

ELECTRONIC WILLS AND DIGITAL ASSETS: REASSESSING FORMALITY
IN THE DIGITAL AGE

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The law of Wills, dating back to 1540, is one of the last holdouts against the digital revolution. In 2019, a will in most states cannot be an electronic document. The Wills Acts adopted by every state in America requires a testamentary will to be in writing, to be signed, and to be attested in the presence of at least two witnesses. States have interpreted the Wills Act, in most cases, to require a physical document printed and signed by hand by a testator and witnesses. For centuries, these pillars of the law of wills have remained resolute and uncompromised. Attempts have been made to lessen the strict requirements of testamentary formality, but only a handful of states have adopted legislation applying what is called the harmless error doctrine. The advent of digital asset succession, however, has taken a more immediate path to encourage chipping away at the formalities for a will. Almost all of the states have adopted digital asset legislation, which only requires a testamentary statement regarding these assets to be in writing in order to be valid. Digital asset legislation opens the door to an even more sweeping change—purely electronic wills. Adopting electronic wills would be a dramatic change to the Wills Act but would not dramatically change property transfers after death. More wealth transfers after death under a nonprobate instrument such as a trust or private contract between a decedent and a financial or insurance company. These testamentary transfers are already largely electronic. Technological changes and expectations in society have been challenging the Wills Act for years. Courts are beginning to broadly interpret the Wills Act to incorporate technological changes. A few states have begun experimenting with versions of electronic wills, and the Uniform Law Commission is proposing legislation to allow electronic wills in the upcoming year. The strict formalities of the Wills Act can still be met by allowing an electronic version of a will. Indeed, as this article argues, electronic wills can serve as reliable evidence of testamentary intent, protecting a testator's interests, and fulfilling the purposes of succession law. State legislatures should adopt legislation allowing for electronic wills in

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order to bring a cost-effective and efficient way of transferring assets at death and to encourage more people to exercise their freedom of disposition.

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INTRODUCTION

With a few clicks of a mouse or taps on our phone, we can buy and sell almost anything. We can pay our bills, file our taxes, apply for a job, transfer money to a friend or family member, and plan a trip across the world all without moving more than a few fingers. The digital age has made our lives remarkably electronic and convenient. Very few transactions in everyday life

cannot be done electronically. One of the last holdouts to accepting the digital world is the law of Wills. Under current law in most states, a document created electronically must be printed out and signed by the testator and in the physical presence of two witnesses to be a valid will.¹ In a world where so many physical, tangible assets have been converted to a digital equivalent, it seems heavily anachronistic to require a will to be a physical document that is signed and attested by two witnesses. This Article explores the way digital assets, nonprobate transfers, and other technological developments are pushing the boundaries of the traditional Wills Act and restructuring the meaning of formality. It is time to reassess what formality means and accomplishes in the digital age and restructure our system to encourage more valid testamentary transfers.

There have been calls for electronic wills and warnings about their adoption for almost a decade by academics.² This article expands and adds to this conversation by considering how the advent of digital assets has changed the legal landscape of electronic wills and pushed the boundaries of traditional formality. The law has begun to grapple with what to do with our digital assets, all the “stuff” we have accumulated online—emails, social media accounts, pictures, documents, databases, other forms of digital media.³ The majority of states have passed legislation to allow digital assets to be treated like tangible assets in the administration of a decedent’s estate as long as a decedent leaves a record signifying that she wants her digital assets to be inheritable.⁴ Companies like Google and Facebook provide online tools that allow a user to express her testamentary intent concerning the assets held in an account directly on the website.⁵ The widespread use and acceptance of online service providers in every aspect of our lives begs

¹ UNIF. PROB. CODE § 2-502 (amended 2008), 8 U.L.A. 506 (1990); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 1999).

² Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J. L. REFORM 105, 125 (2008); Scott S. Bodderly, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL. PROP. TR. & EST. L. J. 197, 198 (2012); Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 866 (2007).

³ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 4 (UNIF. LAW COMM’N 2015).

⁴ ENACTMENT MAP FOR FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Revised, (UNIF. LAW COMM’N 2015), <https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22>.

⁵ FACEBOOK, <https://www.facebook.com/help/1568013990080948> (last visited Feb. 7, 2019); *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> (last visited Feb. 7, 2019).

the question as to whether it makes sense to forbid creating and executing an electronic will. Digital assets reform has demonstrated a new way of executing testamentary intent when it comes to our digital belongings—the law has changed to allow a simple expression of intent, unsigned and unattested to dictate the fate of digital assets.⁶ A formality change is needed in the physical world of testamentary transfers as well.

The majority of Americans do not have a will,⁷ which may be partly caused by the lack of accessibility of will making.⁸ America is unique in the power it accords testators to determine what they want to have done to their property at their deaths,⁹ but we need a more accessible method of drafting and executing wills so they can more fully take advantage of this power to devise. In a recent survey by Caring.com, 78% of Millennials and 64% of Gen-Xers did not have a will.¹⁰ Many Americans do not have the resources, time, or money to hire an attorney to do their estate plan or the gumption to go out and educate themselves on how to create and execute a valid will.¹¹ Data shows that those who are older, in a higher socio-economic group, and more highly educated are more likely to have a will.¹² Whatever the case may be, electronic wills are an attempt to bring freedom of disposition to the majority of the American public and hopefully to younger Americans.

⁶REVISED UNIFORM FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4 (UNIF. LAW COMM'N, 2015)<https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=librarydocuments>.

⁷Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP (May 18, 2016) <https://news.gallup.com/poll/191651/majority-not.aspx> (stating that according to a Gallup Poll only 44% of Americans have a will).

⁸Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 899 (2012).

⁹RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a, cmt. c (AM. LAW INST. 2003).

¹⁰Nick DiUlio, *More than Half of U.S. Adults Don't Have a Will, New Survey Reveals*, HUFFPOST (Feb. 17, 2017), https://www.huffpost.com/entry/more-than-half-of-us-adults-dont-have-a-will-new_b_58a6086ce4b0b0e1e0e2083a.

¹¹*Id.*

¹²Jones, *supra* note 7 (stating, “[s]ixty-eight percent of those aged 65 and older have a will, compared with just 14% of those younger than age 30. Of Americans whose annual household income is \$75,000 or greater, 55% have a will, compared with 31% of those with incomes of less than \$30,000. And while 61% of those with a postgraduate education have a will, only 32% with a high school education or less do.”).

Younger Americans are going to be increasingly interested in being able to engage in electronic will making.¹³

This Article first looks at the types of electronic wills and the history of will formalities in order to explain the functions of formal requirements for will execution. Part I traces attempted retreats from formalism in will execution standards in the doctrines of substantial compliance and harmless error. It argues that technology continues to expand the meaning of formality, allowing a form of formalism that was not contemplated in 1837, and argues that electronic wills can honor tradition and create a more convenient way to transfer assets after death in the digital age.

Part II addresses how the growth of nonprobate transfers and digital asset succession have been successful retreats from testamentary formalities. Part II argues that digital asset reform paves the way for electronic wills by focusing on testamentary intent. It encourages legislatures to adopt legislation more akin to nonprobate transfers and digital asset succession and shows how authenticating a user's identity and capacity can be achieved in ways other than a signed, attested document.

Part III considers the ways technology has challenged these historical formalities and argues that legislation is not needed for courts to interpret the Wills Act in a way that accommodates wills drafted, signed, and attested electronically. The Wills Act can be broadly interpreted to include electronic writings, signatures, and attestation in order to safeguard the testator's interest. Part III explores how more versions or opportunities for electronic or digital expressions of testamentary intent will arise. Part III argues that advances in technology will continue to push the boundaries of the Wills Act with or without new legislation. It advocates for legislatures to accept that electronic documents are just as acceptable as physical documents to meet the purposes of formalities. Part III concludes that adopting electronic wills pushes the law forward, encourages innovation, and promotes freedom of disposition.

Part IV considers all forms of electronic wills and balances the traditional law of succession with the need and desire to accommodate technological developments. Part IV argues that our dependence on digital technology requires that we consider whether the will formalities required under the Wills Act burden more than promote succession law. It encourages legislatures and courts to reassess the purposes of formality and how

¹³See *Internet User Demographics*, PEW RESEARCH CTR. (Jun. 12, 2019), <http://www.pewinternet.org/data-trend/teens/internet-user-demographics/>.

electronic wills can enhance the evidentiary, protective, channeling, and cautionary functions of formality. It argues that electronic wills can meet or exceed the functions of formality as the law has already acknowledged with nonprobate transfers and digital assets. Finally, using the proposed Uniform Act, Part IV advocates for states to adopt a revised, modernized Wills Act that accommodates digital online tools to dispose of a decedent's entire estate—both physical and digital—and addresses the concerns presented by adopting a true electronic Wills Act. Part IV argues that modernizing the Wills Act to accommodate electronic wills makes wills more accessible to the public. It concludes with recommendations for legislation that focus on authenticating identity and capacity of a testator.

The Wills Act has undergone little change since its adoption in 1837,¹⁴ but the demands of the digital age require a reassessment of the meaning of will formality in succession law.

I. WILL FORMALITIES

A last will and testament is a formal document.¹⁵ It takes legal effect at the moment a testator dies.¹⁶ Under the laws of most states, it must be in writing in a reasonably permanent form.¹⁷ It must be signed by the testator or in the testator's presence and under the testator's direction.¹⁸ It must be witnessed and signed by two or more disinterested witnesses in the presence of the testator.¹⁹ A will that fails to meet one or more of these requirements will not be valid to transfer property according to its terms at a decedent's death.²⁰ Other than these formal execution requirements of a will, there is no

¹⁴REINHARD ZIMMERMANN ET AL., *COMPARATIVE SUCCESSION LAWS VOLUME 1: TESTAMENTARY FORMALITIES*, 312 (Oxford Univ. Press, 2011).

¹⁵RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. a (AM. LAW INST. 1999).

¹⁶*Id.*

¹⁷UNIF. PROB. CODE § 2-502; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. i.

¹⁸*Id.*

¹⁹*Id.* at cmt. o.

²⁰*In re Weber's Estate*, 387 P.2d 165, 170 (Kan. 1963) (finding a will invalid and noting that “[a] statement by the person who supervises the execution of the document that it is the testator's will and the like does not amount to an acknowledgment by testator if he does not hear such statement.”); *In re Pavlinko's Estate*, 148 A.2d 528, 528 (Pa. 1959) (finding a will invalid where “[b]y mistake Hellen signed the will which was prepared for her husband, and Vasil signed the will which was prepared for his wife, each instrument being signed at the end thereof.”).

other requirement on the language or form of a will.²¹ As long as the language demonstrates testamentary intent and is formally executed, a court will uphold the will.²² These requirements for a valid will were established in Ancient Rome and adopted as part of the English common law.²³ The digital age challenges these ancient rules and traditions in order to have a formally executed will. The law of succession has been hesitant to lessen the requirements for a will, but the digital age requires a reassessment of these formalities.

An electronic will has a variety of meanings that are used interchangeably but raise different legal issues and may require different levels of formality. This article refers to four different kinds of electronic wills. The first type of electronic will that has the highest degree of formality and that this Article argues could be valid under existing Wills Act is a document typed and executed with electronic signatures in a word processing document and saved as a computer file. Similarly, instead of typed it could be a document written and signed by a testator using a stylus on a tablet or a program that allows for handwritten electronic documents. A second kind of electronic will could be procured on a third-party server designed to create and secure the electronic document for the future. (This would be the will equivalent of a program like TurboTax or be curated by LegalZoom or another kind of program.) The company would have its own formalities in addition to whatever was required by the controlling electronic Wills Act in that jurisdiction to ensure the identity and sound mind of the testator. This Article argues that the first type of electronic will should already be found valid under the existing Wills Act, and that legislation should allow the second type of electronic will to be probated.

A third type of electronic will could be created on a third-party platform that required an account holder to have password-protected credentials to use. This would be a will found in an email, social networking account, or online cloud storage site like Dropbox, OneDrive, or Google Drive. This third type

²¹ UNIF. PROB. CODE § 2-502 (amended 2008), 8 U.L.A. 506 (1990); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 1999).

²² *In re Estate of Allen*, 301 S.W.3d 923, 927 (Tex. App.—Tyler 2009, pet. denied) (“An instrument is not a will unless it is executed with testamentary intent.”); *Brandt v. Schucha*, 96 N.W.2d 179, 187 (Iowa 1959) (“It is fundamental there is no valid will in the absence of testamentary intent.”).

²³ Durham Law Firm, *History of Wills – Part 1: Ancient Wills*, HOPLER, WILMS, & HANNA, PLLC, <https://hoplerwilms.com/blog/2016/04/24/history-of-wills-part-1-ancient-wills/> (last visited Sep. 5, 2019).

of will would not have additional attestation by witnesses and would only be authenticated by the account holder's credentials. A fourth type of electronic will could be a video or audio recording posted or saved on YouTube or another similar platform. This type of will would not be attested or signed but would be verified by the observation of the testator's presence on the video or recording. Part of making wills more accessible would be statutorily authorizing web-based programs to allow users to draft and execute a will on their phones or computers. Online tools and computer software have been around for decades to aid individuals in their estate planning.²⁴ But under the current law, these electronically aided documents are not effective at death unless will formalities are met, which means printing the document and executing it by hand.²⁵ The Wills Act would need to be updated in order to allow for a will created entirely on a web-based program that a testator could change or update with a few clicks of a mouse or taps of her fingers. The third and fourth types of wills should be seriously considered as valid attempts to transfer property in certain situations. In all of these situations, the concerns of traditional formality structures are met through various safeguards in the digital format.

A. Traditional Will Formalities and their Purpose

In ancient Roman law, we see the precursor of formality requirements used today: a written document, signed (or sealed), and attested by a group of disinterested people.²⁶ It was a common practice in Ancient Rome for wealthy property holders to execute a will and appoint successors to their wealth.²⁷ In fact, the right to devise was one of the important rights of Roman citizenship.²⁸ In the early Roman period, a will could be made in three different ceremonies: a solemn assembly of the Roman people, which were held twice a year, a declaration to the Roman army if an individual was a soldier, or a private ceremony used for the conveyance of valuable property.²⁹ Testamentary dispositions were written and seven witnesses attached their

²⁴David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 564 (2017).

²⁵*Id.*; UNIF. PROB. CODE § 2-502 (amended 2008), 8 U.L.A. 506 (1990).

²⁶ZIMMERMAN ET AL., *supra* note 14, at 5.

²⁷*Id.* at 2.

²⁸*Id.* at 358.

²⁹*Id.* at 3.

seal to the document.³⁰ Roman wills were accompanied by statements of beliefs and commentary by the decedent, and thus a Roman citizen had his last chance to exert influence by his disposition of property and his statement.³¹

At the time of the Norman Conquest in 1066, people could still devise their property using vestiges of Roman law.³² By the thirteenth century in feudal England a distinction had developed between real and personal property when it came to succession.³³ The law of primogeniture automatically distributed real property to the testator's oldest son.³⁴ A testator could not make a different bequest of his real property.³⁵ In 1540, land became devisable by a written will under the Statute of Wills.³⁶ The Statute of Wills required no other formalities for land to be devised other than it be in writing.³⁷

As for personal property, a testator could execute a will to devise it at his death.³⁸ If he did not create a testamentary devise, the statute of distributions divided personal property equally among a decedent's children.³⁹ Before the statute of frauds was passed in 1677, wills devising personal property were not required to be in writing.⁴⁰ Individuals could make an oral or nuncupative will to devise personal property.⁴¹ These oral declarations were often upheld by ecclesiastical courts instead of common law courts.⁴² A clergy member would offer last rites and witness whether the decedent made an oral testament.⁴³ As the wealthy became more literate and after the Statute of Frauds was enacted in 1677, the need for oral wills decreased and courts

³⁰ *Id.* at 5.

³¹ *Id.* at 358-59 (stating that it was commonly said that a Roman is only truthful in his will).

³² *Id.* at 308.

³³ *Id.*

³⁴ LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW*, 20 (Stanford University Press 2009).

