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Electronic Wills: Revolution, Evolution, or Devolution

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Internet-based companies are currently encouraging state legislatures to adopt new statutes that will significantly impact Uniform Probate Code (UPC) provisions and other longstanding statutory schemes in order to facilitate widespread marketing and use of online estate planning and notary services in regards to the preparation and execution of wills, trusts, and other related estate planning instruments. Is this evolution or devolution? Will the Uniform Law Committee's current proposal with regard to electronic wills provide sufficient protections against fraud, undue influence and capacity issues?

In 1968, just over a decade before the internet, John Lennon and Paul McCarthy wrote the Beatles' song, Revolution. Perhaps it was a foreshadowing of societal changes that would result from commercialization of a global system of interconnected computer networks (known as the ''Internet'') that now links devices worldwide and has incorporated services and technologies into virtually every aspect of modern life. In Revolution, the Beatles sang:

You say you want a revolution
Well, you know
We all want to change the world
You tell me that it's evolution
Well, you know
We all want to change the world

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Later, in Revolution, the Beatles continue:

You say you got a real solution
Well, you know
We'd all love to see the plan
You ask me for a contribution
Well, you know
We're doing what we can

It remains to be seen whether legislation recognizing (and thereby encouraging) use of electronic wills (and other estate planning documents) is a real solution or whether the better path is continued use of the UPC harmless error approach to such instruments (which requires clear and convincing evidence that an instrument represents testamentary intentions, when the instrument doesn't fully comport with formal execution requirements for a valid enforceable will).

There's concern that devolution away from documents that are the result of advice from competent independent counsel and executed in the actual presence of witnesses who can assess a testator's demeanor, capacity, appearance, and other circumstances surrounding the preparation and execution of documents (e.g. how the terms of the instruments evolved, whether there was procurement, whether others participated in the preparation or formation of the plan, and who else was present at various times during the process), will increase the risks of litigation and perhaps put even well-reasoned independent plans in jeopardy.

A review of the evolution of wills (and in particular some of those cases that have addressed the admission of electronic wills) may help set the stage. In reviewing the requirements for a valid will, one can easily discern a focus on the desire for reliable and credible evidence of the testator intent as a basis for many of the executory requirements.

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HISTORICAL REVIEW OF WILLS

The Greeks and Romans

According to the Enclyclopedia Britannica (1911), in ancient Greece, the will, if it existed at all, was of a very rudimentary character. Later, under Roman law, a will required making a public declaration of intent before seven witnesses, among other requirements. This practice later evolved into a requirement that wills be in writing, as leaving such matters to the memory of the living was deemed too unreliable.

The Middle Ages and the Original Statute of Wills

After the advent of Christianity, when wills were permitted, they were often deposited with the church. The ideology of two witnesses came into fruition, but wills also needed to be made in the presence of not only two witnesses but also in the presence of a priest (barring certain exceptions). Laws affected rights of alienation and the terms of years over which land could be disposed of by will evolved (largely because of the feudal system). The earliest of English statues permitting wills appears to fall within the Act of Henry III (1236). Another key piece of legislation, the Statute of Wills, came into effect in 1540, enhanced by further explanatory acts in 1542-1543. Still certain classes of people could not utilize wills or control the devolution of their estates, but the formalities of wills were laxer (simple notes and even documents in the handwriting of another could constitute a will). In 1677, the Statute of Frauds came into being, which addressed the formalities of execution. Under the Statute of Frauds, all devises needed to be in writing, signed by the testator or by some person for him in his presence and at his direction, and the writing needed to be subscribed by three or four credible witnesses. Recognition of holographic wills appears to date back to the 17th century. The need for credibility of the witnesses led to the passage of an act in 1761-1752, making interested witnesses sufficient for the due execution of a will, but declaring gifts to them void.

The Wills Act of 1837 brought about many of the elements that have been maintained under various statutes currently in effect. It provided that:

- All property (both real and personal) could be disposed of by will;
- The testator had to be over the age of 21 for the will to be valid (which later translates into our present concept of ''sufficient age'');
- Every will had to be in writing, signed at the foot or end by the testator or by someone in his presence and by his direction, and the signature had to be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, who were to subscribe the will in the presence of the testator;
- Gifts to witnesses or the husband or wife of a witness were void;
- The will could be revoked by later will or by destruction with the intention of revoking the will;
- Alternations to the will had to be executed and attested as a will; and,
- A properly identified unattested document could be incorporated in a will.

The UPC

Sound familiar? It should. Many of these very principles remain cornerstones of present statutes, particularly those patterned on the UPC. The UPC provides in pertinent part as follows:

- An individual who is past the age of majority, who is of sound mind, may make a will. [1]
- A will must be in writing, signed by the testator or in the testator's name by someone else in the testator's conscious presence[2] and by the testator's direction and signed by either (1) two other individuals, each of whom signed the will within a reasonable time after they witnessed either the signing of the will or the testator acknowledging the will, or (2) acknowledged by the testator before a notary public or another individual authorized by law to take acknowledgements.[3]
- Holographic wills are recognized as valid if signed by the testator and material portions of the document are in the testator's own handwriting.[4] As to those portions that are not in the testator's own hand, extrinsic evidence of the testator's in-

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[1] UPC §2-501.

[2] The Restatement (Third) of Property: Wills and Other Donative Transfers §3.1 cmt. n (1999) addresses the application of the ''conscious-presence'' test.

[3] UPC §2-502. The ability to use a notary, in lieu of two witnesses, is a relatively new provision of the UPC. This became permissible (under the UPC) in 2008. However, there remain states that have not adopted this provision, and as a consequence those states still require the use of two witnesses. It may be noteworthy that the Uniform Trust Code §402(a)(2), Uniform Power of Attorney Act §105 and Uniform Health-Care Decisions Act §2(f), do not require attesting witnesses or notarization. See UPC Comment to §2-502, Subsection (a), p. 141.

[4] UPC §2-502.

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tent that those portions constitute part of the testator's will is permitted.[5]

- Wills (or any part thereof) may be revoked by the testator's (or a person in the conscious presence of the testator at the testator's direction) execution of a subsequent will that expressly or by inconsistency revokes the prior will or an act performed with the intention of revoking all or a portion of the prior will.[6] Revocatory acts of a will include burning, tearing, canceling, obliterating, or destroying the will or any part of it.[7] However, to be effective such acts must be accompanied by revocatory intent, which may require consideration of extrinsic evidence, including the testator's statements as to intent.[8] However, a revoked will may be revived if there is evidence that upon revocation of a subsequent will, the testator intended the prior will to take effect.[9]

- A writing **in existence** when the will is executed may be incorporated by reference if the will manifests such intent and the writing is sufficiently described to permit identification.[10] The UPC enhances this area in two regards: (1) a testamentary devise that essentially pours a portion of the estate (or the residue) over to a trust (whether in existence at the time the will is executed or later created),[11] and (2) reference to a writing intended to dispose of certain types of tangible personal property, whether or not the writing is in existence at the time the will is executed provided the writing is signed by the testator and adequately describes the items and devisees with reasonable certainty.[12]

- If the will is modified by a writing added upon it (even if such additions don't otherwise meet the executory requirements of a will), such additions will be treated as (1) a will, (2) partial or complete revocation of the will, (3) an addition or alteration of the will, or (4) a partial or complete revival of a formerly revoked will (or portion thereof), if it can be established by clear and convincing evidence that the testator so intended.[13]

