McConnell v. Robbins*, 193 Ind. 359, 140 N.E. 59 (1923); (4) to clarify testamentary intent, *see, e.g.*, *Groves v. Culp*, 132 Ind. 186, 31 N.E. 569 (1892); *Martin v. Raff*, 114 Ind. App. 507, 52 N.E.2d 839 (1944); and (5) to prove undue influence or fraud, *see, e.g.*, *Davis v. Babb*, 190 Ind. 173, 125 N.E. 403 (1919); *Love v. Harris*, 127 Ind. App. 505, 143 N.E.2d 450 (1957); *McCartney v. Rex*, 127 Ind. App. 702, 145 N.E.2d 400 (1957). *See generally* 29 INDIANA LAW ENCYCLOPEDIA *Wills* §§ 85, 146, 193 (1960 & Supp. 1984). Videotape of the testator reading the will could be utilized for any of these purposes.

28. *Murray, supra note 15*, at 1405; *Nash, supra note 7*, at 89.

29. *Beyer, supra note 2*, at 26, 35-36, 49; *Buckley & Buckley, supra note 2*, at 280, 284; *Nash, supra note 7*, at 89; *Videotaped Wills, supra note 2*, at 4.

30. *Beyer, supra note 2*, at 7; *Buckley & Buckley, supra note 2*, at 279; *Nash, supra note 7*, at 88-89. To successfully challenge a will on these grounds, a person must have influenced the testator to such an extent that the testator's "free agency" is squelched such that the will expresses another individual's desires. *Crane v. Hensler*, 196 Ind. 341, 141 N.E. 51 (1925); *Hinshaw v. Hinshaw*, 134 Ind. App. 22, 182 N.E.2d 805 (1962). This consequence must occur at the time the will is executed. *Wiley v. Gordan*, 181 Ind. 252, 104 N.E. 500 (1914); *McCartney v. Rex*, 127 Ind. App. 702, 145 N.E.2d 400 (1957).



consult primarily circumstantial evidence to document the crimes.<sup>31</sup> Undue influence "is an intangible thing which only in the rarest instances is susceptible of what may be termed direct or positive proof."<sup>32</sup> Given this "behind-the-scenes" nature of undue influence, a videotape of the testator reciting the will and directing an execution ceremony could record significant clues as to the exercise of such pressures. Fraud in the execution would be unlikely if the testator were to read through and thus become familiar with the instrument before and during filming.

#### PRACTICE POINTERS

There are several approaches to videotaping execution ceremonies and wills, but some pervasive principles will facilitate the procedure. After the initial client consultation, the written will should be prepared per the lawyer's usual plan. Then a VCR, camera, cassettes, and related paraphernalia should be rented or, if owned by the firm, removed from mothballs. If the entire will is to be filmed, the testator should rehearse his soliloquy. Once his delivery has achieved the satisfactory polish, then the recording session should begin. If the execution ceremony alone is to be recorded, begin filming with the testator and witnesses situated with the written will, perhaps seated at a table or standing before a desk. The filming should be continuous. If a significant error occurs, reshoot the ceremony from the beginning. The VCR should not be stopped while recording so as not to disturb the fluidity of the images. After the will has been properly executed, the recording should terminate, and the video cassette should be prepared for safe storage with the written will. Separate, additional cassettes could be made by the testator for family and friends as keepsakes, if the client so desires.

Few law practices currently employ videotape on a routine basis. The frequency of use is directly dependent upon the volume of prospective video clients available to the firm. In many instances the client's circumstances will not justify the additional expenditures. Not all families erupt into vicious probate battles which span decades of spite and venom. Videotape's evidentiary security blanket might not be necessary in relatively docile estate proceedings. Nor may many

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31. *Davis v. Babb*, 190 Ind. 173, 125 N.E. 403 (1919); *Love v. Harris*, 127 Ind. App. 505, 143 N.E.2d 450 (1957); *McCartney v. Rex*, 127 Ind. App. 702, 145 N.E.2d 400 (1957); *Workman v. Workman*, 113 Ind. App. 245, 46 N.E.2d 718 (1943).

32. *Blackman v. Edsall*, 17 Colo. App. 429, 68 P. 790 (1902) (*quoted in Davis v. Babb*, 190 Ind. 173, 125 N.E. 403 (1919)).

customers wish to spend the additional legal fees for the service. Attorneys must evaluate their possible market for videotape use before leaping into the initial investment.