³⁵ *Id.*

³⁶ ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES*, 143 n.7 (Rachel E. Barkow et al. eds., 10th ed. 2017).

³⁷ *Id.*; ZIMMERMAN ET AL., *supra* note 14, at 309.

³⁸ FRIEDMAN, *supra* note 34, at 1920.

³⁹ *Id.* at 20.

⁴⁰ GEORGE E. GARDNER & WALTER DUNMORE, *HANDBOOK OF THE LAW OF WILLS*, 44 (St. Paul, West Pub. Co. 1916).

⁴¹ SITKOFF & DUKEMINIER, *supra* note 36, at 143 n. 7.

⁴² ZIMMERMAN ET AL., *supra* note 14, at 308.

⁴³ *Id.*

began viewing nuncupative wills with suspicion.⁴⁴ Nuncupative wills were upheld only in extraordinary circumstances, like when a testator became suddenly and terminally ill.⁴⁵

During the next two hundred years, the formalities required for wills underwent a significant number of changes.⁴⁶ Before the Statute of Wills was passed in 1837, the English common law recognized different laws for executing at least nine different types of wills.⁴⁷ The Wills Act of 1837 codified a uniform set of formalities for all dispositions of property after death, therefore abolishing any distinction between real and personal property when it came to devising a will.⁴⁸ The Wills Act required dispositions to be in writing, to be signed at the foot or end by the testator, and to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.⁴⁹

In the United States, the formality required to execute a will is a matter of state law.⁵⁰ The United States adopted nuncupative wills in its early history.⁵¹ Ohio required two witnesses of a nuncupative will by statute.⁵² New York allowed nuncupative wills for a member of the armed forces or a mariner while at sea.⁵³ Seventeen states still allow for nuncupative wills, albeit with significant limitations.⁵⁴ States adopted the Statute of Frauds and versions of the Wills Act first as a matter of common law and then as a matter

⁴⁴GARDNER & DUNMORE, *supra* note 40, at 44.

⁴⁵*Id.*

⁴⁶ZIMMERMAN ET AL., *supra* note 14, at 311.

⁴⁷*Id.*

⁴⁸*Id.* at 312, 361.

⁴⁹SITKOFF & DUKEMINIER, *supra* note 36, at 143.

⁵⁰*Wills and Probate in the USA*, LEXOLOGY (Jan. 24, 2019), <https://www.lexology.com/library/detail.aspx?g=809b0f26-a9cc-4a8d-af4c-02bcb91b446e>.

⁵¹SITKOFF & DUKEMINIER, *supra* note 36, at 142 n.4.

⁵²*Vrooman v. Powers*, 24 N.E. 267, 267 (Ohio 1890).

⁵³N.Y. EST. POWERS & TRUSTS § 3-2.2 (Consol. 2019).

⁵⁴IND. CODE ANN. § 29-1-5-4 (2019) (only for a person in “imminent peril of death”, witnesses must write down testator’s declaration within thirty days and can only dispose of up to \$1,000 in value); MISS. CODE ANN. § 91-5-15 (2019); D.C. CODE ANN. § 18-107 (2019); KAN. STAT. ANN. § 59-608 (2019); MASS. GEN. LAWS ch. 191, § 6 (2019); MO. REV. STAT. § 474.340 (2019); N.H. REV. STAT. ANN. § 551:15 (2019); N.Y. EST. POWERS & TRUSTS § 3-2.2 (Consol. 2019); N.C. GEN. STAT. § 31-3.5 (2019); OHIO REV. CODE ANN. § 2107.60 (West 2019); OKLA. STAT. tit. 84, § 46 (2019); 33 R.I. GEN. LAWS § 33-5-6 (2019); TENN. CODE ANN. § 32-1-106 (2019); VT. STAT. ANN. tit. 14, § 6 (2019); VA. CODE ANN. § 64.1-53 (2019); WASH. REV. CODE § 11.12.025 (2019); W. VA. CODE § 41-1-5 (2019).

of statutory law.⁵⁵ Every state in the United States today has a version of the Wills Act that requires the same elements of the British Wills Act of 1837: a writing, signed by a testator, and attestation by two witnesses.⁵⁶

As we can see in this brief overview of history, will formalities developed to ensure that a testator's will was followed after his death.⁵⁷ But the formalities were as much a matter of tradition as they were function.⁵⁸ We are still using the formality that began under the 1540 Statute of Wills, designed in the 1677 Statute of Frauds, and then incorporated in the 1837 Wills Act to prevent fraudulent testamentary transfers.⁵⁹ John Langbein famously enumerated four functions of formality that had been justifying the existence of formalism in testamentary transfers: the evidentiary function, the channeling function, the cautionary function, and the protective function.⁶⁰ The formalities of the Wills Act serve an important evidentiary function because the will is not effective until after a testator has died and can no longer testify as to her intent. The writing, signature, and witnesses all serve as evidence of the testator's testamentary intent that can be enforced by a court.⁶¹ The channeling function means that a will that abides by the Wills Act will clearly be understood by a court to be a will and will not use judicial resources attempting to decipher whether the document was intended to have testamentary effect.⁶² Will formalities also seek to caution a testator that a document signed and attested will have legal effect when she dies.⁶³ Executing a will is like getting married or signing an affidavit. These actions have legal import and cannot be disregarded without additional formalities.⁶⁴ Formalities also help a testator distinguish a draft or ideas from an actual testament that she wants to control her assets at death. Lastly, will formalities serve a protective function, meaning that formalities are in place to ensure a

⁵⁵ZIMMERMANN, *supra* note 14, at 362.

⁵⁶SITKOFF & DUKEMINIER, *supra* note 36, at 142.

⁵⁷John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975).

⁵⁸See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 4 (1941).

⁵⁹Langbein, *supra* note 57, at 490.

⁶⁰*Id.* at 492 (citing Lon Fuller, *Consideration and Form*, 41 COL. L. REV. 799 (1941) and Gulliver & Tilson, *supra* note 58, at 5–13 (1941)).

⁶¹Langbein, *supra* note 57, at 492–93.

⁶²*Id.* at 494.

⁶³*Id.* at 495.

⁶⁴See 3 AM. JUR. 2D *Affidavits* § 8 (2019).

testator is of sound mind and not under duress or undue influence when executing her will. These functions of formality are noble and desirable; however, too much formality can burden and frustrate testamentary intent rather than encourage it.

Little thought has been given to the functions of formality in the digital age. Formalities serve these purposes and others, but they should not overtake the main consideration of succession law—to implement a testator’s testamentary intent and, by doing so, uphold the freedom of disposition. Electronic wills are forcing us to reconsider to what extent the formalities in the Wills Act are necessary or desirable in the digital age. There have been several attempts to retreat from strict compliance of the Wills Act in order to further freedom of disposition, but these attempts have not been widely adopted.⁶⁵

B. Attempted Retreats from Formalism

Strict compliance with execution requirements for a valid will is the traditional approach and still the majority approach in the United States.⁶⁶ Sometimes this leads to absurd results where the intent of a testator is clearly expressed but cannot be effectuated because of a defect in execution.⁶⁷ Courts, however, have created various exceptions in order to cure execution defects that seem minimal like spouses signing the wrong will.⁶⁸ The debate

⁶⁵Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OREGON L. REV. 337, 353 (2017).

⁶⁶*See, e.g., In re Estate of Chastain*, 401 S.W.3d 612, 619 (Tenn. 2012) (finding that Tennessee courts have “consistently . . . required strict compliance with . . . statutory mandates.”); *In re Estate of Henneghan*, 45 A.3d 684, 686 (D.C. 2012) (requiring “strict statutory compliance . . .”); *Stevens v. Casdorff*, 508 S.E.2d 610, 613 (W. Va. 1998) (finding that the “execution of a written will must also comply with the dictates of . . .” the applicable statute); *In re Bancker’s Estate*, 232 So. 2d 431, 433 (Fla. Dist. Ct. App. 1970) (finding that “strict compliance with the statutory requirements is a prerequisite for the valid creation or revocation of a will.”); *In re Lee’s Estate*, 80 F. Supp. 293, 294 (D.D.C. 1948) (finding that the “intention of the testatrix is not to be considered where the writing fails to comply with the requirements of the statute.”).

⁶⁷*Stevens*, 508 S.E.2d at 612 (W. Va. 1998) (finding a will invalid where “none of the parties signed or acknowledged their signatures in the presence of each other.”); *In re Gray’s Estate*, 76 A.2d 169, 170–71 (Pa. 1950) (finding that it was clear “this writing was testamentary in character . . . It is however equally clear that even if it be a will, it is not a valid or probatable will.”).

⁶⁸*In re Snide*, 418 N.E.2d 656, 658 (N.Y. 1981) (holding a will valid where “Harvey Snide, the decedent, and his wife, Rose Snide, intending to execute mutual wills at a common execution ceremony, each executed by mistake the will intended for the other.”); *In re Kimmel’s Estate*, 123

about the extent of will formality is a longstanding one, and various attempts over the years have tried to reduce the amount of formality required for a valid will.⁶⁹ These reforms have not passed in a majority of states.⁷⁰

1. Substantial Compliance

In the 1970s, John Langbein proposed the doctrine of substantial compliance.⁷¹ Under the doctrine of substantial compliance, a court could probate a will if there was clear and convincing evidence that it substantially complied with the Wills Act.⁷² This doctrine was a retreat from the strict compliance of execution requirements for a valid will. A few states adopted the proposal but have since retreated or narrowed its application.⁷³ The common law doctrine of substantial compliance never caught on to change the formality requirements of a valid will.⁷⁴ State courts maintained that only

A. 405, 407 (Pa. 1924) (finding a valid informal will where the “testator used the word ‘Father,’ as a complete signature, and mailed the paper as a finished document.”); *La Croix v. Senecal*, 99 A.2d 115, 117 (Conn. 1953) (explaining the “gist of the doctrine [of dependent relative revocation] is that if a testator cancels or destroys a will with a present intention of making a new one immediately and as a substitute and the new will is not made or, if made, fails of effect for any reason, it will be presumed that the testator preferred the old will to intestacy, and the old one will be admitted to probate in the absence of evidence overcoming the presumption.”); *In re Estate of Hall*, 2002 MT 171, ¶ 5, ¶ 7, 310 Mont. 486, 51 P.3d 1134, 1136 (finding a joint will valid despite formal execution where spouses “Jim and Betty apparently agreed on the terms of the Joint Will. Jim and Betty were prepared to execute the Joint Will once [their attorney] sent them a final version Jim apparently told Betty to tear up the Original Will, which Betty did.”); *In re Anton, Jr.*, No. BER-P-335-15, 2015 WL 6085394, at *4 (N.J. Super. Ct. Ch. Div. Oct. 6, 2015) (finding that an unsigned will may be entered into probate where the Decedent asserted “no changes were needed, and that Decedent was ready to come back to the attorney’s office and sign the documents[,]” but the Decedent “died at home” before the signing could take place); *Wade v. Wade*, 195 S.E. 339, 341 (W. Va. 1938) (considering that “each case must rest on its own facts and circumstances”); *In re Shaff’s Estate*, 266 P. 630, 633 (Or. 1928) (holding that “[w]hile it is the duty of the court to observe carefully the spirit and intent of the statute, they will not adopt a strained and technical construction to defeat a will where the capacity and intention is plain, and where, by fair and reasonable intendment, the statute may be held to have been complied with”).

⁶⁹Wendel, *supra* note 65, at 354.

⁷⁰*Id.*

⁷¹Langbein, *supra* note 57, at 489.

⁷²*Id.* at 513; SITKOFF & DUKEMINIER, *supra* note 36, at 170.

⁷³SITKOFF & DUKEMINIER, *supra* note 36, at 171–174; N.J. CODE ANN. § 3B:3-3.

⁷⁴Wendel, *supra* note 65, at 354.

the legislature could change will formalities and that actual, not substantial, compliance was required.⁷⁵

2. Harmless Error Doctrine

Legislative reform, however, did occur in a handful of states in the 1990s in an attempt to have a more flexible approach to the rigid formality requirements of the Wills Act.⁷⁶ Today, eleven states have adopted the Harmless Error Rule, which allows a court to probate a will if there is clear and convincing evidence of intent despite errors in execution.⁷⁷ Harmless error has been applied to excuse the defect in an electronic will in at least one situation.⁷⁸ Harmless error could be used more readily in the eleven states that have adopted it to allow electronic wills that meet formality requirements.⁷⁹ As we will see below, however, harmless error is not needed to allow an electronic will. Courts can interpret the Wills Act in a way that encompasses electronic alternatives. The majority of state legislatures have not enacted a harmless error rule and continue to require strict compliance with will formalities even when strict compliance yields harsh results.⁸⁰ For

⁷⁵SITKOFF & DUKEMINIER, *supra* note 36, at 171; *In re Estate of Chastain*, 401 S.W.3d 612, 622 (Tenn. 2012); *Martina v. Elrod*, 748 S.E.2d 412, 414 (Ga. 2013); *Smith v. Smith*, 348 S.W.3d 63, 67 (Ky. Ct. App. 2011); *Ex parte Holladay*, 466 So. 2d 956, 960 (Ala. 1985) (“It is well-settled that, although there are occasions when a court must correct or ignore obvious inadvertences in order to give a law the effect which was plainly intended by the legislature, the judiciary cannot and should not, in a republican form of government, usurp the legislative function.”); *Evans v. Evans*, 410 So. 2d 729, 732 (La. 1982) (“Under [the statute], failure to comply with the requirements enumerated in these articles results in invalidity of the will in its entirety. Absent some express statement by the legislature to the contrary, we are bound to declare the will null and void.”).

⁷⁶CAL. PROB. CODE § 6110 (West 2019); COLO. REV. STAT. § 15-11-503 (2019); HAW. REV. STAT. § 560:2-503 (2019); MICH. COMP. LAWS § 700.2503 (2019); MONT. CODE ANN. § 72-2-523 (2019); N.J. REV. STAT. § 3B:3-3 (2019); OHIO REV. CODE ANN. § 2107.24 (West 2019); OR. REV. STAT. § 112.238 (2019); S.D. CODIFIED LAWS § 29A-2-503 (2019); UTAH CODE ANN. § 75-2-503 (West 2019); VA. CODE ANN. § 64.2-404 (2019).

⁷⁷CAL. PROB. CODE § 6110 (West 2019); COLO. REV. STAT. § 15-11-503 (2019); HAW. REV. STAT. § 560:2-503 (2019); MICH. COMP. LAWS § 700.2503 (2019); MONT. CODE ANN. § 72-2-523 (2019); N.J. REV. STAT. § 3B:3-3 (2019); OHIO REV. CODE ANN. § 2107.24 (West 2019); OR. REV. STAT. § 112.238 (2019); S.D. CODIFIED LAWS § 29A-2-503 (2019); UTAH CODE ANN. § 75-2-503 (West 2019); VA. CODE ANN. § 64.2-404 (2019).

⁷⁸*In re Estate of Javier Castro*, 2013-ES-00140 at *7-8 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013).

⁷⁹*See supra*, note 77.

⁸⁰*Litevich v. Prob. Ct.*, No. NNHCV126031579S, 2013 WL 2945055, at *20 (Conn. Super. Ct. May 17, 2013).

example, Connecticut has not adopted harmless error.⁸¹ When a testator failed to comply with the Wills Act requirements of signing a document she created with an online electronic will company, a Connecticut court refused to probate it.⁸² Harmless error is not necessarily needed to probate electronic wills, but it does help excuse defects in storing a will electronically instead of abiding by the traditional understanding of physically writing, signing, and attesting a will.