As identified above, the UPC generally represents adoption of centuries old executory rules relating to the creation (and revocation) of wills. The only key deviation appears with regard to a more lax approach to who may act as witnesses. In this regard, the UPC does not require disinterested witnesses. Instead, any individual generally competent to be a witness may act as a witness to a will.[14] In moving away from a per se invalidation of wills witnessed by interested parties, the UPC recognized that the use of an interested witness, rather than invalidating the will, is viewed as a suspicious circumstance that might be indicative that the will was the product of fraud or undue influence.[15]

It may be noteworthy that not all states that have adopted the UPC, have adopted the ''harmless error'' rule.[16] The ''harmless error'' rule is a recent addition to the UPC. Comments to UPC §2-503, suggest it as a viable mechanism for (1) addressing defects in compliance with executory requirements where it can be shown the defects weren't the result of duress or trickery,[17] and (2) addressing alterations to previously executed wills. Importantly, the rule imposes procedural safeguards under these circumstances, by requiring that the proponent demonstrate the testator's intent regarding the treatment of such defective writings by clear and convincing evidence.[18] These procedural standards recognize the seriousness of the issue.[19]

THE ADVENT OF THE HARMLESS ERROR DOCTRINE

A review of the comments, and the rational espoused in support of the ''harmless error'' doctrine may provide insight into the thought processes and outcomes pertaining to cases decided to date relative to the admissibility of ''electronic'' wills (albeit some results have strained the application of this rule, perhaps placing undue reliance on clear and convincing evidence of a testator's intent, even when the error extends beyond historical boundaries). Importantly, the comments reflect ''Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases

[5] Comment to UPC §2-502, Subsection (b), p.141, recognizes that a valid holographic will can be executed on a printed will form **if** the material portions of the document are handwritten.

[6] UPC §2-507.

[7] UPC §2-507(a).

[8] UPC §2-507, cmt ''Revocatory Intent.''

[9] UPC §2-509(a)-(c).

[10] UPC §2-510.

[11] UPC §2-511, which incorporates the Uniform Testamentary Additions to Trusts Act (1991).

[12] UPC §2-513.

[13] UPC §2-503 (known as the ''harmless error'' rule).

[14] UPC §2-505(a).

[15] UPC §2-505 cmt.

[16] UPC §2-503.

[17] UPC §2-503 cmt.

[18] *Id.*

[19] *Id.*

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of harmless error.''[20] The comment goes on to provide that:

> The larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent. Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. See Langbein, [Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colm. L. Rev. 1], at 23-29, 49-50 [1987]. The main circumstance in which the South Australian courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other. E.g., Estate of Blakely, 32 S.A.S.R. 473 (1983). Recently, the New York Court of Appeals remedied such a case without aid of statute, simply on the ground ''what has occurred is so obvious, and what was intended so clear.'' In re Snide, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).[21]

Harmless Error and Australian Electronic Will Cases

It is against this backdrop that analysis of the ''electronic'' will cases unfolds. Because the concept of ''harmless error'' was adopted early in Australia, its application to two Australian electronic will cases may be instructive.

Re Yu

The first case was *Re Yu.*[22] In *Yu*, the decedent committed suicide. Shortly before doing so, he created a series of documents on his iPhone, and while most were final farewells, one indicated an intention that it act as his will. To meet the requirements of a writing [or document] the Supreme Court of Queensland looked to other statutes, which defined a document to include ''any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device.''[23] The court also cited to a 2012 case that had held that a Microsoft Word document created on a laptop computer was a document.[24] The court held that the iPhone document that reflected an intention to dispose of all of the decedent's property, prepared at a time when he was contemplating his imminent death, met the requirement of a document that purports to state the testamentary intentions of a deceased, because it addressed what was to be done with his property upon his death. The document also reflected who was to act as the decedent's executor, nominated an alternate if that person refused to act, and authorized the executor to deal with decedent's affairs in the event of his death. Moreover, the document started with the words ''This is the Last Will and Testament'' of Karter Yu, and indicated where Karter resided. Karter also typed his name at the end of the document where a signature would typically appear, followed by the date and a repetition of his address. The court felt that the particular circumstances of the document, its appearance after a series of final farewell messages contained on the same cellphone, proximity in time to decedent taking his own life, and the inclusion of instructions regarding the disposition of his property satisfied the level of proof required to demonstrate that the instrument was intended to operate as the decedent's will. Consequently, the document was admitted to probate.

Mellino v. Wnuk & Ors

In yet another suicide case, the Australian court admitted a DVD as the decedent's will. In a somewhat terse opinion, the Supreme Court of Queensland, in *Mellino v. Wnuk & Ors,*[25] was satisfied that the DVD was a ''document'' within the meaning of Australian law and embodied the testamentary intentions of the decedent (who had committed suicide). The decedent had written the words ''my will'' on the DVD. The court also found that:

> . . . from the substance of what he says on the video recording on the DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video was made. He discusses his intention to [commit] suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.
>
> Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without more formality on the part of the de-

[20] *Id.*

[21] *Id.*

[22] *Re Yu,* [2013] QSC 322.

[23] *Id.* at [2], citing section 36 of the *Acts Interpretation Act* 1954 (Qld).

[24] *Id.* at [2], citing *Alan Yazbek v. Ghosn Yazbek & Anor* [2012] NSWSC 594.

[25] *Mellino v. Wnuk & Ors,* [2013] QSC 336.

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ceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he's no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property.[26]

The court admitted the DVD as decedent's will.

Re Nichol

A more recent Australian case, *Re Nichol,* may provide further insight.[27] In *Nichol,* the decedent also committed suicide. Shortly after his body was found, an unsent text message was located on his cellphone. The text message was determined (through forensic evidence) to have been created sometime prior to October 10, 2016 (the date when the decedent's body was found). In analyzing whether to admit the unsent text message as decedent's will, the Supreme Court of Queensland reviewed statutory requirements that were akin to those set forth above (both under the UPC and the Wills Act of 1837). The court reflected on the importance in determining whether the deceased had testamentary capacity at the time he created the unsent text message and placed the onus of proving such capacity on the proponent of the text message as decedent's will, indicating that:

> A presumption of testamentary capacity does not exist in the absence of a formally executed Will. The onus of proving testamentary capacity where there is an informal Will lies on the party seeking to convince the court the deceased intended the informal document to constitute his or her Will.[28]

The standard for capacity cited in *Nichol* is also akin to that required under American jurisprudence:

> 1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
>
> 2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
>
> 3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
>
> 4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.

In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevent the exercise of her natural faculties.[29]

The court also held that no presumption of validity arises when there exists no duly executed will. As a result, the onus falls to the propounding party to prove its validity.