For those lawyers who are prepared to make the plunge, several important issues must first be resolved. Should the firm employ professional videotaping companies or attempt a solo project? Private operations tend to be more expensive,<sup>33</sup> although the final production is often much more polished. As with home movies, law office videotape productions can be riddled with amateurishness. Lighting, relative to the testator and witnesses, could be poorly positioned or applied. Background office noise could pollute the audio track and drown the crucial dialogue. Badly applied make-up can produce almost comical results. These deficiencies result from employee inexperience both with basic filming techniques and with the equipment.<sup>34</sup>

Fortunately, most cameras and recorders currently available are quite simple to operate, so technical complexity is no longer a substantial barrier to the "in-house" route.<sup>35</sup> With sufficient practice one can quickly develop satisfactory filming acumen.<sup>36</sup> Purely economic considerations dictate the "do-it-yourself" approach, since modern VCR's are becoming increasingly affordable each year. Equipment rental is frequently an attractive alternative to purchase. Perhaps office space limitations might compel a lawyer to consult a professional studio, but today's portable machinery and optical sensitivity to even ordinary office lighting should easily overcome size restrictions.

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33. Prices of videotaped depositions range from \$45 to \$300 per hour, including one camera, studio facilities, director, VCR, technician(s), and lighting. See Indiana Video Productions, Inc., Rate Card, Feb. 13, 1984 (letter to author); Jupiter Legal Video Services, Rate Card, March 13, 1984 (letter to author) [both sources hereinafter cited as Rate Cards]. See also Beyer, *supra* note 2, at 33 (\$90 to \$250 per hour average); McCrystal & Maschari, *PRVT: A Lifeline for the Jury System*, 19 TRIAL 70, 72 (March 1983) (\$185 average hourly rate in large metropolitan areas). "On-site recordation" anticipates additional costs, such as transportation and equipment set-up. One must also purchase the video cassettes. Rate Cards, *supra*.

34. Murray, *supra* note 15, at 1402; Doret, *supra* note 16, at 237.

35. Heller, Buchanan & Bos, *Using Videotape to Effectively Prepare and Present Your Case*, in LITIGATION AND ADMINISTRATIVE PRACTICE SERIES, VIDEO TECHNIQUES IN TRIAL AND PRETRIAL 7, 12 (F. Heller ed. 1983); Merlo & Sorenson, *supra* note 4, at 56.

36. See, e.g., Address by Alfred W. Buckley, Janet E. Buckley, and the author, DuPage County Bar Association, 1985 Probate Law Seminar, Wheaton, Illinois (Feb. 9, 1985). At this conference a sample videotaped will and execution ceremony were shown with illustrations of both acceptable and inadequate filming techniques. Bar Association members who later questioned the author were surprised at the high resolution and quality of the videotape. The excellent results of the filming session were unexpected, given the lack of professional expertise of the production crew.

When selecting video equipment, several features should be included. Most popular VCR's are available in Beta or VHS formats. They should be capable of recording at different speeds, since faster speeds can produce picture resolution superior to the slower, extended play features. The camera should have a viewfinder, a zoom lens, and a time/date generator.<sup>37</sup> It should include remote control and remote microphone capabilities. The recorder should also be comparably equipped. Most cameras have condensing microphones directly attached, but can be plugged into lapel or boom versions as well. Fixed table microphones can create an awkward result if the testator and witnesses are hunched around a single point.<sup>38</sup>

Newer video systems operate extremely well in ordinary indoor illumination since most lenses automatically adjust to bright or dark objects; however, supplemental lighting generally produces greater detail and definition of the recorded images.<sup>39</sup> Three spot or flood lights placed behind the camera at various elevations erase shadows and more equally illuminate the recording site and subjects.<sup>40</sup> Recording locations should be chosen based upon room size and color, existing lighting, acoustics, and isolation from extraneous sources of noise. Backgrounds should not be overly "busy" so as to avoid unwanted distractions.

#### THE FUTURE OF VIDEOTAPE IN PROBATE

Prior to the new law, courts almost certainly would have hesitated to accept videotaped evidence in probate under any circumstances. With the Act, judges have a legal structure upon which to rule on videotape admissibility. Attorneys may now engage this medium without fear that the recorded information will be instantly dispatched by the trial court.

Under the statute videotape will predominantly be utilized as additional documentation of compliance with statutory execution precepts. The Act was not intended to empower videotape to operate

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37. See *supra* notes 28-29 & accompanying text.

38. Beyer, *supra* note 2, at 35; Murray, *supra* note 15, at 1405.

39. See Doret, *supra* note 16, at 231; Galluzzo, *Bright Ideas on Correct Lighting, Video Today*, 31 HIGH FIDELITY, Musical America Ed., Feb. 1981, at A-6; Lachky, *How to Light for Video*, 89 POPULAR PHOTOGRAPHY, Aug. 1982, at 100, 186. Additional illumination assists the videotape camera in perceiving color signals and thus better reproduces acute images. Galluzzo, *supra*, at A-6; Lachky, *supra*, at 100, 186. Excessive lighting can be counterproductive, if glare or shadows consume the subjects. Galluzzo, *supra*, at A-8; Lachky, *supra*, at 186.