3. Holographic Wills

A Holographic Will, a will that is written and signed in the testator's handwriting, does not need to be formally attested.⁸³ Holographic wills come from the civil law as opposed to the common law.⁸⁴ They were initially introduced in Louisiana and Virginia in 1751.⁸⁵ The advantages of holographic wills have long been debated.⁸⁶ Some argue that holographic wills breed litigation and invite a will dispute because of a holographic will's informal language.⁸⁷ Others laud them as a way for people to express their testamentary intent in an inexpensive and authentic way.⁸⁸ Only about half of the states allow holographic wills to be probated; the other half maintain that a valid will needs to be attested by two witnesses.⁸⁹

Holographic wills have faced more issues with the development of technology. When individuals print a pre-printed will form and then fill it out in their own handwriting, courts have to determine if enough of the writing is in a testator's own hand to be a valid holographic will.⁹⁰ This of course complicates the acceptance of holographic wills, and states have taken a

⁸¹ *Id.* at *22.

⁸² *Id.*

⁸³ Langbein, *supra* note 57, at 491.

⁸⁴ ZIMMERMAN ET AL., *supra* note 14, at 370.

⁸⁵ SITKOFF & DUKEMINIER, *supra* note 36, at 199.

⁸⁶ Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 161 (1988).

⁸⁷ Richard Lewis Brown, *The Holographic Problem—the Case Against Holographic Wills*, 74 TENNESSEE L. REV. 93, 117 (2006).

⁸⁸ Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 59 (2008).

⁸⁹ SITKOFF & DUKEMINIER, *supra* note 36, at 198.

⁹⁰ *In re Will of Ferree*, 848 A.2d 81, 85 (N.J. Super. Ct. Ch. Div. 2003).

variety of different approaches to deal with pre-printed forms.⁹¹ Despite the fact that holographic wills do not need to be attested by two witnesses, courts still require strict compliance with the requirement that the holographic will be in the testator's handwriting and be signed by a testator.⁹² A will that is written by someone else or typed and signed by a testator is not a valid holographic will.⁹³ Thus, even though a holographic will does not require

⁹¹*Id.* at 82 (finding that “[b]ecause accepted legal principles compel the ignoring of all pre-printed language in an alleged holograph, because vast portions of the material provisions are not handwritten, and because the document is unintelligible without resort to the pre-printed words, the proffered document may not be admitted to probate.”); *In re Estate of Gonzalez*, 2004 ME 109, ¶ 13, 855 A.2d 1146, 1150 (holding that “printed portions of a will form can be incorporated into a holographic will where the trial court finds a testamentary intent, considering all of the evidence in the case.”); *In re Estate of Muder*, 765 P.2d 997, 1000 (Ariz. 1988) (allowing “printed portions of the will form to be incorporated into the handwritten portion of the holographic will as long as the testamentary intent of the testator is clear and the protection afforded by requiring the material provisions be in the testator’s handwriting is present.”); *Estate of Black*, 641 P.2d 754, 759 (Cal. 1982) (holding a holographic will valid where the “sole mistake was her superfluous utilization of a small portion of the language of the preprinted form” given that “every statutorily required element of the will is concededly expressed in the testatrix’ own handwriting and where her testamentary intent is clearly revealed in the words as she wrote them.”); *In re Estate of Foxley*, 575 N.W.2d 150, 155 (Neb. 1998) (holding that “the handwritten changes on the photocopy of Foxley’s will do not constitute a valid holographic codicil and may not be incorporated into her will by reference . . .”).

⁹²*In re Churchill’s Estate*, 103 A. 533, 535 (Pa. 1918) (holding a holographic will invalid where the testator failed to sign his name “at what was so clearly the end of the paper as a will. What he did do was to write his name in three blank spaces in the paper, first at the top and then in the testimonium and attestation clauses.”); *In re Towle’s Estate*, 93 P.2d 555, 559 (Cal. 1939) (noting that “the fact that a document is entirely in the handwriting of a testator offers an adequate guaranty of its genuineness.”); *In re Fegley’s Estate*, 589 P.2d 80, 82 (Colo. App. 1978) (finding a holographic will invalid where the “placement of the phrase ‘witness my hand . . .,’ followed by a signature space and an attestation clause, indicates that Henrietta intended to sign the document at some future time, and that she did not intend that her name in the exordium clause be a signature.”) (alteration in original); *In re Thorn’s Estate*, 192 P. 19, 19–20 (Cal. 1920) (holding a holographic will invalid where “the word ‘Cragthorn’ was in two places inserted with a rubber stamp, instead of being written by the deceased” even though “the intent of the deceased is obvious.”); *In re Estate of Dobson*, 708 P.2d 422, 423–24, 426 (Wyo. 1985) (finding a holographic will invalid where the “vice president and trust officer of the Stockmen’s Bank & Trust Company” later “recalled writing on [the decedent’s] will” because “it was not entirely in the handwriting of the decedent.”).

⁹³*Berry v. Tribble*, 626 S.E.2d 440, 446 (Va. 2006) (finding a document could not be probated as a holographic will where the “handwritten language is interwoven with the text, both physically and in sequence of thought, throughout the document.”); *In re Towle’s*, 93 P.2d at 559 (Cal. 1939) (finding an invalid holographic will where it was “partially in the handwriting of Helen M. Towle, deceased, and partially in the handwriting of Chester D. Seftenberg.”); *In re McNamara’s Estate*, 260 P.2d 182, 183 (Cal. Dist. Ct. App. 1953) (holding a holographic will invalid where “Mr. Ritchie copied Mr. McNamara’s writing onto another piece of paper. On this other paper, under Mr.

attestation, it does not seem like a retreat from formality when the requirements to have a valid holograph are strictly and formally followed.

The debate about holographic wills is a relevant one in considering the acceptance of electronic wills. In many ways, an electronic will is the equivalent of a holographic will. An electronic will that verified identity using a password protected phone or app instead of requiring attestation would be similar to a will that required handwriting and a signature as authentication tools. Both holographic wills and electronic wills attempt to bring the freedom of disposition to more Americans. Attorneys could use electronic wills for their clients, but more likely individuals will be taking advantage of legislation that allowed electronic wills without the aid of attorneys. If the legislative pattern seen with holographic wills is indicative, perhaps only half of the states would allow individuals to create their own wills electronically, but this would still be a significant step forward in embracing technology in the law and implementing the freedom of disposition.

Will formalities are still relevant and controlling in succession law,⁹⁴ despite movements to change the law and adopt a more lenient standard. The harmless error doctrine is a minority approach.⁹⁵ Holographic wills have been adopted in a little more than half the states, but still require strict adherence to holographic formalities.⁹⁶ Thus far, attempted retreats from formalism have not been universally successful, but technology continues to expand the meaning of formality, allowing a form of formalism that was not contemplated in 1837.⁹⁷ Following the lead of nonprobate transfers and digital asset reform, electronic wills can be employed to both honor tradition and the expediencies of the present day.

Ritchie's writing, Mr. McNamara wrote: 'I have read the above statement,' and signed his name.');

Estate of Southworth, 59 Cal. Rptr. 2d 272, 273 (Cal. Ct. App. 1996) (holding a document invalid as a holographic will where "[a] charitable donor card contains printed language showing an intent to make a future gift to the charity. In the blank space following the printed words a testator writes that her entire estate is to be left to the charity. She signs and dates the donor card.');

In re Estate of Krueger, 529 N.W.2d 151, 155 (N.D. 1995) (denying a will to probate where the decedent's nephew "made the alteration in [decedent's] presence and at her request.');

⁹⁴Wendel, *supra* note 65, at 353–54.

⁹⁵*Id.*

⁹⁶SITKOFF & DUKEMINIER, *supra* note 36, at 198–199.

⁹⁷Wendel, *supra* note 65, at 353–354.

II. NONPROBATE TRANSFERS AND DIGITAL ASSET REFORM PAVING THE WAY FOR ADOPTION OF ELECTRONIC WILLS

In part because the requirements of a valid will were so inflexible and rigid, the nonprobate system of testamentary transfers became more prevalent.⁹⁸ The nonprobate system was adopted by legislation, practice, and common law.⁹⁹ In addition to nonprobate transfers, the latest and most successful retreat from traditional formalism in succession has been through legislation controlling digital assets.¹⁰⁰ This section discusses the lack of traditional formalities in the nonprobate system and digital asset transfers and explores the ways that electronic wills could mimic these forms of transfer. Nonprobate transfers and digital asset succession achieve the goals of formality using electronic documents.

A. *Nonprobate Transfers*

The private alternative to the probate system is known as the nonprobate system of transfer.¹⁰¹ Nonprobate transfers occur according to terms of a private agreement between an individual and a third party.¹⁰² Nonprobate instruments are inter vivos trusts, life insurance policies, transfer on death accounts, investment and retirement accounts, and private contracts.¹⁰³ These instruments need no more formality than is imposed by the controlling trust document or contract itself.¹⁰⁴ Usually, a company or trust imposes formalities required for commercial transactions like a signature and a writing.¹⁰⁵ But many of these agreements can be entirely created and executed

⁹⁸Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1123, 1125 (1993).

⁹⁹*Id.* at 1126–1127

¹⁰⁰REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 4 (UNIF. LAW COMM’N 2015); Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 831 (2014).

¹⁰¹*Id.* at 846.

¹⁰²*Id.*

¹⁰³*Id.* at 805.

¹⁰⁴*Id.*

¹⁰⁵McCouch, *supra* note 98, at 1129–1130 (1993) (“[L]ife insurance companies and pension plan administrators normally accept beneficiary designations only in standard form over the signature of the policy owner or plan participant.”).

electronically without any kind of paper and ink document.¹⁰⁶ The lack of traditional will formalities and the ease of electronic transfers are correlated with nonprobate transfers rise in popularity. Nonprobate transfers use private contracts, fiduciary duties, and password-protected websites to replace a signed and attested document.¹⁰⁷ Nonprobate transfers ensure that the functions of formality are met and people are confident in their transfers.

More wealth transfers occur in the nonprobate system than in the probate system.¹⁰⁸ There are many reasons why nonprobate transfers are used with more frequency than probate transfers. A main reason is that modern wealth is held in nonprobate assets instead of land.¹⁰⁹ Retirement accounts and life insurance policies hold a significant amount of private wealth.¹¹⁰ In the first quarter of 2018, retirement assets totaled \$28 trillion, and accounted for 34% of all household financial assets in the United States.¹¹¹ During 2016, life insurers paid \$76 billion to beneficiaries of life insurance holders who died that year.¹¹² These assets, however, could still be part of the probate estate, but many people opt for them to be transferred outside of the probate system by using the company's own procedure to distribute wealth at death.¹¹³ Nonprobate transfers gained popularity because of a perception that these transfers were more flexible and efficient than probating a will.¹¹⁴ Life insurance companies are known for their ability to get money to survivors quickly without a prolonged, court-supervised process.¹¹⁵ Courts have long

¹⁰⁶ 17A AM. JUR. 2D *Contracts* § 18 (“Under the Uniform Electronic Transactions Act, a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.”).

¹⁰⁷ Banta, *supra* note 100 at 804–06.

¹⁰⁸ John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12 (2012).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 12–13.

¹¹¹ *Retirement Assets Total \$28.0 Trillion in First Quarter of 2018*, INV. CO. INST., https://www.ici.org/research/stats/retirement/ret_18_q1.

¹¹² AM. COUNCIL OF LIFE INSURERS, LIFE INSURERS FACT BOOK 2017, 47 (2017).

¹¹³ Langbein *supra* note 108, at 14–15.

¹¹⁴ SITKOFF & DUKEMINIER, *supra* note 36, at 468.

¹¹⁵ Zack Sigel, *How Quickly Do Life Insurance Companies Pay Out Death Claims?*, POLICY GENIUS (Apr. 27, 2018), <https://www.policygenius.com/life-insurance/how-quickly-do-life-insurance-companies-pay-out-death-claims/>.

upheld these contracts as a valid means of transferring wealth at death even though traditional will formalities are not present.¹¹⁶

A contract between a third party financial company and an account holder gives a transaction formality and is protected under contract law.¹¹⁷ When intended beneficiaries think that financial companies have distributed the funds in an account improperly, they can sue the financial entity for a breach of contract and breach of fiduciary duties.¹¹⁸ As long as the court finds that the parties have entered into a contract, the financial company will be held to the standards of the account agreement and fiduciary duties.¹¹⁹ Contract law, then, protects account holders and their testamentary intent.

Nonprobate transfers have also embraced the digital revolution.¹²⁰ Federal and state law require that electronic signatures are given the same effect as paper signatures.¹²¹ The Uniform Electronic Transactions Act (UETA) specifically excludes wills and testamentary transfers from using an electronic signature, but it does not exclude trusts or other nonprobate transfers.¹²² Nonprobate transfers can be electronically created and signed with little hassle; individuals can change the beneficiary designations of their nonprobate assets electronically without any attestation or additional formality.¹²³ Many accounts have downloadable apps that allow users, with a password-protected user name, to make changes and additions to their policies and accounts on their phones and tablets.¹²⁴ Companies advertise their abilities to help customers make changes electronically, indicating that customers want this kind of ease and flexibility in managing their affairs.¹²⁵

¹¹⁶ SITKOFF & DUKEMINIER, *supra* note 36, at 472; Parks' Ex'rs v. Parks, 156 S.W.2d 480, 485 (Ky. 1941) (noting that a life insurance policy does not need to be changed by a testamentary disposition).

¹¹⁷ Parks, 156 S.W.2d at 485.

¹¹⁸ See, e.g., UBS Fin. Servs., Inc. v. Aliberti, 113 N.E.3d 335, 338 (Mass. App. Ct. 2018); Jacobs v. Mazzei, 112 A.D.3d 1115, 1116 (N.Y. App. Div. 2013).

¹¹⁹ Aliberti, 113 N.E.3d at 343.

¹²⁰ See Electronics Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. § 7001(a) (2000).

¹²¹ *Id.*; UNIF. ELEC. TRANSACTIONS ACT § 7 (UNIF. LAW COMM'N 1999).

¹²² UNIF. ELEC. TRANSACTIONS ACT § 3 (UNIF. LAW COMM'N 1999).

¹²³ *Id.*

¹²⁴ Sabah Karimi, *15 Best Mobile Banking Apps and Services*, GO BANKING RATES (Jan. 16, 2018), <https://www.gobankingrates.com/banking/mobile/best-mobile-banking-apps-services/>.

¹²⁵ *Id.*

Revocable trusts are seen as will substitutes and do not need to meet requirements of a Wills Act in order to be valid.¹²⁶ Revocable trusts do not need to be in writing, signed, nor attested.¹²⁷ In order to have a valid trust, a settlor must intend to create a trust, bifurcating property ownership and imposing fiduciary obligations.¹²⁸ If a settlor creates this kind of arrangement, then she has created a valid trust.¹²⁹ At first, courts struggled with this kind of property transfer after death because it did not follow traditional will formalities.¹³⁰ Through state legislation and the common law, however, these revocable trusts are widely upheld and seen as a valid alternative to traditional will formalities.¹³¹ States have experimented with the revocable trust in lessening will formalities and allowing a valid trust with intent as the sole indicator of validity.¹³² These trusts have become the preferred way to transfer assets and demonstrate that the formalities required for a valid will are unnecessary for a safe, effective, and authentic transfer of assets.¹³³

Instead of a signed and attested writing in order to give confidence in the transfer, trusts employ a trustee to manage the transfer of assets after the settlor's death and impose fiduciary duties on the trustee.¹³⁴ The beneficiaries are able to obtain any information they need in enforcing the terms of the trust.¹³⁵ They can bring suit to prevent overreaching or fraudulent behaviors by a trustee.¹³⁶ In addition to imposing fiduciary duties, the doctrines of undue influence and fraud fight against the adoption of a trust agreement that

¹²⁶ RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (2003).

¹²⁷ *Id.*

¹²⁸ *Id.* §§ 2, 13.

¹²⁹ *Id.* § 2.

¹³⁰ *Farkas v. Williams*, 125 N.E.2d 600, 608–09 (Ill. 1955); *Betker v. Nalley*, 140 F.2d 171, 173 (D.C. Cir. 1944); *Bromley v. Mitchell*, 30 N.E. 83, 84 (Mass. 1892).