In *Nichol*, the cellphone was found on a workbench in the shed were the decedent's body was found. A friend accessed the phone to look through the decedent's contact list to determine who should be informed of his death. The friend informed decedent's brother that she had found the unsent text message and she took a screen shot of the message. The text message read as follows:

> Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636
>
> MRN190162Q
>
> 10/10/2016
>
> My will

"MRN190162Q" matches decedent's initials and date of birth, which was January 19, 1962. There was also a paperclip symbol on the left side of the words "My will" and a smiley face on the other side of those words. No one disputed that the text was addressed to decedent's brother, David Nichol, whose contact was stored in the phone under "Dave Nic." Decedent's wife (Julie) contested probate of the text message, and placed significance on the fact that it was never sent. She argued the failure to send was indicative that the decedent had not yet made up his mind, and despite an earlier suicide attempt by decedent, he had not made a will prior to his previously unsuccessful suicide attempt. The proponents of the text messaged "will" argued that decedent's labelling of the message as his will, coupled with extrinsic evidence supporting decedent's testamentary intentions, should be sufficient, especially when considered in light of the location of decedent's wallet (behind the TV) and the pin number for his bank account. Julie argued that there was no evidence that decedent had capacity, given his history of depressions and a prior suicide attempt.

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[26] *Id.* at [3].

[27] *Re Nichol,* [2017] QSC 220.

[28] *Id.* at [4], *citing Konui v. Tasi & Anor,* [2015] QSC 74 at [43].

[29] *Id.* at [4], citing *Banks v. Goodfellow,* (1870) LR 5 QB 549 at 565 confirmed by the Court of Appeal in *Frizzo v. Anr v. Frizzo & Ors* [2011] QCA 308.

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Even though decedent had told Julie he had made another will using a ''Will Kit,'' no evidence of such a will was ever found. Decedent's mother also testified that in 2015 her son told her he did not have a formal will, but he had written something out and put it behind the china cabinet, but this document was also never found. Other testimony was adduced that decedent had indicated he told his brother, after Julie left him, that he wanted everything to go to his brother and nephew and that Julie was to have nothing. Other evidence reflected that the decedent did not have a close relationship with his son.

Perhaps important to the outcome, the cellphone was forensically evaluated. According to the court, the experts report confirmed that:

> (a) The text message had not been sent;
>
> (b) That its content indicated that it was created on 10 October 2016 but the time which it was created could not be pinpointed other than that it was created at some time prior to 4:25pm on 11 October 2016;
>
> (c) That the unsent text message was likely to be saved by someone pressing the back arrow in the message editing views; and,
>
> (d) When the draft message is opened for editing, a paperclip symbol is visible which, when pressed, enables the attachment of a picture or other to the message.[30]

The focus of the court's analysis was whether there was sufficient evidence to establish that the decedent intended the document to operate to dispose of his property upon death. Further, despite evidence of the need for counselling and that decedent may have engaged in combative behavior, no one described the deceased as acting erratically, irrationally, or being so afflicted by depression that it was affecting his ability to think or function. Moreover, the use of the words ''my will'' in a message that addressed disposition of his assets showed he appreciated the significance of what he was doing by creating the text message. The court indicated that the ''evidence must be scrutinised carefully and the Court must be satisfied that, on the balance of probabilities, the deceased wanted that particular draft to be his final will and did not want to make any changes to the document.''[31] The court ultimately found the following circumstances satisfied the requisite standard for the text message to operate as decedent's will at the time he drafted it on or about October 10, 2016:

> (a) The fact that the text message was created on or about the time that the deceased was contemplating death such that he even indicated where he wanted his ashes to be placed;
>
> (b) That the deceased's mobile phone was with him in the shed where he died;
>
> (c) That the deceased addressed how he wished to dispose of his assets and expressly provided that he did not wish to leave the applicant anything;
>
> (d) The level of detail in the message including the direction as to where there was cash to be found, that there was money in the bank and the card pin number, as well as the deceased's initials with his date of birth and ending the document with the words ''my will''; and,
>
> (e) He had not expressed any contrary wishes or intentions in relation to his estate and its disposition from that contained in the text message.[32]

The court did not find the fact that the text message was never sent of import; instead it found that the failure to send the text message was indicative of decedent's desire not to alert his brother that he was about to commit suicide.

It is noteworthy that both Australian cases were the result of suicides, related to unsigned electronic notes found in close proximity to the deceased body, where sufficient evidence of reliability as to the authorship of the notes and testator intent was provided.

Canadian Case

In *Rioux v. Coulombe* the decedent also committed suicide.[33] A note was found next to her body instructing the finder to an envelope containing a computer disk. Decedent had written on the envelope ''This is my will/ Jaqueline Rioux/ February 1, 1996.'' The only thing in the envelope was a disk containing a copy of a single file that was testamentary in nature and was an exact copy of a document contained on decedent's computer (which was also unsigned). The document on her computer was saved on the same date as the decedent had made a handwritten note in her diary reflecting that she had made a will on her computer. Quebec had a dispensing power (which is similar to the harmless error doctrine). In applying that doctrine the court found that the document on the disk and computer reflected decedent's testamentary wishes and admitted the document for administration.

[30] *Id.* at [6].

[31] *Id.* at [12].

[32] *Id.* at [12].

[33] *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.).

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Statutory Construction and U.S. Electronic Will Cases

Moving across the globe to the United States, four cases may be added to the analysis. Nevertheless, before doing so, it might be important to note that the U.S. Supreme Court recognized that ''rights of succession to the property of a deceased . . . are of statutory creation.''[34] Therefore, the cases addressed below must be viewed against the prism of statutory authority.

Taylor v. Holt

The first case is the Tennessee case of *Taylor v. Holt*.[35] Unlike the Australian cases, *Holt* did not involve a suicide. In *Holt,* the decedent prepared a document purporting to be his will on his computer. The one page document was electronically signed by the decedent, who then asked two neighbors to act as witnesses and they affixed their signatures (as witnesses) to a printed form of the document containing the decedent's computer-generated signature in the presence of the decedent. Affidavits provided by the two attesting witnesses indicated that the decedent ''personally prepared the Last Will and Testament on his computer, and using the computer affixed his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness.''[36] Each of the witnesses also attested that they were '' 'of the opinion that the Testator, Steve Godfrey, was of sound mind' at the time the will was witnessed.''[37] The document devised everything to a person who was merely identified as ''Doris.'' At the time of his death, decedent lived with his girlfriend, whose name was Doris Holt. The decedent died one week later. Decedent's sister, who would have been his intestate heir, contested admission of the computer-generated will to probate.

In analyzing whether the document met the executory formalities of a will under Tennessee law, the Tennessee Court of Appeals looked to the definition of ''signature'' under the version of Tenn. Code. Ann. §1-3-105 in effect at the time the will was executed, which provided that:

> As used in this code, unless the context otherwise requires: . . .''Signature'' or ''signed'' includes a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed.[38]

The decedent's sister contended the computer-generated cursive representation of decedent's name was not a ''signature.'' The proponent filed a motion for summary disposition, claiming there were no facts in dispute and that the document constituted a validly executed will. The court found that:

> Deceased did make a mark that was intended to operate as his signature. Deceased made a mark by using his computer to affix his computer generated signature, and, as indicated by the affidavits of both witnesses, this was done in the presence of the witnesses. The computer generated signature made by Deceased falls into the category of ''any other symbol or methodology executed to adopted by a party with intention to authenticate a writing or record,'' and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as the tool to make his signature, and therefore, complied with Tenn. Code Ann. §32-1-104 by signing the will himself.[39]

The court also found that in the absence of disputed facts relating to the execution and witnessing of the will, the proponent's motion for summary disposition should be granted and the will admitted to probate. The outcome of *Taylor v. Holt,* therefore rested on whether the formalities of due execution were met and not the application of the ''harmless error'' rule.