40. Lachky, *supra* note 39, at 186.

as a testamentary medium. Written wills cannot be replaced by videotaped counterparts. During hearings before a Subcommittee of the Senate Judiciary Committee, there was considerable concern that House Bill 1913 should not supplant the writing requirement.<sup>41</sup>

Conceivably videotape could operate as an oral will to render the writing obsolete. However, it is improbable that videotape would be applied as a nuncupative will. Such testaments may be made only if an individual is in "imminent peril of death," either because of illness or other calamity.<sup>42</sup> Nuncupative wills are valid only if the testator dies as a consequence of the impending peril, and they must be published before two disinterested witnesses and "reduced to writing by or under the direction of one of the witnesses within thirty days" thereafter.<sup>43</sup> Furthermore, such wills cannot revoke an existing written will but merely modify the writing to effectuate the oral version.<sup>44</sup> There is also an estate value restriction of \$1000 above which nuncupative wills cannot function, except for active military personnel during war time.<sup>45</sup> Given all of these qualifications, most videotaped wills would doubtlessly fail as nuncupative wills.

Perhaps the General Assembly might consider further amending the probate code to permit videotaped wills to operate *alone* as wills. Certainly precedents exist which analogize videotape with writings. For example, under the Federal Rules of Evidence, "'writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by . . . *photographing, magnetic impulse, mechanical or electronic recording.*"<sup>46</sup> The Uniform Rules of Evidence recite almost identical language.<sup>47</sup> Under California law a writing equals "every . . . means of recording upon any tangible thing any form of communication or representation."<sup>48</sup> Sister jurisdictions through caselaw have equated audio recordings and motion pictures with writings.<sup>49</sup>

41. Testimony of the author before the Senate Subcommittee on Civil Law, Senate Judiciary Committee, Hearings on House Bill No. 1913, March 14, 1985.

42. IND. CODE ANN. § 29-1-5-4(a) (Burns 1972).

43. *Id.* § 29-1-5-4(a)(1)-(2).

44. *Id.* § 29-1-5-4(c).

45. *Id.* § 29-1-5-4(b). Even this exception is limited to \$10,000 estates. *Id.*

46. FED. R. EVID. 1001(1) (emphasis added). However, videotape is specifically considered to be a photograph under the Federal Rules. *Id.* 1001(2).

47. See MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 70 n.22 (E. Cleary 2d ed. Supp. 1978).

48. CAL. EVID. CODE § 250 (Deering 1966) (cited in Beyer, *supra* note 2, at 54 n.196).

49. See *People v. Purify*, 43 Ill. 2d 351, 253 N.E.2d 437 (1969) (audio recording); *State v. Beach*, 304 Minn. 302, 231 N.W.2d 75 (1975) (audio recording); *Mitchell*

Videotape can communicate to the court an individual's wishes concerning the disposition of his property at least as well and perhaps better than can a written instrument. Since the purpose of probate statutes is to establish a structure through which a testator's desires may be determined and implemented,<sup>50</sup> videotape appears to provide an excellent medium to accomplish this quest.

Opponents of videotaped wills question the integrity of magnetic tape as an archival storage device. Videotape is susceptible to erasure by magnetic fields, whether intentional or accidental. It is also vulnerable to dust contamination, and fluctuations in humidity and temperature. Paper is not as frail. But these dangers can be reduced or eliminated with appropriate precautions. Storing video cassettes in non-metallic containers over two feet from magnetic fields or electrical sources should offer adequate insulation.<sup>51</sup> Storage environments should maintain a consistent, controlled temperature and humidity, as free of dust as practicable, within tolerable ranges of change.<sup>52</sup> The longevity of videotape over decades remains a question mark, but con-

Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, Bora v. Mitchell Bros. Film Group, 445 U.S. 917 (1980) (motion pictures) (all cases cited in Beyer, *supra* note 2, at 54 nn.198-99).

50. Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275 (1854).