¹³¹ RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. b, § 74(1) (2003); UNIF. TRUST CODE § 603 (UNIF. LAW. COMM'N 2000) (amended 2018); *Patterson v. Patterson*, 2011 UT 68, ¶ 17, 266 P.3d 828 (Utah 2011) (“By enacting the [Uniform Trust Code], the legislature has demonstrated its intent to treat revocable living trusts as will equivalents.”).

¹³² *See, e.g., State v. Caslavka*, 531 N.W.2d 102, 106 (Iowa 1995).

¹³³ *Langbein supra* note 110, 8–10; RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.3 cmt. b (1999).

¹³⁴ RESTATEMENT (THIRD) OF TRUSTS §§ 2, 3 (2003).

¹³⁵ *Id.* § 82.

¹³⁶ *Id.* § 94.

was not what a settlor wanted.¹³⁷ Of course there is still litigation about the validity of a trust document, but the litigation is more substantive and is based on settlor intent, fiduciary duties, capacity, fraud, or undue influence.¹³⁸ It is not based on whether a signature happened at the right time or in the right context, but on a more substantive basis as to whether an instrument created a valid trust.¹³⁹ Thus, revocable trusts as a form of nonprobate succession have proven that there are alternatives to formality that promote the same purposes as traditional will formality and in many cases do a better job of promoting a settlor's intention.

Because of the rise of nonprobate transfers, adopting an electronic will is not as monumental a shift as it would seem. There are other ways to promote the functions of formality. With more property being transferred via the nonprobate system rather than traditional wills, these formalities have already become more of a hindrance to transfer assets at death. Trusts, retirement accounts, life insurance policies, and bank accounts are already well established in using electronic formats for their transactions.¹⁴⁰ As a result, assets are already transferring by electronic will substitutes.¹⁴¹ Adopting electronic wills only allows an easier and more flexible way for people to transfer property at death, which would hopefully increase the number of people who exercise their freedom of disposition. As seen in the next section, the most recent change to succession law in over forty states adopts a less rigorous way to transfer digital assets and gives another example of how

¹³⁷ *Id.* § 12 cmt. a (“Where no consideration is paid for the creation of a trust, it can be set aside or reformed upon the same grounds, such as fraud, duress, undue influence, or mistake, as those upon which a gratuitous transfer of property not in trust can be set aside or reformed.”).

¹³⁸ *See, e.g., State v. Caslavka*, 531 N.W.2d 102, 106 (Iowa 1995) (“[The court] independently searched the record and [could] find no objective manifestation of intent to create a trust.”); *Harvey v. Leonard*, 268 N.W.2d 504, 512 (Iowa 1978) (“The first issue which we must confront is whether the defendants breached their fiduciary duty to the beneficiaries of the trust and to the trust estate itself.”); *Kerber v. Eischeid*, No. 15-1249, 2016 WL 1696929 at *5 (Iowa Ct. App. Apr. 27, 2016) (“Their petition at law alleged . . . lack of testamentary capacity and undue influence”); *In re Trust of Killian*, 494 N.W.2d 672, 673 (Iowa 1993) (“Joan filed suit against the trustees alleging breach of fiduciary duties and fraud concerning the handling of her trust.”).

¹³⁹ *See, e.g., In re Marriage of Petersen*, No. 15-0282, 2016 WL 1757628 at *6, (Iowa Ct. App. Apr. 27, 2016) (noting that the formalities of a trust had not been maintained because the beneficiaries were not given notice of gifts to the trust and no tax returns were filed by the trust. Instead of operating as part of an estate plan, the trust was being used as a “convenient entity to hold assets”).

¹⁴⁰ Banta, *supra* note 100, at 811–812; UNIF. ELEC. TRANSACTIONS ACT § 3 (UNIF. LAW COMM’N 1999).

¹⁴¹ Banta, *supra* note 100, at 811–812.

electronic wills could work successfully to promote the freedom of disposition.

B. Digital Assets Transfers

In today's digital world, our emails, social media accounts, documents,¹⁴² and pictures are stored online.¹⁴³ These assets are known as digital assets. The law is still working to resolve the question of what happens to these digital assets upon an account holder's death.¹⁴⁴ The legislation that has been passed in the majority of states has opened the door to less formality in disposing digital assets and has paved the way for electronic wills to dispose of physical assets. This section addresses how digital asset reform has challenged traditional will formality requirements and pushes for more electronic options in estate planning. It argues that digital asset reform's focus on testamentary intent regardless of what form that written statement takes provides an example for electronic wills legislation. It also shows how electronic wills could solve some of the problems that the uniform digital asset act created by making digital assets unable to pass via intestacy.

1. Digital Asset Reform

Digital asset reform has been evolving for at least the past decade.¹⁴⁵ Connecticut was the first state to pass legislation regarding digital asset succession in 2005 and several states followed suit in enacting legislation.¹⁴⁶ The main issue of contention continues to be what to do when a decedent is silent about her digital assets: should her digital assets be included in the probate estate and transferred to her heirs under intestacy laws, or should digital assets be retained and presumably deleted by the digital asset provider? The first attempt at legislation by the Uniform Law Commission stated that digital assets should be included in the probate estate and transferred to heirs.¹⁴⁷ The Uniform Law Commission in 2014 presented a

¹⁴² Jamie P. Hopkins, *Afterlife in the Cloud: Managing A Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209, 215-217 (2013).

¹⁴³ Banta, *supra* note 100, at 800.

¹⁴⁴ *Id.* at 801.

¹⁴⁵ *Id.* at 830.

¹⁴⁶ *Id.*

¹⁴⁷ Sasha A. Klein & Mark R. Parthemer, *Who Will Delete the Digital You? Understanding Fiduciary Access to Digital Assets*, PROB. AND PROP., July–Aug. 2016, at 32, 33-34 (detailing the legislative hurdles in adopting the Revised Uniform Fiduciary Access to Digital Assets Act).

model statute that treated digital assets like any other property in a decedent's estate.¹⁴⁸ It rejected the notion that private companies could impose noninheritability clauses in terms of service agreement of a digital accounts.¹⁴⁹ Digital assets, under this first attempted legislation, would be controlled like any other physical property by a validly executed will.¹⁵⁰ All the formalities that are required for a will would be required to devise or destroy digital assets.

Internet companies, however, opposed the legislation.¹⁵¹ They feared that transmitting data after an account holder's death to a decedent's heirs would violate the Stored Communications Act, a federal act that imposes civil liability on companies that share customer's electronic communications with unauthorized third parties.¹⁵² Of course, the Stored Communications Act provides exceptions when a user gives "lawful consent"¹⁵³ and the question was whether a fiduciary of a decedent's account could give "lawful consent."¹⁵⁴ Unhappy with the Uniform Law Commission's proposal to treat digital assets like physical assets and therefore presumptively inheritable, an internet trade association called NetChoice, proposed a statute called Privacy Expectation Afterlife and Choices Act (PEAC).¹⁵⁵ PEAC limited digital asset inheritance to situations where the request was for information no more than a year prior to the date of death and where the executor demonstrated a good faith belief that records were relevant to the estate administration.¹⁵⁶ PEAC also provided for an account holder to express how the assets should be treated after a period of inactivity in order for the company to distribute those assets to a decedent account holder's heirs.¹⁵⁷

Realizing that the legislation would not be widely adopted with the strength of the digital asset service providers lobbying against it, the Uniform

¹⁴⁸ UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, (UNIF. LAW COMM'N 2014).

¹⁴⁹ *Id.* §§ 3, 7(b).

¹⁵⁰ Klein & Parthemer, *supra* note 149, at 33–34.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Stored Communications Act, 18 U.S.C. § 2702(b)(3) (2012).

¹⁵⁴ *Id.* § 2702(c)(2); Klein & Parthemer, *supra* note 147, at 34.

¹⁵⁵ *Privacy Expectation Afterlife and Choices Act (PEAC)*, NETCHOICE, <https://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/> (last visited Sept. 23, 2019).

¹⁵⁶ *Id.* § 1(A)(f), (h).

¹⁵⁷ *Id.* §§ 1(B)(c)(i), 3(a).

Law Commission changed its proposal.¹⁵⁸ Later that same year, the Uniform Law Commission proposed a revised digital assets act that no longer treated digital assets like physical property, automatically becoming part of a decedent's estate; instead, the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) requires account holders to affirmatively bequeath digital assets in order for these assets to be transferred upon their deaths.¹⁵⁹ If they fail to do so, digital assets will be controlled by a company's default policies and procedures.¹⁶⁰ RUFADAA seeks middle ground by allowing account holders to devise digital assets but requires them to do so expressly.¹⁶¹ Intestacy laws will not aid an account holder in this regard. RUFADAA has been adopted in a large majority of states.¹⁶²

Digital asset reform under RUFADAA is a cautionary tale for uniform law in the United States. On a national level, there was enough opposition from online companies to stunt the evolution of freedom of disposition in the digital realm.¹⁶³ The default rule was created not using surveys of what the typical decedent would want, but under pressure from powerful corporations and lobbies to mitigate their own liability under the law.¹⁶⁴ Whereas early states that passed litigation without the help of a uniform law made assets fully inheritable, later states that passed the uniform law made them inheritable only with an express statement that effect in a testator's estate planning documents.¹⁶⁵ One of the weaknesses of uniform, national law is the lack of experimentation. As digital asset legislation showed, states were more willing to experiment with different standards before the uniform act was propagated.¹⁶⁶ As states consider electronic wills, legislatures should experiment with formalities that make sense for their residents and see whether adopted reforms aid or obstruct an efficient transfer of assets at death.

¹⁵⁸ Klein & Parthemer, *supra* note 149, at 34.

¹⁵⁹ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS § 4 (UNIF. LAW COMM'N 2015).

¹⁶⁰ *Id.* § 5.

¹⁶¹ *Id.* § 4.

¹⁶² Enactment Map for the Fiduciary Access to Digital Assets Act, Revised, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=groupdetails> (last visited Sept. 30, 2019).

¹⁶³ Klein & Parthemer, *supra* note 149, at 33 (detailing the legislative hurdles in adopting the Revised Uniform Fiduciary Access to Digital Assets Act).

¹⁶⁴ *See id.* at 33–34.

¹⁶⁵ Banta, *supra* note 102, at 830.

¹⁶⁶ *Id.*

2. Digital Asset Reform Allows Electronic Statement of Intent

The adoption of RUFADAA paves the way for a digital will to control digital assets and validates the tools already used by some companies to effectuate testamentary intent. Under RUFADAA, users may express their testamentary intent regarding their digital assets in a “will, a trust, power of attorney, or other record.”¹⁶⁷ The definition of record includes “information that . . . is stored in an electronic or other medium.”¹⁶⁸ Notably, the statutory language implies that an “other record” does not need to meet will formalities of the Wills Act to be effective. A will, a trust, power of attorney, or something else can express testamentary intent.¹⁶⁹ The statute contemplates that such a record can be stored electronically as well as physically.¹⁷⁰ Thus, under RUFADAA, a statement typed in a notes section on a cell phone may be adequate to express testamentary intent regarding digital assets. Likewise, a typed or written note printed on a piece of paper without a signature or witnesses could be used to express testamentary intent regarding digital assets. The statute lowers the standards for a testamentary expression of intent that will be honored by the courts regarding a specific class of assets, namely, digital assets.

This lack of formality in transferring digital assets is a remarkable change in the law of succession.¹⁷¹ It does not let the formality of a document impede execution of a testator’s intent. However a decedent decides to devise her digital assets, RUFADAA respects and enforces that intent.¹⁷² Testamentary intent is paramount in devising digital assets.

Because the default rule under RUFADAA is one of non-inheritance, removing the barriers to devise digital assets is most likely a positive development. Perhaps state legislatures were willing to allow a document to suffice to transfer digital assets with no formalities attached because digital assets have less financial value than other tangible assets, which must be devised via a formal will or nonprobate transfer. Legislation promoting electronic wills could do something similar. Will formalities are designed to

¹⁶⁷ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(a), (b) (UNIF. LAW COMM’N 2015).

¹⁶⁸ *Id.* at § 2(22).

¹⁶⁹ *Id.* at § 4(b).

¹⁷⁰ *Id.* at § 4(a), (b).

¹⁷¹ *See* UNIF. PROB. CODE § 2-502(a) (UNIF. LAW COMM’N 2010).

¹⁷² REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(a) (UNIF. LAW COMM’N 2015).

protect the intent of the decedent and ensure that freedom of disposition is honored.¹⁷³ Legislatures can still require some formality and security in digital documents to protect the testator's intent and have confidence that such record is not subject to fraud or abuse. RUFADAA establishes a system where digital assets can be devised without any traditional formalities, but adopts digital formality through online tools or a valid will, trust, power of attorney, or other record. It incorporates the formal documents that already exists and then expands the ways that testamentary intent can be validly expressed.

Digital assets should not be treated differently than physical assets. To an extent, RUFADAA already forecloses that argument by requiring a statement of intent in order to devise.¹⁷⁴ If a testator has not made a testamentary statement regarding her physical assets, a state's intestacy statute applies to devise the property to those the law presumes a typical decedent would choose.¹⁷⁵ For digital assets, however, silence means that the assets are not descendible under state intestacy law.¹⁷⁶ Physical or electronic wills can eviscerate this distinction by encouraging any testator to make a statement of intent regarding her digital assets. Allowing electronic wills to be drafted and executed on a portable electronic device will hopefully also encourage testators to think about the assets held on that device that they are using to execute their will. If more people make electronic wills, more people will include testamentary statements under RUFADAA that will devise their digital assets. Allowing a version of electronic wills to devise digital assets as well as physical assets will bridge the gap that RUFADAA has created between these two types of assets.

3. Digital Asset Reform Alternatives to Formalities

Digital asset reform demonstrates that there are different kinds of formalities that can serve the purpose of authenticating and safeguarding a testamentary document. By allowing third party companies to offer will drafting and safeguarding services, states would encourage innovation and competition in the electronic will industry. If individuals could estate plan on

¹⁷³ Langbein, *supra* note 57, at 492.

¹⁷⁴ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(a), (b) (UNIF. LAW COMM'N 2015).

¹⁷⁵ UNIF. PROBATE CODE § 2-101(a) (UNIF. LAW COMM'N 2010).

¹⁷⁶ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(a), (b) (UNIF. LAW COMM'N 2015) (indicating the only methods for devising digital assets).

their phones and create a will itself as a digital asset, it is likely that more individuals would engage in estate planning.¹⁷⁷ Digital assets pave the way for adoption of electronic wills by being more accessible and convenient. Digital asset reform shows that allowing vendors to be involved and focusing on testamentary intent meet the requirements of formality in the digital age.¹⁷⁸

Several online companies have provided some kind of digital record that does not require formalities but that are presumably effective to transfer digital assets upon death.¹⁷⁹ Instead of required formalities, these companies require a username and password to change the settings of the account upon the user's death.¹⁸⁰ Google, for example, employs an inactive account manager, allowing a user to state whether she would prefer the assets to be deleted or transferred to a trusted individual in the event of her "inactivity."¹⁸¹ Facebook, similarly, provides a mechanism for a user to name a trusted individual as a "legacy contact" to access, update, or remove a deceased user's account.¹⁸² These private contracts between a user and company are ideal to ensure an individual user makes the determination of the fate of her digital assets, honoring testamentary intent and providing a convenient way to transfer assets.¹⁸³

These agreements between a user and an online company lack the protections of will formalities and must rely on contractual protections in the law.¹⁸⁴ They do not satisfy the Wills Act of a writing, signature, and attestation.¹⁸⁵ But they have created their own formalities that still meet the purposes for why formalities exist in the first place—they authenticate and safeguard a document.¹⁸⁶ The agreements are in writing.¹⁸⁷ Instead of a

¹⁷⁷ See Weisbord, *supra* note 8, at 899.

¹⁷⁸ See Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 969 (2016).

¹⁷⁹ *Id.* at 968.

¹⁸⁰ *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> (last visited Feb. 7, 2019); *What is a Legacy Contact?*, FACEBOOK, <https://www.facebook.com/help/1568013990080948> (last visited Feb. 7, 2019).

¹⁸¹ GOOGLE, *supra* note 180.