Litevich v. Probate Court, District of West Haven

The next case on electronically generated wills, *Litevich v. Probate Court, District of West Haven,*[40] is an unpublished opinion emanating out of Connecticut (a state that had not adopted the harmless error provisions of the UPC). In *Litevich,* the decedent had a 1991 will that was executed in accordance with Connecticut's executory requirements for wills, and a 2011 Legalzoom will, which decedent created online, printed out, but did not execute or have witnessed. Evidence presented indicated that decedent erroneously believed that to be valid the will would also need to be notarized, and decedent did not engage in executory acts while she attempted to locate a notary. Decedent died within a short time following the generation of the Legalzoom will and competing petitions for admission of the respective trusts ensued.

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[34] *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

[35] *Taylor v. Holt,* 134 S.W. 3d 830 (Tenn. Ct. App. 2004).

[36] *Id.* at 831.

[37] *Id.*

[38] *Id.* at 832-833, citing Tenn. Code Ann. §1-3-105(27)(1999).

[39] *Id.* at 833.

[40] *Litevich v. Probate Court, District of West Haven,* 2013 Ct. Sup. 1362, 2013 WL 2945055.

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Because Connecticut had not adopted a harmless error rule with regards to wills that are not executed in strict compliance with the executory provisions of Connecticut's statutes, the proponents of the Legalzoom will attempted to circumvent the omissions regarding executory requirements by mounting a constitutional challenge to Connecticut's executory will statutes. The basis for proponents' constitutional challenge was that Connecticut's statutes violated the equal protection clause by impermissibly discriminating between two classes of people. Proponents claimed that (1) one class of people was comprised of testators who comply with the state's statutory formalities for execution of wills (under what proponents argue were arcane rules emanating from King Henry VIII's 1540 Statute of Wills), and (2) another class was comprised of people who utilize modern means to express their testamentary intentions that may not comply *per se* with the executory formalities of Connecticut's statutes. As one might surmise, given the high hurdles associated with constitutional challenges, the proponents were unable to prevail under such a challenge.

The court found a ''stark contrast'' between King Henry VIII's 1540 Statute of Wills and Connecticut's Statute of Wills. The court found that the 1540 Statue of Wills was ''in derogation of the common law rather than as an act *giving* the power of testamentary disposition of property and defining the limits of the power thus given''[41] while the Connecticut Statute of Wills was a:

> **positive rule** for the transmission of property . . . Thus, in contrast to the English version of the statute, Connecticut treats the Statute of Wills as a legislative grant of power, not as an act modifying the common law or, by extension, an act that modifies a natural right to make a testamentary disposition.
>
> Testators who comply with the statute have exercised the grant of power given them by the legislature in accordance with the reasonable conditions placed upon that power. Further such testators have provided what our legislature, in authorizing the passing of property by will, has determined to be reliable evidence that a will is valid. **Testators who fail to comply with the statue have not properly exercised the testamentary power given by the legislature and have not provided what the legislature has determined is reliable evidence of the absence of fraud**. (Internal citations omitted, emphasis added.)[42]

[41] *Id.* at *13.

[42] *Id.*

Perhaps important to the analysis of the issues propounded by the Uniform Laws Committee's proposed Electronic Wills Statute, the court in *Litevich* reflected that ''[w]ithout a standardized set of authentication techniques, the ability of the statute to further its purposes is eroded.''[43] Moreover, ''[t]he goal of preventing fraudulent testamentary instruments has perhaps never been more important than it is in the modern age.''[44] The court went on to hold that the formalities of the Statute of Wills:

> continue to provide a process that has in the past and continues today to ensure the existence of reliable evidence that an individual's exercise of legislatively-granted testamentary power is valid, and that the testamentary document itself is what it purports to be.[45]

The *Litevich* court went on to analyze the theory and history behind the harmless error rule, and found, as a general principle, anything that tended to erode or weaken the Statute of Wills should be guarded against. The court further held that providing one's social security number and a credit card and confirming final purchase of the Legalzoom document on the company's website was not tantamount to a signature[46] and among the hierarchy of defects that might be cured by application of the harmless error doctrine, the failure to sign a will is ''one of the most difficult defects to overcome.''[47] Ultimately, here, the total absence of a signature was deemed fatal to the Legalzoom will proponent's claim and the Legalzoom will was declined probate.

In Re: Estate of Javier Castro

In 2013, an Ohio Probate [Trial] Court Judgment was issued in *In Re: Estate of Javier Castro, De-*

[43] *Id.* at *14.

[44] *Id.* at *15.

[45] *Id.*

[46] At fn. 17, *id.,* the court discussed what was required to constitute an electronic signature, under Connecticut law, and found the facts in this case not to meet those requirements. In Connecticut, an Electronic Signature means:

> ''. . .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.'' . . . Black's Law Dictionary (9th Ed. 2009) also provides a definition for ''electronic signature,'' which is defined as ''An electronic symbol, sound, or process that is either attached to or logically associated with a document (such as a contract or other record) and executed or adopted by a person with the intent to sign the document. Types of electronic signatures include a typed name at the end of an email, a digital image of a handwritten signature, and the click of an 'I accept' button on an e-commerce site.''

[47] *Id.* at *22.

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ceased.[48] In *Castro,* the probate court was faced with an issue of first impression – the creation and introduction of an electronic will. For religious reasons the decedent was unable to receive a blood transfusion and understood in the absence of that procedure he would die. Decedent wished to create what would have been the equivalent of a holographic will. He asked his siblings for paper, so that he could manually write out his testamentary desires, and lacking paper and a writing implement wrote out his desires on a Samsung Galaxy Tablet, which his brother had brought with him to the hospital. The tablet had an ''s note'' feature, which permitted decedent to literally write on the tablet screen with a stylus pen, such that what he wrote could be preserved and saved exactly as written by decedent. Here, rather than decedent writing out his testamentary desires, he dictated those desires to his brother, who wrote them out as directed by decedent. Ultimately, later that day, the decedent signed the end of the transcribed will on the tablet in the presence of his brothers. After signing, he acknowledged his signature in the presence of his nephew (who became the third witness to the will on the tablet). Following decedent's death, the tablet version of the will remained unchanged and a copy was printed out and presented to the court for admission to probate. The copy of the tablet will consisted of three pages, with lines similar to those found on green paper and black writing. The pages looked as if they were from a green legal pad. The first two pages contained 11 enumerated paragraphs and the third page reflected the signatures of decedent, and his two brothers and his nephew (each of which acted as witnesses to the tablet will). If the tablet will were not admitted to probate, the decedent's intestate heirs would have been his parents, each of whom indicated that they did not wish to contest admission of the tablet will to probate. The probate court's analysis focused on whether the tablet will constituted a ''writing'' within the confines of Ohio statute. Although the court indicated that Ohio Rev. Code §2913.01(F) was not necessarily controlling, it was nonetheless instructive. That statute provided that:

> ''Writing'' means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.[49]

The Probate Court found that the tablet will did constitute a writing. However, there was one deficiency – the tablet will (although witnessed) was not attested to as required by the executory requirements of Ohio's statute. However, Ohio had adopted a harmless error provision,[50] which permitted a document to be treated as if executed in compliance with all the formal executory requirements of a will, if the court is satisfied that the document should be treated as a will if the intent to do so was established by clear and convincing evidence. In *Castro,* the Probate Court admitted the tablet will for probate, having found that:

- The decedent prepared or caused the document to be prepared;
- The decedent signed the document and intended it to constitute his will; and,
- The document was witnessed by two or more witnesses who signed in that capacity within the conscious presence of the decedent.