51. Studies have demonstrated that there is no detectible level of erasure when a powerful magnetic source operates within three inches of a videotape. R. SARGENT, PRESERVING THE MOVING IMAGE 141 (1974) [hereinafter cited as THE MOVING IMAGE]; 3M Company Magnetic Audio/Video Products Division, The Handling and Storage of Magnetic Recording Tape, Retentivity 2 (Technical Publication No. M-VC-209 (761.5)II) (undated) [hereinafter cited as 3M Technical Publication]. "As long as the tape is kept about *half an inch or so* from any large magnetic field (such as a motor), there is no possibility that the tape will be erased. It takes a field of about 150 gauss to have any noticeable effect on a recording." J. Wheeler, How to Make Your Videotape Last for Decades—Or Centuries 2 (unpublished technical manuscript, Ampex Corporation, June 21, 1982) (emphasis added) [hereinafter cited as Wheeler]. "Protection of the tape from accidental erasure is of little concern . . . [I]t is unlikely that uncontained magnetic fields strong enough to cause erasure would be found in ordinary storage or shipping conditions." 3M Technical Publication, *supra* at 2. Modern videotape can more easily endure magnetic fields because of improvements over the past decade in the magnetic strength, or coercivity, of tape. Wheeler, *supra*, at 2.

52. NATIONAL CENTER FOR STATE COURTS, COURTS' EQUIPMENT ANALYSIS PROJECT, AUDIO/VIDEO TECHNOLOGY AND THE COURTS 43, 46 (1977) [hereinafter cited as AUDIO/VIDEO TECHNOLOGY]; C. BENSINGER, THE VIDEO GUIDE 75 (3d ed. 1982); THE MOVING IMAGE, *supra* note 51, at 139; Ampex Corporation Magnetic Tape Division, Care & Handling of Magnetic Tape 3 (Technical Publication No. T1361, Nov. 1982) [hereinafter cited as Ampex Technical Publication]; 3M Technical Publication, *supra* note 51, at 1-2. The video cassette container can be stored in a heat-sealed plastic bag to guard against dust, maintain the proper humidity, and preserve the integrity of the container's seal. See AUDIO/VIDEO TECHNOLOGY, *supra*, at 43; 3M Technical Publication, *supra* note 51, at 2. Videotape should be stored in a temperature and humidity range

tinuing technological advancements should enable videotape to remain extant indefinitely.<sup>53</sup> Perhaps the greatest threat to videotape use in probate is equipment obsolescence. Today's popular VCR's may be museum relics once the time arrives to replay a video will. Machines and instruction manuals may have to be retained for many years to guarantee playback.<sup>54</sup> Of course, as more sophisticated recording systems are developed, information could be transferred from the outdated medium onto its future replacements. This would almost certainly require statutory or judicial guidance to insure propriety.

Until the legislature enacts broader resolutions, videotape will remain an evidentiary tool under the language of the new provision. Still, the Act is at least the first bold step into the exciting arena that audio-visual technology has constructed.

### CONCLUSION

There is a paradox of estate administration with which the legal profession has struggled for centuries. The most valuable witness possible to explain the testator's hopes and objectives is the only person who cannot personally testify before the court—the testator herself. Videotape achieves the closest facsimile to such direct testimony. The videotaped wills statute provides a new plateau toward which practioners may strive to carry estate planning. How the new law is developed depends upon the members of the bench and bar as well as the public. Experimentation with the medium will inevitably determine whether videotape becomes a probate boon or burden. But House Enrolled Act 1913 has forged the initial opportunities. The uncharted waters await the first courageous Bohemians.

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of  $\pm 5^{\circ}\text{F}$  and  $\pm 10\%$ , respectively. "Generally, an environment that is comfortable for the operating personnel is ideal for magnetic tape, that is, a temperature in the lower 70's and a relative humidity of about 45%." 3M Technical Publication, *supra* note 51, at 1. Another authority indicates that temperature and humidity fluctuations between  $50^{\circ}$  to  $90^{\circ}\text{F}$  and 40-60% are tolerable, although  $\pm 3^{\circ}\text{F}$  in a range between  $65^{\circ}$  and  $80^{\circ}\text{F}$  is probably less stressful on the tape. Ampex Technical Publication, *supra*, at 5, 7. "Tape can withstand  $150^{\circ}\text{F}$  temperature for several hours with very little (or no) noticeable degradation." Wheeler, *supra* note 51, at 3. Even if videotape is "soaked in water for hours or even days," it can be dried and replayed with minimal cognizable degeneration. *Id.* To reduce dust contamination, one might install a variety of filters in the air conditioning system. 3M Technical Publication, *supra* note 51, at 1.

53. 3M Technical Publication, *supra* note 51, at 1. See also H. JOBE, G. CANNON & R. MILLER, A GUIDE TO PLANNING, PREPARING AND PRODUCING A VIDEOTAPE 20 (1978); Buckley & Buckley, *supra* note 2, at 285. *Contra*, THE MOVING IMAGE, *supra* note 51, at 137, 139, 149 (videotape shelf life estimated at up to 10-20 years). "A properly stored videotape should last hundreds of years. The only known cause of deterioration would be a hot or moist environment." Wheeler, *supra* note 51, at 3.

54. Buckley & Buckley, *supra* note 2, at 286.