¹⁸² FACEBOOK, *supra* note 180.

¹⁸³ See, e.g., Banta, *supra* note 100, at 968.

¹⁸⁴ *Id.* at 965.

¹⁸⁵ See, e.g., GOOGLE, *supra* note 180; FACEBOOK, *supra* note 180.

¹⁸⁶ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4 (UNIF. LAW COMM'N 2015).

¹⁸⁷ GOOGLE, *supra* note 180; FACEBOOK, *supra* note 180.

signature, account statements are only accessible via a secure username and password.¹⁸⁸ There are no witnesses, but there is a third party company that provides the service—much like a bank or life insurance company that has a testator fill out their form in order to protect beneficiary designations.¹⁸⁹ These online tools are much more like nonprobate transfers. Although there is a concern that the terms of service agreements are unilateral contracts that provide that a company can change the terms at any time,¹⁹⁰ companies care about public perceptions of their agreements. Google could legally rid itself of the inactive account manager system at any time, but if there is a demand for the service from consumers, consumers will find another service that does what they want it to do.

Although allowing online tools to control the distribution of assets after death is a drastic departure from traditional wills, new formalities have been adopted in these online tools to ensure that they are valid and authentic manifestations of intent. Once an individual has manifested her testamentary intent in an online tool and dies, a company cannot change that intent and RUFADAA requires that her intent be followed. Formalities still exist in devising digital assets, but instead of the law controlling what online tools need in order to be valid, a company creates provisions of inheritability. Companies choose what kind of verification it needs in order to transfer assets after a period of inactivity.¹⁹¹ Companies choose whether to assess a fee or not and the period of compliance.¹⁹² RUFADAA does not impose requirements on what this contract between the user and the company requires.¹⁹³ Instead, the law encourages companies to allow users to indicate their intent and prioritizes that intent above any other expression a decedent may have made.¹⁹⁴

This is not unlike private contracts we see in other areas of succession law, namely nonprobate transfers. Nonprobate transfers that deal with

¹⁸⁸ GOOGLE, *supra* note 180; FACEBOOK, *supra* note 180.

¹⁸⁹ See Banta, *supra* note 100, at 808.

¹⁹⁰ See generally David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 608 (2010) (discussing the growing number of consumer contracts that are changed unilaterally); Banta, *supra* note 178, at 964–65.

¹⁹¹ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 6(a)(1)–(2) (UNIF. LAW COMM'N 2015); GOOGLE, *supra* note 180; FACEBOOK, *supra* note 180.

¹⁹² REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 6(b) (UNIF. LAW COMM'N 2015).

¹⁹³ *Id.* at § 5(a).

¹⁹⁴ *Id.* at § 4(c).

monetary assets are protected by private enforceable contracts.¹⁹⁵ If a bank or investment company refuses to transfer assets in an account upon death, the beneficiaries can sue the entity under the account agreement they agreed to when the account holder opened the account.¹⁹⁶ As Internet companies follow the tradition of nonprobate transfers, they need to ensure transferability in their terms of service agreement. The fact that digital asset companies are able to change their policies regarding these digital assets at any time, however, is concerning. If digital asset providers decide that using the nonprobate system is best, then there should be a legally enforceable contract providing for the transfer of those assets at death at the time the account holder entered into the agreement. RUFADAA allows account holders to make their testamentary intent known by a will, trust, power of attorney, or other record to address situations where the contract of the company has changed.¹⁹⁷

Some companies forbid transferability of digital assets altogether. Yahoo!, for example, by terms of its service agreement terminates a deceased user's account upon death.¹⁹⁸ This contractual prohibition on transferability of digital assets has not been challenged. Under RUFADAA, however, a decedent's intent would control over contrary provisions of a terms of service agreement.¹⁹⁹ In the absence of expressed intent, however, the clause forbidding inheritability would seemingly be upheld under RUFADAA. The Massachusetts Supreme Court declined to assess the validity of Yahoo's

¹⁹⁵ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1(a) (AM. LAW INST. 2003).

¹⁹⁶ *Van Hosen v. Bankers Tr. Co.*, 200 N.W.2d 504, 505 (Iowa 1972) (“Defendant bank has since withheld retirement benefits payable to plaintiff under the plan here involved.”); *Evans v. Cole*, 281 N.W. 230, 234 (Iowa 1938) (“Appellants argue strenuously that the contract was not personal and that assignment to them in nowise breached the contract.”); *Hixson v. First Nat. Bank*, 200 N.W. 710, 711 (Iowa 1924) (“The plaintiff presents . . . that he lost his farm because of the alleged breach of contract by the defendant.”).

¹⁹⁷ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(a) (UNIF. LAW COMM'N 2015).

¹⁹⁸ *Yahoo Terms of Service*, YAHOO!, <https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm> (last updated Jan. 2, 2018) (“*No Right of Survivorship and Non-Transferability*. You agree that your Yahoo account is nontransferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”).

¹⁹⁹ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(c) (UNIF. LAW COMM'N 2015).

noninheritability clause and remanded the case to the Probate and Family Court for further proceedings.²⁰⁰ It did note that “The express language of the termination provision, if enforceable, thus purports to grant Yahoo the apparently unfettered right to deny access to the contents of the account and, if it so chooses, to destroy them rather than provide them to the personal representatives.”²⁰¹ Whether such a clause is enforceable has not been judicially determined.

Although RUFADAA allows a less formal electronic “record” to dispose of digital assets²⁰² and presumably sanctions agreements made between a user and a digital asset service provider, there are sufficient formalities in order to encourage testamentary intent to control digital assets. Testamentary freedom rather than archaic formalities becomes the driver of digital asset distribution under RUFADAA. It remains to be seen how RUFADAA will be enforced with contrary contractual provisions or no statement from the decedent, but the reformed law shows that in a digital age, the accessibility and flexibility of fewer formal requirements is a more appealing approach.

In addition, digital assets reform allows digital assets to be distributed by a will, which merges the discussions of whether an electronic document can be a will disposing of digital assets. Electronic wills only ease the distribution of digital assets only if people remember to put it in their wills. Practicing attorneys already put digital asset on checklist of assets for physical wills.²⁰³ The overwhelming number and form of digital assets in every quarter of modern life demonstrates the need for succession law to adapt in order to stay relevant. Digital assets are here to stay. Today’s assets are increasingly being transformed from tangible to digital ones. In order to promote the ease and accessibility of transfer, digital asset inheritance should be a featured component of electronic wills.

Digital assets have become so much a part of our everyday lives that it is difficult to think of every circumstance where they appear. Consider the

²⁰⁰ *Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766, 769 (Mass. 2017).

²⁰¹ *Id.* at 779.

²⁰² REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 2(22) (UNIF. LAW COMM’N 2015).

²⁰³ Frank S. Baldino, *Estate Planning and Administration for Digital Assets*, MD. B.J., Nov.–Dec. 2012, at 29, 30 (“When working with a client to prepare his or her estate plan, an attorney should recommend that the client prepare an inventory of each of his or her digital assets.”); Sharon D. Nelson & John W. Simek, *When You Die, Will Your Digital Assets Go to Hell? Understanding Digital Property*, OR. ST. B. BULL., May 2016, at 23 (“The best advice we can give clients is to keep a detailed list of their digital property with access information . . .”).

digital assets contained in password-protected accounts that a typical decedent would have. She would have a score of password protected financial accounts like bank access, PayPal, cyber currency, investment and brokerage accounts, bill paying capacity online, loan payments online, IRS tax filings. A decedent might have password-protected business accounts containing client records, patient records, customer information databases, inventory, or online shops. A typical decedent would have personal password-protected accounts with frequent flyer points, credit card cash back programs, or discounts or vouches with specific companies. A decedent might also have financial value in the gaming world and creations or currency that others would be interested in acquiring.

The rapid increase in digital assets and property stored online will encourage more people to seek out ways to transfer accumulated wealth in these assets. There are also scores of practical digital assets that may not have much financial value, but still need to be sorted through and saved if relevant or important to survivors. Allowing electronic wills would add another digital asset to our list, the electronic will itself. Electronic wills could be stored on computers, in the cloud, by lawyers or by testators. Many apps have already been created to engage people in will drafting. Changing the law would encourage innovation in the development of these apps and provide a way for individuals to access will drafting software and proper execution requirements all from their phone, tablet, or computer.

Digital asset legislation is the latest most successful approach to lessening traditional formality requirements to devise. Following the pattern of nonprobate transfers, digital asset reform sets the ground work for the adoption of electronic wills and demonstrates that a different kind of formality for digital documents can address concerns about safeguarding testamentary intent. Digital asset reform focuses more on an individual's testamentary intent rather than on the way that intent was manifested. The lodestar of testamentary intent should be the model for legislative reform of electronic wills. In addition, digital asset reform allows companies to aid in the attempt to authenticate and safeguard a will. If states allow electronic wills to be offered by third-party companies, they will encourage innovation and competition in aiding people to complete their estate plans.

III. TECHNOLOGY PUSHING BOUNDARIES AND FORMALITIES

Even before the advent of digital assets, technological developments have long pushed the boundaries of strict adherence to will formalities. This Part

gives an overview of how the law has dealt with versions and elements of proposed electronic wills. Generally, courts have continued to require strict compliance to will formalities, but some states have legislatively determined that electronic wills are a valid form of testamentary transfer. Nevada was the first state to allow electronic wills.²⁰⁴ In 2001, Nevada passed a statute that allowed electronic wills if there was only a single original document, a method of authentication, and a method to determine whether the original had been altered.²⁰⁵ Nevada recently updated its electronic will statute.²⁰⁶ There has been no case law in Nevada further elaborating on its electronic wills statute. Indiana passed legislation in 2018 that allowed for electronic wills to be signed and attested electronically.²⁰⁷ Arizona has passed legislation that will allow testators to sign their wills electronically.²⁰⁸ Most recently, Florida passed legislation allowing for electronic signing, witnessing and notarization of wills.²⁰⁹ The Uniform Law Commission is working on a statute to address the formation, validity, and recognition of electronic wills, and its proposal will be addressed below.

In the absence of a statutory provision allowing electronic wills, it is up to the courts to apply the existing formality requirements and determine whether an electronic will meets the requirements under the common law. As will be seen in this Part, through the common law, courts have expanded what was originally contemplated by a signed writing attested by two or more witnesses and adapted these requirements as technology has changed—pens gave way to typewriters, typewriters gave way to computer processing systems. The common law has adapted to these changes without statutory authorization, and it can adapt to electronically stored, signed, and attested documents as well using a broad interpretation of statutory language.

²⁰⁴ Taylor Bechel & Ashley Thompson, *Electronic Wills*, LAW WEEK CO. (Jun. 16, 2017), <https://lawweekcolorado.com/2017/06/electronic-wills/>.

²⁰⁵ *Id.*

²⁰⁶ Kyle B. Gee, *The 'Electronic Wills' Revolution: An Overview of Nevada's New Statute, The Uniform Law Commission's Work, and Other Recent Developments*, 28 OHIO PROB. L.J. March-April 2018, at 1, 2. (2018); NEV. REV. STAT. §§ 133.085, 136.185 (2017).

²⁰⁷ IND. CODE § 29-1-21 (2019).

²⁰⁸ H.R. 2656, 53rd Leg., 2d Reg. Sess. (Az. 2018).

²⁰⁹ H.R. 409, 2019 Leg., Reg. Sess. (Fla. 2019) (effective Jan. 1 2020).

A. Electronic Writing

Wills are required to be in writing.²¹⁰ The Restatement defines this as a reasonably permanent record of the marking constituting the will.²¹¹ People have written their wills on all sorts of surfaces: skin, wood, a tractor fender, a petticoat.²¹² Because they have been reasonably permanent markings, courts have upheld these wills. One of the early challenges to the written requirement was whether writing in pencil instead of pen would be a reasonably permanent marking.²¹³ Courts found that a pencil was a reasonably permanent marking and satisfied the writing requirement.²¹⁴ Then typewritten wills were challenged as not being a writing within the meaning of the Wills Act.²¹⁵ Again, courts found that a typewritten will was a reasonably permanent marking and could be probated.²¹⁶ Several state statutes now define a writing as a handwritten or typewritten document.²¹⁷ As technology changes, the “writing” element has also changed. Pencils, typewriters, and now computers are pushing the boundaries of what the Wills Act means by a writing. Courts now have to determine whether a document written or typed on a tablet and executed on a tablet is considered a writing. The first American court to decide this issue held that it was.²¹⁸

In 2012, a terminally ill patient wanted to make a will during his stay in a hospital.²¹⁹ His brothers did not have any paper or a pencil, so they pulled out their touchscreen tablet.²²⁰ The testator dictated what he wanted in his will, and his brother handwrote the provisions using the stylus on the tablet.²²¹

²¹⁰ UNIF. PROB. CODE § 2-502(a) (UNIF. LAW COMM’N 2010).

²¹¹ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. i (AM. LAW INST. 2003).

²¹² THOMAS E. ATKINSON, LAW OF WILLS 294–95 (2d ed. 1953); L.B. Whyde, *Johnstown Woman’s Will Recorded on Wood*, NEWARK ADVOCATE, Sept. 28, 2010.

²¹³ *Musgrove v. Holt*, 240 S.W.2d 1068, 1070 (Ark. 1922); *Paglia v. Messina*, 169 N.E. 423, 423 (Mass. 1930); *Tomlinson’s Estate*, 19 A. 482, 483 (Pa. 1890); *Myers v. Vanderbilt*, 84 Pa. 510, 514 (1877); GARDNER, *supra* note 40, at 29.

²¹⁴ GARDNER, *supra* note 40, at 29.

²¹⁵ *Stuck v. Howard*, 104 So. 500, 502 (Ala. 1925), *overruled in part by Reynolds v. Massey*, 122 So. 29 (Ala. 1929).

²¹⁶ *Id.*

²¹⁷ *See, e.g.*, OHIO REV. CODE ANN. § 2107.03 (2019).

²¹⁸ *In re Estate of Javier Castro*, No. 2013ES00140 (Ohio C.P. June 19, 2013).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

His brother read back the section to the testator.²²² The testator, the brother who wrote the will, and the other brother who was present during this process all signed the will.²²³ After the testator died, his brothers presented a paper copy of the will written on the tablet to the court for probate.²²⁴ The question became whether the tablet was a “writing.”²²⁵ The Ohio probate code did not further define the term writing. The court turned to sections of Ohio’s state criminal code that defined writing as “any computer software, document, letter . . . or any other thing having in or upon it any written, typewritten, or printed matter.”²²⁶ The court determined that the document prepared on a tablet constituted a writing under the probate code.²²⁷

The Ohio probate court is the first American decision on a will written, signed, and attested on a tablet. Australian court decisions have had a few more electronic will cases. In one, a decedent had typed on his iPhone a text file that said it was his last will and testament.²²⁸ The Australian court held that this was a document that satisfied its wills act.²²⁹ Australian courts have also probated Microsoft Word files that were labeled as the testator’s will in a file name, but at least one Australian court denied probate of an electronic document.²³⁰

The definition of a writing given in the restatement is a reasonably permanent marking and electronic documents saved in a file seem to meet this definition as being reasonably permanent.²³¹ Paper documents are not more reasonably permanent than electronic documents, at least in today’s world where document storage and files are mostly kept digitally or are at least being transferred to a digital system.²³² The Ohio probate court looked

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *In re Yu*, [2013] QSC 322 (Austl.).

²²⁹ *Id.*

²³⁰ *Estate of Currie* [2015] NSWSC 1098 (Austl.); *Yazbek v Yazbek* [2012] NSWSC 594 (Austl.); *but see Mahlo v Hehir* [2011] QSC 243 (Austl.).

²³¹ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. i (AM. LAW. INST. 2003).