In re Estate of Duane Francis Horton, II

The most recent case addressing an electronic will hails from Michigan and is *In re Estate of Duane Francis Horton, II.*[51] Michigan is generally considered a UPC state and has adopted a harmless error rule akin to that propounded under the UPC.

In *Horton,* similar to the facts in the above referenced Australian cases, decedent committed suicide. As his last entry in a journal, he left an undated handwritten note that stated:

> ''I am truly sorry about this . . . My final note, my farewell is on my phone. The app should be open. If not look in evernote, 'Last Note'[.]''
>
> The journal entry also provided the email address and password for ''evernote.''[52]

It was uncontested that the undated unsigned journal entry was in decedent's own handwriting. The ''evernote'' (the Note), however, was a typed document that only appeared in electronic format. It did

[48] *In Re: Estate of Javier Castro, Deceased,* 2013-ES-00140 (Ct. Comm. Pl. Lorain County, Probate Div., Ohio, June 19, 2013).

[49] Ohio Rev. Code 2913.01(F).

[50] *See* Ohio Rev. Code 2107.24.

[51] In re Estate of Duane Francis Horton, II, No. 339737, 2018 BL 254016 (Mich Ct. App. July 17, 2018). Discussion of this case in this article is reproduced or adapted with permission from Sandra D. Glazier's article ''In re Estate of Duane Frances Horton: The Will on a Phone Case'', LISI Estate Planning Newsletter #2657 (August 6, 2018) at http://www.leimbergservices.com Copyright 2018 Leimberg Information Services, Inc. (LISI).

[52] *Estate of Duane Francis Horton, II.*

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not contain an electronic signature other than decedent typed his full legal name at the conclusion of the Note. The Note included apologies, religious and self-deprecating comments, funeral instructions, and directions as to the disposition of his possessions. It also indicated that his relationship with his mother was estranged and he did not wish her to receive any of his assets.

Decedent's mother would have been his sole heir if he were determined to have died intestate. Prior to decedent's death, Guardianship and Alternatives, Inc. (GAI) had been his duly appointed conservator. Following his death, GAI sought to have the Note admitted as decedent's will and be appointed personal representative. Decedent's mother opposed admission of the Note as a will. From the opinion, it is obvious that the court wanted to give effect to decedent's clearly stated dispositive intentions.

Michigan is essentially a Uniform Probate Code state.[53] In a Michigan will contest, the proponent of a will bears the burden of establishing that a purported will was duly executed.[54] The Note clearly did not meet the requirements of Mich. Comp. Laws 700.2502, which requires in pertinent part that a will be signed by the testator (or in the testator's name) and witnessed by at least two individuals who either actually witnessed the execution by the testator or signed within a reasonable time of the testator acknowledging his signature on the will.[55]

Michigan does recognize holographic wills. Therefore, a document that is dated and signed by the testator containing material portions in the testator's handwriting can be admitted as a will.[56] As to those portions of a document (which are not dated, signed, and in the testator's own handwriting) incorporated (actually or by reference) into a holographic (or duly executed) will, they can nonetheless also constitute part of the will, if extrinsic evidence demonstrates that the document was intended to constitute part of the testator's will.[57]

In this instance, because the journal entry was not dated and signed, it did not meet the requirements of a holographic will. The Note also did not otherwise meet the formalities required under Michigan's statutes for a duly executed will. However, the court held that the Note could be admitted as a will under Michigan's harmless error provision. This provision permits admission of writings intended as wills, if the proponent can establish by clear and convincing evidence that the decedent intended the instrument to constitute (revoke, amend, or revive) a will.[58] The court found it appropriate to use the harmless error provision to effectuate admission of the Note, despite comments to UPC §2-503 (upon which MCL 700.2503 was based), which indicate that the purpose behind liberalization of rules recognizing certain documents as a will was to ''excuse harmless error in complying with the formal requirements for executing or revoking a will''.[59] A further review of the comments reflects that the types of ''harmless error'' that this exception was intended to address related to such things as (1) when the testator, through a misunderstanding of the rules, fails to obtain the signature of one or more witnesses, or (2) when an alternation occurs on a previously executed will.[60]

The comments also indicate, in pertinent part:

> While, in appropriate case, §2503 relaxes the requirements of MCL 700.2502, to preserve and give effect to the testator's intent, §2503 applies only to a document or writing on a document. It does not apply to testamentary instructions in or on other media, such as an audiotape or videocassette.[61]

Here, there was clear evidence that decedent wrote the Note in close proximity to taking his own life and that his handwritten note essentially intended to incorporate the electronic record by reference. One might query whether the result would have been the same in the absence of the handwritten journal entry, written in close proximity to his suicide that referenced a record containing clear indications of intent as to the disposition of his property, inclusive of requests relative to the disposition of his remains. Then again, as reflected in other cases discussed in this article, the harmless error doctrine with regard to the executory provisions of estate planning resulted in similar outcomes.

In reviewing all of the cases that permitted admission of the an electronic will that did not technically fall within the parameters of pertinent state statutes,

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[53] But numerous provisions of Michigan's Estate and Protected Individuals Code (EPIC) deviate in some respects from the UPC.

[54] Mich. Comp. Laws §700.3407(1)(b).

[55] Mich. Comp. Laws §700.2502.

[56] Mich. Comp. Laws §700.2502(2).

[57] Mich. Comp. Laws §700.2502(3).

[58] Mich. Comp. Laws §700.2503.

[59] UPC §2-503 cmt.

[60] See Mich. Comp. Laws §700.2503 Reporter's Comment. Estate and Protected Individuals Code with Reporters' Commentary, January 2016 update, Commentary by John H. Martin and Mark K. Harder Reporters for the EPIC and MTC Drafting Committees, Probate & Estate Planning Section, State Bar of Michigan, ICLE©2010-2016 jointly held by the Probate and Estate Planning Section of the State Bar of Michigan and John H. Martin with respect to the EPOC Commentary and Mark K. Harder with respect to the MTC Commentary. The quoted comment appears at p. 91.

[61] *Id.*

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the lynchpin concept of attempting to effectuate a testator's intent seemed to be at play.[62]

Cases Reflect Elements of Authenticity backed by Clear and Convincing Evidence of Intent

In each of the cases reflected above, the evidence presented probably would have met the clear and convincing standard espoused in UPC §2-503. At its core, the harmless error doctrine attempts to facilitate implementation of a decedent's testamentary desires when those desires have been expressed in documented form, despite irregularities or deficiencies in formal executory requirements espoused in statutes, but only when the high burden of proof needed to meet a ''clear and convincing'' standard has been satisfied. Even in those cases where the harmless error doctrine (or a similar doctrine) was not applied, significant evidence of reliability was present.