²³² Chuck Cohn, *Why You Should Be Running a Paperless Company*, FORBES (Sept. 3, 2014, 2:57 PM), <https://www.forbes.com/sites/chuckcohn/2014/09/03/why-you-should-be-running-a-paperless-company/#618377a6f833> (noting that “[d]igitalized companies can easily back up crucial information . . . [as] digital documents can be protected remotely via the cloud or an off-site hard

to other areas of the law to determine a definition of the statutory term “writing” and saw that in the criminal code, electronic documents were considered writings.²³³ Even in the absence of statutory change, it is entirely plausible for probate courts, like the Ohio court, to find that an electronic document satisfies the Wills Act requirement of a “writing.” The common law changes to adjust to developments in society and other areas of law.²³⁴ There was no need to pass a statutory provision to allow pencils instead of pens or typewritten instead of handwritten wills. Likewise, it seems unnecessary to pass a statutory provision to allow for a purely electronic document to serve as a writing under the Wills Act. Probate courts could adopt the common understanding that documents that exist purely electronically are valid writings. They have begun to do so in Australia and in Ohio without statutory validation.²³⁵ Just last year, a Michigan court of appeals decided that a message a man wrote on his cell phone disinheriting his mother was valid under the Michigan Wills Act and harmless error standard.²³⁶ The man had left a handwritten note that expressed his apology and stated that his final note would be in the “Evernote” app on his phone.²³⁷

drive.”); Scott Kramer, *Organize Your Life: 8 Tips to Scanning Personal Documents*, FORBES (May 27, 2016, 2:30 PM), <https://www.forbes.com/sites/scottkramer/2016/05/27/organize-your-life-8-tips-to-scanning-personal-documents/#84d600122e18> (pointing out that “digitized documents don’t fade over time or get torn—like their paper counterparts do.”); Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAGAZINE (July 21, 2010), <https://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html> (discussing how we are “living in a world without forgetting . . . [with] digital trails that will follow us forever.”); Eric Schmidt & Jared Cohen, *The ‘Privacy Talk’ is the New Sex Talk Parents Should Have With Their Kids*, WIRED (Mar. 4, 2014, 6:30 AM), <https://www.wired.com/2014/03/privacy-talk-new-sex-talk-2/> (discussing that “[d]ata permanence is a hallmark of the digital era, and there’s nothing we can do about the fact that what we do today is recorded and stored with no expiration date and no “erase” button.”); J. Peder Zane, *Hey, at Least You Can Be Virtually Immortal*, N.Y. TIMES (Mar. 12, 2013), <https://www.nytimes.com/2013/03/13/business/retirementspecial/hey-at-least-you-can-be-virtually-immortal.html> (discussing how people today may enjoy “virtual immortality . . . [as] new technologies [are] now so common most people take them for granted . . .”).

²³³ *In re Estate of Javier Castro*, No. 2013ES00140 (Ohio C.P. June 19, 2013).

²³⁴ *Hoffman v. Dautel*, 368 P.2d 59 (Kan. 1962).

²³⁵ *Radford v White* [2018] QSC 306 (Austl.) (allowing video recordings to be a valid will); *Re Nichol* [2017] QSC 220 (Austl.) (probating an unsent text message on a phone); *In re Yu* [2013] QSC 322 (Austl.) (probating electronic writing on phone); *In re Estate of Javier Castro*, No. 2013ES00140 (Ohio C.P. June 19, 2013).

²³⁶ *In re Estate of Horton*, 925 N.W.2d 207, 215 (Mich. Ct. App. 2018).

²³⁷ *Id.* at 209.

He provided his sign-on name and password for the app.²³⁸ In this typed note, the decedent expressed his wishes for how his property would be distributed at his death.²³⁹ The court found that this was a “document or writing” that did not comply with the attestation requirement of the Wills Act or the handwritten requirement for a holographic will.²⁴⁰ The court applied Michigan’s Harmless Error statute, which statutorily decrees that as long as there is clear and convincing evidence that decedent intended a document or writing to be his will, it can be probated by the court.²⁴¹ The court found that there was clear and convincing evidence that the decedent intended this to be his will, and found that it was a valid will under Michigan law.²⁴² The *In re Horton* case is an example of how the Harmless Error statute allows an electronic writing to be a valid will without other statutory authorization.²⁴³ But it also shows that technology is pushing the boundaries of what we consider a writing—typed words on a cell phone screen are reasonably permanent enough to be considered a writing.

Although statutory approval may not even be needed for documents that exist entirely in digital form saved on a computer, statutory approval would be needed for an electronic will in the form of a video or audio recording. Even applying the lenient harmless error doctrine, it is unlikely that a video or audio recording could overcome the plain statutory requirement of a writing. In 1983, a Wyoming court had to determine whether a recorded DVD of a testator bequeathing his property could be probated under the Wills Act.²⁴⁴ The court found that it did not.²⁴⁵ Changing the law to allow for video and audio recordings seems like a much more significant change than allowing for electronic “writings.” Video recordings are expressly allowed in Louisiana and Indiana in order to verify compliance with will formalities during execution, but such recordings do not substitute as a writing under the Wills Act.²⁴⁶

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 212.

²⁴¹ *Id.*

²⁴² *Id.* at 215.

²⁴³ *Id.*

²⁴⁴ *In re Estate of Reed*, 672 P.2d 829, 830 (Wyo. 1983).

²⁴⁵ *Id.*

²⁴⁶ LA. CODE CIV. PROC. ANN. art. 2904 (2019); IND. CODE ANN. § 29-1-5-3 (2019).

Yet, it is important to remember that most electronic documents could be considered under the common law as a “reasonably permanent record.”²⁴⁷ Electronic documents are how we conduct business in the world today and have largely replaced printed paper files. Without any kind of statutory approval, courts have and could continue to find that an electronic document satisfies the Wills Act’s requirement of a writing.

B. Electronic Signature

The Wills Act requires a testator to sign a will in order for it to be valid. A signature evidences finality and provides evidence of authenticity.²⁴⁸ The most important component of a signature is that the testator signed with the intent that the mark be her signature.²⁴⁹ Even before federal legislation validated electronic signatures in transactions, courts allowed typewritten signatures if it was done with requisite intent.²⁵⁰ Technology has again pushed the boundaries of what the signature element of the Wills Act requires, and courts are beginning to deal with whether an electronically typed name on a document constitutes a signature.

In *Taylor v. Holt*, a testator wrote his one-page will on his computer.²⁵¹ Instead of printing the will and signing a paper copy by hand, he typed his name at the end of the will in cursive font in front of two witnesses. He then printed the document and had two witnesses sign the paper by hand.²⁵² The appellate court upheld the trial court’s holding that this typed signature constituted a signature under the Wills act, finding “Deceased simply used a

²⁴⁷ UNIF. PROB. CODE § 2-502 cmt. a (UNIF. LAW COMM’N 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. i (AM. LAW INST. 2003).

²⁴⁸ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. j (AM. LAW. INST. 2003).

²⁴⁹ *Nelson v. Texarkana Historical Soc. and Museum*, 516 S.W.2d 882, 883 (Ark. 1974); *Estate of McCabe*, 224 Cal. App. 3d 330, 334, 274 Cal. Rptr. 43 (Cal. Ct. App. 1990); *Matter of Estate of Erickson*, 806 P.2d 1186, 1188 (Utah 1991); *Irving v. Divito*, 807 S.E.2d 741, 744 (Va. 2017).

²⁵⁰ *Irving v. Goodimate Co.*, 70 N.E.2d 414, 417 (Mass. 1946) (finding that “[a] memorandum is signed in accordance with the statute of frauds if it is signed by the person to be charged, in his own name, or by his initials, or by his Christian name alone, or by a printed, stamped or typewritten signature, if in signing in any of these methods he intended to authenticate the paper as his act.”); *Hillstrom v. Gosnay*, 614 P.2d 466, 469 (Mont. 1980) (finding that “[p]rovided the necessary intent to authenticate is shown, the typewritten “signature” on a telegram is a proper subscription within the meaning of the statute [of frauds].”).

²⁵¹ 134 S.W.3d 830 (Tenn. Ct. App. 2003).

²⁵² *Id.* at 830–31 (typed signature is acceptable).

computer rather than an ink pen as the tool to make his signature.”²⁵³ Likewise, in *In re Estate of Javier Castro*, the testator and his witnesses signed a tablet using a stylus.²⁵⁴ The court found that the testator’s signature satisfied the legal requirements of the Wills Act stating, “The tablet application also captured the signature of Javier. The signature is a graphical image of Javier’s handwritten signature that was stored by electronic means on the tablet.”²⁵⁵ Neither of these courts had a problem holding that a signature could be an electronic one.

Yet, at least one court has found that the definition of signature does not include a printed name on the document. In *Matter of Reed’s Estate*, a testator had written a will on printed letterhead.²⁵⁶ The court found that the printed letterhead did not meet the requirement of a signature even though it might satisfy the standard for a contract.²⁵⁷ The court found that more formality is required for a signature under the Wills Act than in a commercial contract.²⁵⁸ In *Litevich v. Probate Court*, a testator drafted a will using an online service provider.²⁵⁹ She created an account, drafted a will, and electronically confirmed the documents she had created.²⁶⁰ The company mailed her paper copy of her will, but she failed to sign the document by hand.²⁶¹ The court found even though she had electronically confirmed portions of the will, had created an online account, and her name was electronically typed on the document, she had not satisfied the signature requirement of the Wills Act under Connecticut law.²⁶²

Like with the writing element discussed above, it is likely that statutory authority is not needed for courts to adopt an interpretation of the signature requirement of the Wills Act that encompasses electronic signatures. Although mere typewritten text of a testator’s name may not meet the signature requirements, a handwritten signature using a tablet stylus should be considered signatures under the act if done with intent.²⁶³ When deciding

²⁵³ *Id.* at 833.

²⁵⁴ 2013ES00140 at *7–8 (Ohio C.P. June 19, 2013).

²⁵⁵ *Id.*

²⁵⁶ 625 P.2d 447 (Kan. 1981).

²⁵⁷ *Id.* at 452.

²⁵⁸ *Id.*

²⁵⁹ 2013 WL 2945055, at *1 (Conn. Super. Ct. 2013).

²⁶⁰ *Id.* at *2.

²⁶¹ *Id.*

²⁶² *Id.* at *22.

²⁶³ *In re Estate of Javier Castro*, 2013ES00140 at *7–8 (Ohio C.P. June 19, 2013).

whether a signature is valid for purposes of the Wills Act, courts can consider other areas of the law. The Uniform Commercial Code, for example, recognizes the validity of signature in letterhead.²⁶⁴ The Uniform Law Commission promulgated the Uniform Electronic Transactions Act (“UETA”), which provides that an electronic signature will be treated the same as a signature by hand.²⁶⁵ UETA has been adopted in the vast majority of states.²⁶⁶ In addition, the federal Electronics Signatures in Global and National Commerce Act (“E-SIGN”) defines an electronic signature as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”²⁶⁷ Both of these laws legally allow electronic transactions to be treated the same as signatures on paper. The Act states that if the law requires a signature, an electronic signature satisfies the law in all cases except under the Wills Act.²⁶⁸ It expressly excludes wills, codicils, and testamentary trusts from its coverage.²⁶⁹ States, however, are free to change this exception in their own laws to treat electronically signed wills the same as paper signed wills.

As we have seen, although the statutory language allowing electronically signed documents expressly excludes wills,²⁷⁰ courts have begun to legally equate electronic signatures and paper ones. This federal and uniform law is persuasive authority to allow electronic signatures in wills. In a world where consumers engage in sophisticated commercial transactions, file taxes, and submit court documents with electronic signatures, it becomes more likely that courts will accede to the understanding of electronic signatures under the Wills Act. The Wills Act in no way prevents a court from finding that an electronic signature is a signature for purposes of the Act.²⁷¹ The most important consideration for determining whether a signature is valid is

²⁶⁴ UNIF. COMMERCIAL CODE § 1-201(37).

²⁶⁵ UNIF. ELEC. TRANSACTIONS ACT § 101(a)(2) (UNF. LAW COMM’N 1999).

²⁶⁶ PRACTICAL LAW REAL ESTATE, REAL PROPERTY ELECTRONIC RECORDING ACT: STATE OVERVIEW, WESTLAW, available at [https://content.next.westlaw.com/Document/I66e3df587a6611e498db8b09b4f043e0/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I66e3df587a6611e498db8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1).

²⁶⁷ 15 U.S.C. § 7006(5).

²⁶⁸ 15 U.S.C. § 7003.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. i (AM. LAW. INST. 2003).

whether the decedent intended it to be her signature. Because Americans have been able to sign almost every document in their lives electronically for the past twenty years, it is likely that a testator would intend an electronic signature to be valid on her will if she executed it in the last two decades.

As technology continues to develop, electronic signatures may change to an even more secure form. Face recognition and fingerprint technology are becoming mainstream.²⁷² Such technology could be adopted to have a verifiable signature as well. Courts could interpret the Wills Act requirement for a signature to encompass these forms of authentication and authorization.

C. Electronic Attestation

The last requirement under the Wills Act is that two witnesses sign a will attesting that they either were in the presence of the testator when she signed her will or that the testator acknowledged in their presence that the will and signature was hers.²⁷³ The Uniform Probate Code allows that a will can be notarized instead of attested by two witnesses.²⁷⁴ But it has only been adopted in two states.²⁷⁵ The large majority of states require two witnesses to attest to a will in order for it to be valid.²⁷⁶ States have been strict about attesting and having witnesses who actually see the testator sign the document.²⁷⁷ This is necessary because a will does not become effective until after a testator dies and no one else besides the witnesses can testify as to the authenticity of the will and a decedent's intent as expressed in her will.

As discussed above, a witness can theoretically electronically sign a testator's will under the signature requirement as long as the witness intends that it be her signature.²⁷⁸ The problem for electronic attestation is the

²⁷² See Melanie Bailey, *The Hidden Data in Your Fingerprints*, SCIENTIFIC AMERICAN (Apr. 27, 2018), <https://www.scientificamerican.com/article/the-hidden-data-in-your-fingerprints/>; David Pogue, *Passwords Are on the Way Out, and It's About Time*, SCIENTIFIC AMERICAN (Aug. 1, 2016), <https://www.scientificamerican.com/article/passwords-are-on-the-way-out-and-it-s-about-time/>; Ricardo Villadiego, *The Future of Authentication Is Here*, FORBES (June 4, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/06/04/the-future-of-authentication-is-here/#187bde8432e1>.

²⁷³ UNIF. PROB. CODE § 2-502(a)(3) (UNIF. LAW COMM'N 2010).

²⁷⁴ *Id.* at § 2-502(a)(3)(B).

²⁷⁵ SITKOFF & DUKEMINIER, *supra* note 36, at 197.

²⁷⁶ *Id.* at 159.

²⁷⁷ *Id.* at 143.

²⁷⁸ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2003).

requirement that most states have that the attestation occur in the presence of the testator and/or each other. Some courts have interpreted presence to mean that a testator must be in the line of sight of the witnesses when she signs her will and other states have adopted the conscious presence test, finding that a witness is in the presence of the testator if through sight, hearing, and or general consciousness of events understands that the testator is in the act of signing.²⁷⁹ Neither test uses an element of physicality to determine whether the parties were “present.” Courts will be able to determine whether attestation can be accomplished remotely under the Wills Act.

Technology has pushed the boundaries of the presence test with the use of phones, video monitors, and of instantaneous video conference. In *In re McGurrin*, a testator sought to have an individual witness a will over the phone.²⁸⁰ The court found that the Wills Act required the witness to have an “observatory function” which could not be accomplished by a telephonic acknowledgment by the testator.²⁸¹ A New York appellate court also held that a telephonic communication could not satisfy the requirement of witnessing a will.²⁸² In *Whitacre v. Crow*, witnesses viewed the signing of a testator’s will on a video monitor.²⁸³ The court held that the conscious presence test was not met partly because the video monitor only worked one way. The witnesses saw and heard the testator’s actions, but the testator could not see and hear the witnesses.²⁸⁴ Presence was defined in the statute as being “within the range of any of the testator’s senses” and the court found that excluded sights and sounds relayed through electronic means.²⁸⁵

These cases, of course, leave open the question of whether conscious presence could be established by a two-way video conference. Video conferencing has become more widely used and normalized.²⁸⁶ Although

²⁷⁹ *Id.* at § 3.1 cmt. p (AM. LAW. INST. 2003).

²⁸⁰ 743 P.2d 994, 995 (Idaho Ct. App. 1987).

²⁸¹ *Id.* at 1002.

²⁸² *In re Will of Heaney*, 347 N.Y.S.2d 732, 735 (Sur. Ct. 1973).

²⁸³ 972 N.E.2d 659, 662 (Ohio Ct. App. 2012).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *When Choosing an Enterprise Video Conferencing Solution, Focus on These Critical Attributes*, FORBES (Nov. 10, 2017, 10:21 AM), <https://www.forbes.com/sites/insights-zoom/2017/11/10/when-choosing-an-enterprise-video-conferencing-solution-focus-on-these-critical-attributes/#1063c88215ba> (discussing that “[s]avvy executives from leading companies are waking up to the benefits of video conferencing.”); *You Need to See What You’re Missing: Overcoming Organizational “Stage Fright” in the Adoption of Video Conferencing*, FORBES (Nov. 6, 2017, 1:34 PM), <https://www.forbes.com/sites/insights-zoom/2017/11/06/you-need-to-see-what>

courts have not allowed attesting witnesses to attest remotely, meaning by phone or video, it seems entirely plausible for the law to allow this form of attestation in the future. The Wills Act requires that witnesses must be in the presence of the testator and some courts and the Restatement have interpreted presence broadly to mean that parties comprehend the act of signing is occurring.²⁸⁷ This “conscious presence test” could be applied to electronic attestation. A witness who is serving to verify the testator’s identity and capacity can do so remotely with technology that has been developed for instantaneous video communication. This type of communication fits directly within the conscious presence test applied by many courts.²⁸⁸ Courts could begin to expand the concept of attestation

States are beginning to adapt to videoconferencing technology in courts. Although it is not the preferred method of giving testimony, the Federal Rules of Civil Procedure allow a witness to give testimony remotely using videoconferencing if good cause can be shown.²⁸⁹ The District of Columbia Circuit has upheld a remote testimony against attacks that there was a problem with oath requirement.²⁹⁰

youre-missing-overcoming-organizational-stage-fright-in-the-adoption-of-video-conferencing/#3955960e7e59 (discussing that “most firms are moving swiftly to embrace still more value from the video conferencing medium.”); David Biello, *Can Videoconferencing Replace Travel?*, SCIENTIFIC AMERICAN (Mar. 18, 2009), <https://www.scientificamerican.com/article/can-videoconferencing-replace-travel/> (noting that “[i]t is unlikely that videoconferencing can replace all travel, but organizations are turning to it more and more as the technology’s downside . . . largely has been eliminated.”); *Video Conferencing Market to Reach US \$7.85 bn by 2023, Driven by Globalization of Enterprises: Transparency Market Research*, Global News Wire (Mar. 8, 2016, 7:30 AM), <https://www.globenewswire.com/news-release/2016/03/08/817797/0/en/Video-Conferencing-Market-to-reach-US-7-85-bn-by-2023-Driven-by-Globalization-of-Enterprises-Transparency-Market-Research.html> (discussing that “[a]part from corporate enterprises, verticals such as healthcare and government & defense are expected to witness high growth in the coming years due to increasing adoption of video conferencing solutions in these sectors.”); Helen Chernikoff, *Videoconferencing Gains as Travel Costs Rise*, N.Y. TIMES (June 3, 2008), <https://www.nytimes.com/2008/06/03/technology/03iht-video.1.13418747.html> (discussing how companies have “encouraged employees to use video conferencing in addition to conference calls and car-pooling to cut operating costs . . .”).

²⁸⁷ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. p (AM. LAW INST. 2003).

²⁸⁸ *Id.*

²⁸⁹ FED. R. CIV. P. 43(a) (“For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”).

²⁹⁰ *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 668–69 (D.C. Cir. 2007).

Videoconferencing is the tool that could convert the attestation requirement into the electronic realm. Technology is continuing to improve in transporting sound and sight to remote locations.²⁹¹ States have already begun allowing electronic notarizations where a remote notary participates through video conference to authenticate identity and documents.²⁹² For example, Virginia allows documents to be electronically notarized; a notary authenticates a signature's identity and then affixes an electronic notary seal on a document, and this can be done using audio-video conference technology.²⁹³ Under the current Wills Act, courts could interpret "presence" as encompassing instantaneous videoconferencing under either the line of sight test or conscious presence of attesting witnesses, especially in states that have adopted electronic notarization.²⁹⁴ Legislation could clarify that witnesses could attest remotely with video conferencing technology, but that may not be necessary under the language of the Act.

The bigger legislative hurdle is considering whether attestation could be satisfied by a third-party will drafting company. Imagine an app on a phone

²⁹¹Olivia B. Waxman, *Watch a Blogger Turn his Smartphone into a 3D Hologram Projector*, TIME (Aug. 3, 2015), <http://time.com/3982898/smartphone-3d-hologram-projector/> (discussing a new strategy for "turning smartphones into 3D hologram projectors that involves a plastic CD cover, a glass cutter, a sheet of graph paper, some tape, and a pen."); Tom Metcalfe, *Futuristic 'Hologram' Tech Promises Ultra-Realistic Human Telepresence*, NBC NEWS (May 4, 2018, 3:46 PM), <https://www.nbcnews.com/mach/science/futuristic-hologram-tech-promises-ultra-realistic-human-telepresence-ncna871526> (discussing "[a] new 3-D display system developed by researchers in Canada, is able to transmit a full-size, 360-degree image of a human that can be seen without any special gadgets like headsets or fast-moving mirrors."); Anne Eisenberg, *Holograms Deliver 3-D, Without the Goofy Glasses*, N.Y. TIMES (Dec. 4, 2010), <https://www.nytimes.com/2010/12/05/business/05novel.html> (noting that "[n]ow you can watch actual moving holograms that are filmed in one spot and then projected in another spot.").

²⁹²Pem Guerry, *Electronic and Remote Notarization Legislative Updates*, LAW TECHNOLOGY TODAY (May 15, 2017), <https://www.lawtechnologytoday.org/2017/05/electronic-and-remote-notarization-legislative-updates/> (discussing that "[e]lectronic notarizations—and, more specifically, remote notarizations conducted online—are gaining popularity across the country, and legislatures in many states have enacted or are considering bills that would allow the practice."); Lauren Silverman, *Notaries are Starting to Put Down the Stamp and Pick up a Webcam*, NPR (June 12, 2017, 4:23 PM), <https://www.npr.org/sections/alltechconsidered/2017/06/12/532586426/notaries-are-starting-to-put-down-the-stamp-and-pick-up-a-webcam> (discussing that "new technology and new laws are making it possible to skip the sometimes-arduous search for the notary stamp in favor of a video chat . . .").

²⁹³V.A. CODE ANN. §§ 47.1-6.1, 47.1-7 (2019).

²⁹⁴RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.1 cmt. p (AM. LAW INST. 1999).

that allows users to update their wills. Although the law could find that text in such an app was a writing and that a testator had electronically signed the document, unless two witnesses also enter their signature onto the document, there is no way for a will to be properly executed under current law. Legislation should promote the development of third-party, neutral businesses to develop software that would serve the functions of an attesting witness by providing evidence of identity and that a testator had capacity to execute her will and was of a sound mind. For example, in *Litevich*, discussed above, a testator used Legal Zoom to draft her will.²⁹⁵ The will was unsigned and unattested when she died, but legislation could provide for wills created on an online platform with a method to authenticate a testator's identity and to ensure the sound mind of a testator (perhaps with a video recording) could satisfy the attestation requirement of the Wills Act. Allowing a form of attestation by an online service provider would be a significant change in the Wills Act, but as we will see below third-party entities requiring their own form of verification is already the accepted norm of transferring non-probate transfers including digital assets.

Advances in technology will continue to push the boundaries of the Wills Act. Even without new legislation, courts could confidently interpret the language of the Wills Act to encompass electronic writings, electronic signatures, and electronic attestation. In our digital world, documents on our devices are just as real as documents printed out, electronic signatures are just as binding as ink signatures, and videoconferencing is just as instantaneous as physical presence. Legislative reform could acknowledge these electronic definitions of the 1837 Act and push the law forward to encourage innovation and further technological development in estate planning with the overarching goal to promote freedom of disposition without sacrificing the objectives of traditional will formalities.

IV. REASSESSING FORMALITIES IN THE DIGITAL AGE

In many ways, formalism in will execution gives us a false sense of security. Two signatures of attesting witnesses are not necessarily the key to ensure that a decedent's intent is being fulfilled. There are a multitude of

²⁹⁵No. NNHCV126031579S, 2013 WL 2945055, at *1 (Conn. Super. Ct. New Haven Dist. May 17, 2013).

examples where too much formality frustrated testamentary intent.²⁹⁶ Instead of holding onto formalities that reach back to ancient Rome,²⁹⁷ legislation can find a way for electronic wills to meet and exceed the justifications and purposes of traditional formality. Electronic wills can serve as reliable evidence of a testator's intent, protect against fraud, streamline the process so as to avoid litigation, and impress upon testators that their actions will have legal significance after their deaths. These are the functions of formality that pen and paper wills serve, but there is no reason why electronic wills cannot do the same. In fact, it is possible that electronic wills can strengthen the justifications of formality and encouraged more people to exercise their freedom of disposition.

A. Evidentiary Function Met with Electronic Will

One of the main justifications of requiring a signed attested writing as a valid will is that it serves as reliable evidence that a testator's intent as manifested in the writing is her true intent.²⁹⁸ Any clear expression of testamentary intent and verification of identity could meet this same evidentiary purpose and be a reliable indicator of a testator's intent. This could be done as easily in an electronic form as on a piece of paper.

Opponents of electronic wills argue that one of the main weaknesses of electronic wills is that technology is always changing. They worry that an electronic will, ten to thirty years after it was executed, will no longer be accessible and therefore will not be able to serve as evidence of what a testator wanted. Obsolescence of technology, however, is not a good reason to frustrate reform. Testators and their attorneys will take into account changing technology as they draft and store the will. They will make appropriate backups and change the format of the document as times change. If an individual stored an electronic will on a cloud storage system that stopped operating, they would need to make alternative arrangements. If an individual does not make appropriate arrangements to safeguard her

²⁹⁶ See, e.g., *In re Bryen's Estate*, 195 A. 17, 20 (Pa. 1937) (denying a will to probate where "[t]he obvious truth of the matter is that the loose sheet was signed by mistake, instead of the last of the three pages backed and bound together and prepared in accordance with decedent's final instructions to counsel. . . . [w]hile decedent's mistake is regrettable, it cannot be judicially corrected; the situation thus created must be accepted as it exists.").

²⁹⁷ Jon J. Gasior, *History of a Last Will and Testament*, SINCLAIR PROSSER LAW, (Jan. 28, 2016), <https://www.sinclairprosserlaw.com/history-of-a-last-will-and-testament/>.

²⁹⁸ *Brownlie v. Brownlie*, 191 N.E. 268 (Ill. 1934); *In re Estate of Mecello*, 633 N.W.2d 892, 898 (Neb. 2001).

electronic will, then her intent will be lost; however, that should not prevent individuals who would like to use electronic wills from the opportunity to do so. In addition, as generations shift, those who will be the most engaged in estate planning will be more comfortable with technology and ensuring that their electronically stored documents continue to be useful and relevant.

Electronic wills serve as a reliable evidence of what a testator intended because electronic wills are difficult to alter without a trail. Electronic documents have metadata that keeps track of when changes were made to a document. Metadata is difficult to fudge for an ordinary layperson. When an electronic document is presented for probate, a court can assume that the document has not been tampered with unless there is evidence to the contrary. If a party raises questions of forgery or document tampering, evidence can be presented in order to see if the changes to the document were made after death. The evidentiary function of formality is only strengthened by an electronic will.

In addition, the evidentiary justification of electronic wills would support electronic wills that were not in writing. Video or audio wills are a form of wills that legislatures should consider as they consider electronic alternatives. Technological advances make it much more accessible for people to record a video or audio will and save it digitally. Companies advertise services helping people create video wills to be stored on their websites as a comfort to grieving family members.²⁹⁹ Individuals who did not want to pay for a service could easily post it to YouTube or save it in their digital files. Video wills serve the main functions of formality. There is plentiful evidence that the video will is an authentic; a video or audio recording of an individual expressing her last will and testament would be easily verifiable and reliable evidence of what she truly intended. It would also serve an expressive function of giving the testator an opportunity to leave a final statement to friends and family. The courts would only use the video to provide evidence of the identity of the testator and that she was of a sound mind in creating the video, similar to the way that courts only call witnesses who attested to a will to testify before them if there is a dispute as to a testator's identity or capacity.

Electronic wills in any form serve a compelling evidentiary purpose as to what a testator would have wanted because it would be a verifiable recording of written words, voice, or picture expressing a decedent's last wishes. Such

²⁹⁹ Isaac Raviv, "Make your Video Will in 3 Easy Steps: Last Will and Testament in the Digital Age", SAFE BEYOND BLOGS, <https://www.safebeyond.com/blog/-/blogs/make-your-video-will-in-3-easy-steps-last-will-and-testament-in-the-digital-age>.

technology was certainly not conceived in 1837 when the Wills Act was passed requiring a signed and attested writing to serve an evidentiary purpose. In today's world, electronic files serve as reliable evidence. Digital evidence in social media posts, emails, photographs, video and audio recordings are admissible evidence in a court.³⁰⁰ Likewise, any digital recording of a decedent's last will and testament is probative of a testator's intent.

B. Protective Function Met with Electronic Will

Although many agree that the evidentiary function of formality is met with an electronic will, the protective function of formality may be more disputed. The concern is that without two witnesses who attest to a will, there may be more room for fraud or foul play. The Wills Act formalities of a signed, attested writing are there to protect a decedent and to deter fraud. Concerns about fraudulent wills if they no longer are signed, attested writings may be completely overblown. There are few cases where a court overturned a will due to fraud.³⁰¹ We only need to look to the example of nonprobate transfers to see that the system is successful without this one kind of formality. The trust is protected by the imposition of fiduciary duties. Executors are similarly held to fiduciary duties in probating a document and could be found personally liable if they failed to live up to their fiduciary duties under the law.³⁰² It is already in place to protect a testator's wishes, no matter how the will was executed.

Requiring a printed out, signed, and attested document does not ensure that a testator's intent will be protected. No matter the system that is adopted to transfer property, scheming individuals are always going to find ways to thwart the law and obtain ill-gotten gains. But this is no reason to hold onto archaic systems of formality. Electronic systems can be employed to verify a testator's identity. With developments in security systems of electronic documents, it is likely that an electronic document or system of will

³⁰⁰Lucy L. Thomson, *Mobile Devices: New Challenges for Admissibility of Electronic Evidence*, AMERICAN BAR ASSOCIATION (2013), available at https://www.americanbar.org/content/dam/aba/events/science_technology/mobiledevices_new_challenges_admissibility_of_electronic_device.authcheckdam.pdf.

³⁰¹James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 551 (1990) ("Thus, one change since 1677 is that fraudulent wills are seldom a problem."); Joseph Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 HARV. L. REV. 309, 313 (1928) (discussing early cases of fraud).

³⁰²*Humane Soc'y, Etc. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975).

execution is more protective than an attestation requirement. Biometric recognition technology and geolocation identification can serve as reliable security systems to access secure documents.³⁰³ It is likely that other security and identification systems will be developed in the future. For example, Sweden has piloted a program where individuals insert microchips underneath their skin that hold personal information, credit card numbers, tickets, and passport information.³⁰⁴ Criminal systems are working with DNA processing to take a genetic fingerprint of suspected individuals.³⁰⁵ Perhaps DNA fingerprinting is a form of identification that could be used to validate electronic wills as well. These kinds of technologically adapting systems can add more protection to the documents or recordings that were created and uploaded by a testator as his last will and testament.