Commentaries on the harmless error doctrine are mixed. Some view it as a ''slippery slope problem of habitual noncompliance with Wills Act requirements.[63] Others view the use of the harmless error doctrine as a compromise that ''favors fact-sensitive adjudication . . .against determinate formality rules.''[64] However, it remains important to remember that the formalities of will acts were intended to perform intent-effectuating functions. These statutes were also intended to:

> provide a ritual, cautioning testators that their acts should be taken seriously to produce reliable evidence of testator's wishes, to protect testators (in the case of nonholographic wills) from fraud, undue influence or other forms of pressure, and to channel testators into forms of expressions easily recognized by courts as wills.(Internal citations omitted).[65]

In essence, the harmless error doctrine is merely an extension of a rebuttable presumption approach to wills that would otherwise be deemed invalid because of a defect in due execution.

> When a will is proper in form, it is presumed to reflect serious, genuine, authentic testamentary intent. But the presumption is rebuttable. Contestants may challenge the presumption raised by due execution by showing *inter alia* that the testator lacked capacity or did not in the circumstances truly intend the executed instrument to serve as his will. The ''central insight'' underlying the harmless error rule is just the mirror image: ''[T]he law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one'' Thus under the will execution reform, lack of due execution gives rise to the presumption that the document was not intended as the testator's will, but proponents may challenge that presumption by showing that, despite the execution defect, the testator *did* seriously intend the document to serve as his will. Like other important factual presumptions created by the UPC, the rebuttal must be clear and convincing. (Internal citations omitted).[66]

Of import to the harmless error approach is, in fact, the quantum of evidence required to rebut what would otherwise be presumed to be an invalid instrument. Clear and convincing evidence has been found to be evidence that is:

> ''so clear, direct and weighty and convincing as to enable the [factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issues.'' ''Clear and convincing evidence is more than a mere preponderance; it is highly probable evidence free from serious or substantial doubt.'' ''Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven'' (Internal citations omitted).[67]

Holding deviations from historical statutes of wills to a clear and convincing standard provides protections that some of the current and proposed electronic wills statutes may not provide. So, it is against this backdrop (and the pressures of societal change and online corporate marketers) that a review of recent electronic will statutes (and the Uniform Law Commission proposals) might be viewed, as such statutory efforts attempt to codify standards that might help to authenticate electronically created testamentary instruments. However, the question remains as to whether such attempts meet the historical purposes of

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[62] See *Shriners Hosps. for Children v. First N. Bank of Wyo.*, 373 P.3d 392 (Wyo. 2016). See also the Comment to UTC §1006 that reiterates the concept that trusts should be administered in accordance with the settlor's intent.

[63] *See* Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law,* 73 Wash. & Lee L. Rev. 3,5, fn. 5 (2016) citing Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills,* 64 S.C. L. Rev. 403, 420 (2012).

[64] *Id.,* at 6, fn 8, citing Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice,* 34 Conn. L. Rev. 453, 474 (2002).

[65] *Id.* at 9.

[66] *Id.* at 24-25.

[67] *Id.* at 44-45.

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not only formality and forms of expressions easily recognized by courts as wills, but also protection against fraud, undue influence, or other forms of pressure.

ELECTRONIC WILL STATUTES

Nevada

As early as 2001 (and recently amended in 2017) Nevada enacted statutes relating to electronic wills,[68] requirements for a self-proving electronic will,[69] notarization of documents in proceedings related to an electronic will,[70] and the performance of certain notarial acts by electronic means.[71] Pursuant to Nevada's electronic wills statute, a will created by an individual over the age of 18, who has sufficient capacity to make a will, will be deemed valid if it comports with the following requirements:

> (a) Is written, created and stored in an electronic record;
>
> (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one of the following:
>
> > (i) an authentication characteristic of the testator; or
> >
> > (i) an electronic signature[72] and electronic seal[73] of an electronic notary public, which is placed on the document in the presence of the testator and whose presence the testator place his or her electronic signature; or
> >
> > (ii) the electronic signatures of two or more attesting witnesses, placed on the document in the presence of[74] the testator and in whose presence the testator placed his or her electronic signature.[75]
>
> (c) Is created and stored in such a manner that:
>
> > (1) Only one authoritative copy exists;
> >
> > (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
> >
> > (3) Any attempted alteration of the authoritative copy is readily identifiable; and
> >
> > (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.[76]

Interestingly, such a will may be made in or out of the state.[77] Further, it will be deemed to have been executed in Nevada if the sole ''authoritative'' copy of the electronic will is either:

> (a) Transmitted to and maintained by a custodian designated in the electronic will at the custodian's place of business in this State or at the custodian's residence in this State; or
>
> (b) Maintained by the testator at the testator's place of business in this State or at the testator's residence in this State.[78]

An important aspect of the Nevada statute may be the authentication requirements, which appear intended to assure that the will represents a document executed by the decedent. These requirements include:

> (a) An authentication characteristic, which is defined as:
>
> > a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digi-

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[68] Nev. Rev. Stat. §133.085.

[69] Nev. Rev. Stat. §133.086.

[70] Nev. Rev. Stat. §133.087.

[71] Nev. Rev. Stat. §133.088.

[72] An ''electronic signature'' is ''an electronic symbol or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the electronic document.'' Nev. Rev. Stat. §240.188.

[73] After July, 2018, an electronic seal ''means information within a notarized electronic document that includes the name, jurisdiction and expiration date of the registration of an electronic notary public and generally includes the information required to be set forth in a mechanical stamp pursuant to NRS 240.040.'' Nev. Rev. Stat. §240.187.

[74] After July, 2018, ''in the presence of'' or ''appear before'' essentially includes being in someone's virtual presence, inasmuch as it is defined as meaning either being: ''(1) [i]n the same physical location as another person and close enough to see, hear, communicate with and exchange credentials with that person; or (2) [i]n a different physical location from another person but able to see, hear and communicate with the person by means of audio-video communication that meets any rules or regulations adopted by the Secretary of State.'' Nev. Rev. Stat. §240.1882.

[75] Nev. Rev. Stat. §133.085(1)(b).

[76] Nev. Rev. Stat. §133.085.

[77] Nev. Rev. Stat. §133.085(3).

[78] Nev. Rev. Stat. §133.085(4)(a)-(b).

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tized signature[79] or other authentication using a unique characteristic of the person.[80]

(b) The creation of only one original, unique, identifiable and unalterable electronic record of the electronic will.[81]

Just as in the case of paper wills, an electronic will (in Nevada) may be made self-proving. To do so, the electronic will must have:

(a) the declarations or affidavits of the attesting witnesses incorporated as part of, attached to or logically associated with the electronic will;[82]

(b) the designation of a qualified custodian to maintain custody of the electronic record of the electronic will;[83] **and**

(c) Must at all times before being offered for probate or being reduced to a certified paper original that is offered for probate, remain under the custody of a qualified custodian.[84]

One cannot help but ask what if the ''qualified custodian'' does not know that the testator has died and/or the testator's family or devisees do not know that an electronic will has been created that may only exist on a server somewhere out there in the Ethernet? Years ago it used to be common practice for testator's to either leave their wills with their lawyers for safe keeping or place them with the county probate register (in the county where they resided) for safekeeping. This system worked when people were stationary and/or when people had long-standing relationships with their attorneys, such that the family knew who the estate-planning attorney was. Every year I spend considerable time trying to track down clients of the first law firm I joined. When that firm folded, I became the repository for numerous wills that had been maintained in the firm's vaults. Luckily, over the years, I have found most of those clients (but some not until long after their demise, if they died in other jurisdictions or even outside of the United States). However, I still have some wills for persons I have been unable to locate some 30 years after the demise of that firm. Currently, my practice is not to retain the original will, since Michigan now permits admission of a copy of a will, when the original cannot be located.[85]