In many ways, electronic documents and recordings could be more protective of a testator than written documents. As discussed above, it is difficult to alter the metadata of an electronic document to make it look like the changes were made by the testator.³⁰⁶ It becomes even more difficult if the document is electronically secure until the testator dies. A video or audio recording could be even more protective of a testator's intent because courts and beneficiaries could see if there were any suspicious circumstances in the recording.

Tamper-proof documents or at least documents that show ever change and alteration to the document serve a compelling protective function preventing fraud. Nevada's electronic will legislation provides for a qualified custodian to protect a stored electronic will from tampering. A qualified custodian under Nevada law must prove an uninterrupted chain of custody of

³⁰³Ricardo Villadiego, *The Future Of Authentication Is Here*, FORBES (June 4, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/06/04/the-future-of-authentication-is-here/#187bde8432e1>; Natasha Singer, *Microsoft Urges Congress to Regulate Use of Facial Recognition*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/technology/microsoft-facial-recognition.html>; Nick Tabor, *Smile! The Secretive Business of Facial-Recognition Software in Retail Stores*, THE N.Y. TIMES MAGAZINE (Oct. 20, 2018), <https://nymag.com/intelligencer/2018/10/retailers-are-using-facial-recognition-technology-too.html>.

³⁰⁴Bjorn Cyborg, *Why Swedes are Inserting Microchips into their Bodies*, THE ECONOMIST (Aug. 2, 2018), <https://www.economist.com/europe/2018/08/02/why-swedes-are-inserting-microchips-into-their-bodies>.

³⁰⁵Heather Murphy, *Coming Soon to a Police Station Near You: The DNA 'Magic Box'*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/science/dna-crime-gene-technology.html?action=click&module=Top%20Stories&pgtype=Homepage>.

³⁰⁶See Villadiego, *supra* note 302; see also Tabor, *supra* note 302.

the electronic document and ensure that no alteration or unauthorized access to a document occurred. The qualified custodian is also responsible for storing evidence of proper execution of a document. This is another example how electronic wills can protect the integrity of a document and verify the identity of who is accessing or changing a document.

Due to the strides in videoconferencing, remote attestation can serve as protective a function as in person attestation. Perhaps by allowing a more geographically diverse pool of potential witnesses to a will, testators can choose individuals who support and know their testamentary intent. In the alternative, testators can choose witnesses who are third-party professionals employed by an electronic will company. These individuals would be trained to know what to look for in a testator who was executing a will and serve more like a notary. Electronic attestation can be just as protective of a testator's intention as in-person attestation.

There is more protecting the validity of a will than just the execution requirement of two attesting witnesses and a signed writing. Other doctrines in succession law like undue influence, capacity, and even fraud prevent fraudulent wills from being enforced.³⁰⁷ Audio recordings have been used to prove undue influence or lack of capacity of a decedent in a challenged will. The protection of a decedent's intent as expressed in her will is an important goal, but traditional formalities are not the only way to protect testamentary intent. Electronic wills in their many forms can verify identity, prevent later additions, and secure the document or recording until it is needed.

C. Channeling Function Met with Electronic Will

One of the difficulties in accepting electronic wills is the myriad of forms and styles that an electronic document can take. The concern is if we allow electronic wills, it would ultimately increase the cost and expend more judicial resources of the probate court in parsing out the validity of an electronic will. Again, these concerns could be over exaggerated. Electronic wills can be as uniform as state legislatures wish. There may not be a channeling problem in allowing electronic documents and recordings, especially if those electronic documents and recordings make it clear that a testator had testamentary intent, which is always a litmus test for a valid will. Again, intention, not form, should be the key factor in determining whether a will is probated.

³⁰⁷Moneyham v. Hamilton, 168 So. 522, 523 (Fla. 1936).

It is important to note that court records are increasingly electronic.³⁰⁸ Allowing electronic wills to be probated in an electronic court system would only increase efficiency by foregoing the use of paper filings in probate courts.

Written electronic documents would be easily channeled through the existing electronic court system in most states. When it comes to video or audio recordings, states could address channeling problems by enacting legislation that required a certain format for the courts to consider. If state law required certain formalities for a video will to be effective, perhaps a statement by a testator that indicated she understood this was her will and wanted to leave a video will would solve the problems of channeling or making sure that there was enough uniformity for courts to routinely process the estate. Legislation could also require that executors reduce a video will to a typed transcript in order to aid efficient judicial resolution of the proceeding.

In considering living wills, a statement of intent medical or end of life care, several states have already allowed an electronic form of this document to be valid. These states have addressed the channeling problem by creating a central database for electronic living wills to be stored.³⁰⁹ Something similar could be enacted or used for electronic wills. A password protected site could store electronic documents or recordings that were people's last wills and testaments. Electronic documents and recordings can easily meet the channeling function of formality.

D. Cautionary Function Met with Electronic Will

The last main function of formality is to ensure that an individual realizes that she is committing a legal act when she executes her will. Electronic documents as much as paper documents can fulfill this cautionary or ritual function. Just because something is easy and efficient does not mean that people cannot understand the legal significance of the act. People are comfortable with conducting transactions in the electronic realm. Consider the successes of online retailers as an example of how people have become

³⁰⁸Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U.L. REV. 1827, 1835 (2008) ("Electronic filing has become effectively universal in U.S. federal courts."); Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH. L. REV. 175, 197 (2004) ("[B]oth federal and state courts are embracing electronic filing . . .").

³⁰⁹Beyer, *supra* note 2, at 866.

adept at electronic transactions. Most property transactions these days also have a significant electronic component. Tax returns impress upon individuals that they will be guilty of a crime if they have incorrectly filled out the electronic tax form.³¹⁰ It is fair to assume that an electronic version of someone's testamentary intent will still impress the same gravity and awareness on that individual that they are carrying out an act that will have legal effect upon their death.

Some of the concerns about electronic wills are based on the idea that these easy to access and draft wills are a threat to the legal profession. Good legal advice and estate planning can never be replaced. If people feel comfortable disposing of their assets using an electronic service, they should be able to do that. Attorneys can adapt their practices to providing services for electronic wills, partnering with an app provider, storing electronic wills on a database, or adopting a slew of other business models. By adopting electronic wills as part of their practice, attorneys could help clients draft, amend, and revoke their wills in a cheaper, more efficient way.

In addition, video or audio wills would also meet the cautionary/ritual function of formality. An individual filming himself or herself talking about his or her own death would certainly serve the cautionary or ritual function of formality, impressing on a testator that it is a legally significant act. It would protect a testator from fraud because it would be difficult to manipulate a video recording. In addition, any abnormalities in the recording could indicate that the testator was under some form of duress or was of an unsound mind.

E. Push for Modernization

The Uniform Law Commission is in the process of drafting and proposing an Electronic Wills Act for ratification by state legislatures.³¹¹ The process is ongoing and the Commission is doing a thorough job defining various elements of an electronic will, electronic presence, and electronic revocation. Because the Uniform Law Commission's goal is to produce legislation that could be widely adopted, it is taking a more modest approach than some states might take. For example, thus far in the drafting process, the uniform

³¹⁰H&R Block, *Six Ways Lying on Your Tax Return Can Get You Into Trouble With the IRS*, <https://www.hrblock.com/tax-center/irs/audits-and-tax-notice/six-ways-lying-tax-return-can-get-trouble-irs/> (last visited Sept. 10, 2019).

³¹¹UNIF. ELEC. WILLS ACT (UNIF. LAW COMM'N, ELEC. WILLS COMM. Proposed Official Draft 2019).

legislation has not included video or recordings as valid electronic alternatives.³¹² States should experiment with audio and video recordings as valid indications of an individual's testamentary intent if they make it clear that the recording is intended to serve as a will.

The Uniform Law Commission proposes legislation that covers an electronic will drafted and executed entirely on a screen.³¹³ It allows a record to be on an electronic medium and includes word-processing documents, web pages, email, or text message to be a valid record for an electronic will.³¹⁴ It expands signature to include an electronic symbol, sound, or process, thereby opening the door for enhanced identification technology like fingerprint or face recognition systems.³¹⁵ It allows for "electronic presence" to be accomplished by video conferencing.³¹⁶ It maintains the same requirements of the 1837 Wills Act by requiring a text record, signed by the testator and attested by two witnesses.³¹⁷ These are conceivably changes that could be made under the common law as courts have and may continue to widen the interpretation of writing, signature, and attestation to accommodate technological changes.³¹⁸ The proposed legislation contemplates revoking an electronic will with a subsequent will either electronic or traditional or by a revocatory act with a preponderance of evidence, which would include deleting the will or destroying the platform that stored the electronic will.³¹⁹ Importantly, the uniform act states that an electronic will must be executed where the testator is physically located or domiciled in order for it to be valid.³²⁰ This would prevent someone in a jurisdiction that does not allow electronic wills from executing an electronic will while physically in that jurisdiction. States are also free to legislate that electronic wills from another jurisdiction are not valid in the state.

The Uniform Law Commission's proposed act does not require any special requirements for the format of an electronic will.³²¹ States, of course, are free to go beyond the basic structure of the Uniform Law Commission's

³¹² *Id.* at §§ 2(3), 4(a).

³¹³ *Id.* at § 2(2).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ UNIF. LAW COMM'N, ELEC. WILLS COMM., *supra* note 311, at § 4.

³¹⁸ *See supra* Part III.

³¹⁹ UNIF. LAW COMM'N, ELEC. WILLS COMM., *supra* note 311, at § 11.

³²⁰ *Id.* at § 10.

³²¹ *Id.* at § 4.

act and require some kind of protections in the electronic document from unauthorized access or alterations. A certification by the executor that the electronic document was not amended or changed after a testator's death, a certification that some kind of electronic record of alterations that occurred, or a certification the electronic will was under the control and custody of a testator or trusted source will go far to ensure that the will is a valid expression of testamentary intent. This will allow commercial custodians to market their services, but will not require an individual to use a third-party custodian in order to have a valid electronic will.

Another alternative to employ that the Uniform Law Commission does not address is using electronic notaries to witness a will instead of attesting witnesses. Several states adopted the Revised Uniform Law on Notarial Acts (RULONA), which allows notaries to notarize a document electronically and remotely.³²² An electronic or remote notary could ask a set of questions to ensure that a testator was freely executing her will and had the capacity to do so. These states and others could determine that an electronic notary is a valid form of witnessing a will and fulfills the functions of formality.

Any legislation that a state passes to allow electronic wills need to focus on ensuring that there is a method to authenticate a testator's identity. This can be done through a form of electronic signature or even a showing that the text, video, or recording was only accessible via through a secure system—a password, a fingerprint, or facial recognition. States can decide whether they want an affirmative showing of some kind of chain of custody or proof of document integrity or if it would be better to have a rebuttable presumption that the electronic document had the needed authentication of a valid will.

The focus of legislation should be ensuring that a testator was of sound mind and executed the will voluntarily. Remote attestation with either a notary or witnesses that the testator chooses can satisfy this requirement. In addition, a video or audio recording could satisfy this requirement with additional witnesses or just the evidence of the recording that the testator made. Lastly, any legislation should require a testator to express a clear indication of testamentary intent for the instrument to be valid. Testamentary intent is the lodestar in succession law and any valid will should

³²²Gee, *supra* note 206; 33 IND. CODE § 33-42-17-5 (2019); MICH. COMP. LAWS § 55.287 (2011); MINN. STAT. ANN. § 358.645 (2019); MONT. CODE ANN. § 1-5-603 (2019); NEV. REV. STAT. ANN. § 240.1997 (West 2019); TENN. CODE ANN. § 8-16-310 (2018); TEX. GOV'T CODE ANN. § 406.109; VT. STAT. ANN. tit. 26 § 5365 (2018); VA. CODE ANN. § 47.1-2 (2013).

unequivocally express that a testator was contemplating death and devising property with the understanding that it would have legal effect after her death.

One of the reasons why legislatures may have resisted modernizing wills and allowing an electronic format is due to concerns about the influx of will contests in probate courts. Electronic wills would not necessarily breed more litigation as long as they met the formalities of an updated Wills Act. Although it may not be necessary to have legislation to allow an electronic will under a broad interpretation of existing statutory language, until legislation is passed, intestate parties will have an incentive in overturning an electronic will. Legislating on this important matter will prevent contests as people continue to push for an electronic alternative to a paper will. Many of the fears about changing formality requirements by adopting the harmless error doctrine have been overblown. In jurisdictions that have lessened will formalities by adopting the harmless error standard, empirical evidence has shown that the harmless error standard has not vastly increased the number of will contests.³²³ The adoption of electronic wills and the perceived lessening of traditional formalities would not adversely affect the caseload of probate courts. More people would be able to exercise their property right to dispose their property as they wish and formalities would be in place to allow them to do so electronically.

Adopting a law to allow for electronic execution of an electronic document does not mean that everyone must or should use it. As addressed above, a testator who chooses to use an electronic estate planning documents will need to make sure that she stays current with any technological innovation and that her will made many years ago on a certain platform is still viable and accessible. Some may decide that it is actually less convenient to have an electronic will that meets the requirements of formality and stays up to date. Traditional, physical wills can still be used with the advent of electronic wills to suit individual's needs and circumstances.

³²³David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2065 (2018) ("In sum, my review of the Alameda County files did not bear out the prediction that harmless error would vastly increase the number of will contests."); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 51 (1987) ("A properly conceived harmless error rule actually decreases litigation about Wills Act formalities, although hard cases that require judicial resolution must inevitably arise.").

CONCLUSION

The execution formalities of a valid will have not changed since 1837 when the first Wills Acts were passed.³²⁴ A valid will today (like in 1837) needs to be in writing, signed, and attested in the presence of at least two witnesses.³²⁵ Yet, unlike 1837, all of these formalities can easily be met through their electronic counterparts. A writing can be some sort of electronic record, a signature can be some form of electronic identity marker, and witnesses can videoconference in order to be present at an execution ceremony. Indeed, electronic transfers are what most Americans are used to and comfortable with in the digital era. Although proposed retreats from the formalism of the 1837 Wills Act have largely been unsuccessful, technological advances have begun to chip away at the strict requirements of the Wills Act. Notably, most states have passed digital asset reform, which allows individuals to control their digital assets through a statement of intent or a private contract with internet companies that provide digital assets.³²⁶ Digital asset reform has paved the way for the adoption of electronic wills and should be used as a model to adapt traditional wills to a digital form. In addition, nonprobate transfers after death are more prevalent than probate transfers and are largely done through electronic means, transferring life insurance funds, retirement accounts, and pay on death accounts through websites, emails, and apps.

Courts have begun interpreting the Wills Act statutes broadly in order to allow electronic writings and electronic signatures. Although courts have not yet allowed witnesses to attest a will through electronic means, as videoconferencing continues to be normalized, courts could interpret presence to include electronic presence. The common law has accommodated changes in technology in the past and has begun to do so in limited cases of electronic wills.

Legislation, however, is the best means to validate electronic wills. The functions of the Wills Act formalities can be met and even exceeded with an electronic wills statute. Electronic wills serve as reliable evidence of testamentary intent, which should be the lodestar in any disposition after death. With technological advances, electronic wills can be even more

³²⁴ RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 1999).

³²⁵ *Id.*

³²⁶ See REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, § 4(a), (b) (UNIF. LAW COMM'N 2015); see also Banta, *supra* note 102 at 819.

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protective of a testator's intention and employ advanced means to authenticate a testator's identity and prevent changes after the document has been executed. The vast majority of transactions have been moved to the electronic realm and it is time for wills to follow this course. Implementing electronic wills can encourage more individuals to exercise their freedom of disposition in a cost-effective manner and meet people's expectations about the ease and convenience of electronic transfers in the realm of donative transfers at death. Electronic wills unveil a significant access to justice issue. Allowing for electronic wills gives people the opportunity to estate plan in an easy, secure, and accessible way. It is cost-effective for many individuals to have some kind of electronic will. In many cases, it will probably be those with moderate to low means who employ an online service to engage in will-drafting and execution, at least initially. We should applaud a change in the law that encourages testamentary intent and the freedom of disposition.