Indiana Electronic Wills Statute

In 2018, Indiana enacted its own version of an electronic will statute.[86] Under this statute, persons who are otherwise competent to execute wills and are free from undue influence or duress may create and execute electronic wills.[87] Unlike the Nevada statute, Indiana requires that electronic wills be executed in the ''actual'' as opposed to ''virtual'' presence of the testator.[88] The persons excluded from being ''custodians'' under the Indiana statute are more expansive than those prohibited under the Nevada statute. In Indiana, the following cannot act as custodian: (1) the testator who executed the electronic will; (2) an attorney; (3) a person who is named in the electronic will as a personal representative of the testator's estate; or (4) a person who is named or defined as a distributee in the electronic will.[89] However, the persons who may otherwise maintain custody of the electronic will and any document integrity evidence associated with an electronic record or will, or a completely converted copy of the electronic will, are significantly more expansive than provided under the Nevada statute, when self-authentication remains an objective.[90] While the Indiana statute may provide clearer instructions about what is necessary to ensure ''document integrity,''[91] the Indiana statute appears to provide more stringent requirements when it comes to creating a self-providing electronic will when compared to the re-

[79] A digitized signature means a graphical image of a handwritten signature that is created, generated or stored by electronic means. Nev. Rev. Stat. §133.085(6)(c).

[80] Nev. Rev. Stat. §133.085(6)(a).

[81] Nev. Rev. Stat. §133.085(c)(1) and (6)(b).

[82] Nev. Rev. Stat. §133.086(a).

[83] Nev. Rev. Stat. §133.086(b).

[84] A ''qualified custodian'' of an electronic will cannot be an heir of the testator or a beneficiary or devisee under the electronic will. It must also be someone/or an entity that consistently employs, and stores electronic records of electronic wills in, a system that protects electronic records from destruction, alteration or unauthorized access and detects any change to an electronic record. Nev. Rev. Stat. §133.320. They must also store the following as part of the electronic record of an electronic will: (a) a photograph or other visual record of the testator and the attesting witnesses that was taken contemporaneously with the execution of the electronic will; (b) a photocopy, photograph, facsimile or other visual record of any documentation that was taken contemporaneously with the execution of the electronic will and provides satisfactory evidence of the identities of the testator and the attesting witnesses, including, without limitation, documentation of the methods of identification used; and, (c) an audio and video recording of the testator, attesting witnesses and notary public, as applicable, taken at the time the testator, each attesting witness and notary public, as applicable, placed his or her electronic signature on the electronic will. Nev. Rev. Stat. §133.320(3)(a)-(c). Nev. Rev. Stat. §133.086(c).

[85] Mich. Comp. Laws §700.3402(c).

[86] Ind. Code §29-1-21.

[87] Ind. Code §29-1-21-1.

[88] Ind. Code §29-1-21-3(1)

[89] Ind. Code §29-1-21-3()(A) – (D).

[90] Ind. Code §29-1-21-10(a).

[91] Ind. Code §29-1-21-3(6).

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quirements provided for self-proving wills under the Nevada statute.[92]

Interestingly, the Indiana statute goes a step further in specifically authorizing the use of on-line services to create an electronic will.[93] Whether the electronic will has been created by an attorney who provides a testator with an electronic will form or a user interface for creating, completing or executing an electronic will, or a ''vendor or Licensor of estate planning software of digital estate planning forms,''[94] the form or interface must provide advisory instructions with each electronic will, as set forth by the statute.[95] The Indiana statute essentially requires a writing confirming intent to revoke an electronic will, mere deletion or making the electronic record unreadable may not be sufficient (at least according to the instructions, although absent per se in the statute).[96]

Arizona Electronic Wills Statute

After June 30, 2019, Arizona residents will be able to execute electronic wills because of the 2018 passage of an amendment to their Wills Statute.[97] To qualify as an electronic will in Arizona, the will must be created and maintained in an electronic record, contain the date and electronic signature of the testator **and** contain (1) an authentication characteristic of the testator; **or** (2) an electronic seal of an electronic notary public who placed the their electronic seal on the will in the presence of the testator and the testator had to place his electronic signature on the will in the notary's presence.[98] The statute does not make entirely clear whether the notarial act must take place in the actual (as opposed to virtual) presence of the testator.[99] Like each of the other statutes referred to above, authenticating characteristics unique to the testator are required. In Arizona, this includes a characteristic that is ''unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person.''[100] This could include a fingerprint, retinal scan, voice recognition, facial recognition, video recording, digitized signature, or another form of commercially reasonable authentication that uses a unique characteristic of the testator.[101] Arizona essentially adopts the requirements of a ''qualified custodian'' akin to those of Nevada, in order to have a self-proved electronic will.[102] But, unlike the Indiana statute, an electronic will in Arizona may be revoked by any revocatory act otherwise permissible with regard to paper wills, in addition to canceling, rendering unreadable, or obliterating it with the intention of revoking it.[103]

Other jurisdictions, such as Florida, California, New Hampshire, and Virginia have or are considering adopting their own version of an electronic wills act.

In recognition that the horse is essentially out of the barn, the National Conference of Commissioners on Uniform State Laws has fast-tracked a project to develop an Electronic Wills Act (UWA). As of the writing of this article, the UWA is not yet in final or approved form.

Questions still abound as to whether actual presence or virtual presence should be permitted with regard to the witnessing and notarization of wills under the UWA. Section 5 of the UWA currently contemplates actual or virtual presence will suffice. Perhaps more expansively than some of the already enacted electronic wills statutes, the UWA also contemplates the possibility of a ''harmless error'' provision, for those electronic wills that are not executed in conformity with the proposed statute. Much of the UWA essentially mirrors provisions of the UPC, and merely makes clear that those provisions will apply to electronically created and executed wills. Comments contained in the UWA appear to encourage the use of electronic notarization under the theory that this process will provide more protection against alteration that mere paper notarization. Unfortunately, the most recent draft of the UWA does not require some of the enhanced protections contained in the Nevada, Indiana and/or Arizona statutes. Clearly, benefits can be derived by arriving at a consensus that creates a level of uniformity as electronic will companies jump in to mass-market electronic wills to the public.

Requirements that enhance the likelihood that electronically created wills are at least executed by the purported testator and properly preserved against tampering, appear important in an age where many electronic document can be modified. However, one

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[92] *See* Ind. Code §29-1-21-4.

[93] Ind. Code §29-1-21-6 (2).

[94] *Id.*

[95] Ind. Code §29-1-21-6 (b).

[96] Ind. Code §29-1-21-6 (b). See also, Ind. Code §29-1-21-8. In addition, if a copy of the electronic will cannot be located after the testator's death, a presumption that the will is lost or missing (similar to that regarding paper wills) will apply. Ind. Code §29-1-21-8(f).

[97] Arizona H.B. 2471.

[98] Ariz. Rev. Stat. §14-2518.

[99] See Arizona Adopts Electronic Will Law Effective New Year, where Robert Fleming, a Tucson, Arizona attorney, reports that as of May, 2018, Arizona does not yet explicitly permit a notary public to act remotely.

[100] Ariz. Rev. Stat. §14-2518 E.1.

[101] *Id.*

[102] Ariz. Rev. Stat. §14-2519, §14-2520.

[103] Ariz. Rev. Stat. §14-2507.

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should not overlook the evidentiary concerns that may remain with regard to the admissibility of the video recordings of execution required under various electronic notary statutes. Some concerns not addressed by current statutes were, in part, addressed in *In re Estate of Clinger.*[104] In *Clinger,* the Supreme Court of Nebraska held a video recording of a will execution was admissible. Nonetheless, special instructions to the jury were required. These instructions informed the jury that the tape should only be considered for purposes of demonstrating capacity and state of mind, but not for purposes of demonstrating the absence of undue influence, because responses to questions about whether the instrument was freely and voluntarily done would be hearsay if offered to prove the truth of the matter asserted.

OTHER CONCERNS AND CONSIDERATIONS

Historically, in Michigan, persons who wished to make a simple will without the benefit of counsel could do so by either downloading or obtaining a copy of the Michigan Statutory Will.[105] This form provided notice to the testator of: (1) its limited nature; (2) if it did not meet the testator's desires he should seek out the advice of a lawyer; (3) it will have no effect on jointly held assets or assets that reflect beneficiary designations; (4) it is not designed to reduce taxes, (5) adopted children and children born out of wedlock will be treated the same as children born or conceived during marriage; and, (5) if they marry or divorce they should make a new will. The Michigan Statutory Will only works for individuals who are married and/or have children. It only permits two cash gifts to be made to persons or charities. It permits the use of a list to dispose of certain types of tangible personal property. Everything else goes to the surviving spouse, and if there is no (surviving) spouse, to the children equally. If the testator is not survived by either a spouse or children, he can select an intestate distribution to his heirs at law, or equally split the residue between his heirs at law and those of his predeceased spouse. The testator can nominate a personal representative, and a guardian and/or conservator for minor children. Nothing more can be accomplished under a Michigan Statutory Will.

There is no counterpart to the Michigan Statutory Will form found in the UPC. It was intended to provide a low-cost model form that could be easily completed and not vary significantly from intestacy, other than over-coming the statutory shares that could go to children in the absence of a will, when a testator is married. It was felt that the risks attendant to such dispositive provisions were limited compared to the provision of a low cost alternative to Michigan residents. There is, however, no like restriction on what terms and dispositions can be included under any of the current or proposed legislative options for electronic wills.

In those statutes that require both unique characteristics and stringent qualified custodian requirements, there may be enhanced protections against fraudulent attempts to modify or otherwise tamper with the will greater than those provided for paper wills. Nevertheless, tampering should not be the only concern. The statistics regarding elder abuse (which includes abuse of other individuals who are vulnerable for reasons other than mere age) are staggering. One study estimated that as many as 5 million elders are abused each year.[106] A 2015 True Link Report on Elder Financial Abuse placed losses experienced by the elderly as a result of all forms of elder financial abuse at a staggering $36.48 billion per year.[107] The Elder Law Section of the New York State Bar Association has created FAQs due to the widespread and growing problems of elder abuse, and its belief that attorneys are effectively positioned to identify and address incidents of elder abuse amongst clients and potential clients.[108] Even FINRA has taken action in an attempt to provide enhanced protections for vulnerable individuals.[109] Provisions within the Economic Growth, Regulatory Relief and Consumer Protection Act, signed into law on May 24, 2018, also recognized the need for training in the financial industry so that action can be taken to protect vulnerable adults from this insidious problem.

Removing attorneys from the process by placing vulnerable adults in the potential position of executing documents (perhaps created by malfeasant family members or care providers) where there is only limited interaction before witnesses or a notary (who may know nothing about the plan or have the sufficient wherewithal to adequately assess capacity), doesn't necessarily provide a benefit even if it provides greater convenience. The converse may also be true. Individuals have always been free (in most states) to create holographic wills, or sign hard copies of documents created on a computer and printed out for their execution. When such documents represent the inten-

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[104] *In re Estate of Clinger*, 872 N.W. 2d 37 (2015).

[105] Mich. Comp. Laws §700.2519.

[106] *What is elder abuse?*, National Council on Aging.

[107] True Link Report on Elder Financial Abuse 2015, True Link (January 2015).

[108] Elder Abuse An FAQ for Attorneys, New York State Bar Association.

[109] FINRA Rules 4512 and 2165, which took effect Feb. 5, 2018.

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tion of the testator, but are created under circumstances where a presumption of undue influence may arise, the absence of counsel can result in the instruments being set aside.

Attorneys involved in identifying, planning for, and/or litigating undue influence are (or should be) aware that the lack of independent counsel can constitute a ''suspicious circumstance'' that may undercut the enforceability of wills of vulnerable adults when concerns exist that the same may be the product of undue influence.[110] Unfortunately, the public generally is not aware of the importance of independent competent counsel in defending the enforceability of a will they create. Nor may they be aware of the staggering statistics regarding the prevalence of undue influence.

As we fashion new laws to address the public's apparent desire for low-cost options and easy access, the inclusion of notifications in such forms (akin to the process imposed by Indiana) may serve to at least alert the public that use of an attorney (and receipt of competent advice) in the creation and execution of testamentary instruments can be beneficial and worth the effort and expense. Generally, the receipt of independent competent legal advice may enhance the likelihood that a testator's estate plan withstand attack.[111] Such advice needs be more than just perfunctory.[112] The provision of professional legal advice and services — as contrasted to serving as a mere scrivener — requires the ''interpretation and application of legal principles to guide future conduct or to assess past conduct.''[113] A ''scrivener'' is merely someone who transcribes or memorializes what others tell him or her. Acting as a mere scrivener does not constitute the rendition of legal advice. Importantly, in some states, the lack of independent counsel can even heighten the burden required to rebut a presumption of undue influence, once that presumption has been found to exist.[114]

Given potential issues relating to the rendition of legal services without a license, it is likely that many of the online services will be little more than form providers or scriveners. While this might work for some – it may leave vulnerable adults at greater risk of undue influence (which is a form of elder financial abuse).[115] Because some states do not recognize a ''probable cause'' or ''good faith'' exception to the application of no contest clauses, perhaps statutes that permit electronic wills should prohibit the inclusion of a ''no contest'' clause in such instruments. If the statute does not prohibit the use of a ''no contest clause'' perhaps, it should at least reflect that the instrument may be attacked if there exists ''good faith'' or ''probable cause,'' particularly in those states that do not otherwise apply such exceptions to the enforcement of ''no contest'' clauses.

Indiana's requirement that instructive language be included in all online systems or otherwise electronically supplied forms, might be expanded to include such things as:

> 1. This form does not address all options that might be provided if you were to seek out and obtain estate-planning services from a competent estate-planning attorney.
>
> 2. Due to the potential complexities and implications of state and federal laws (including but not limited to current and possible changes in tax regimes), utilization of this form could have an unanticipated and potentially adverse impact upon your estate plan.
>
> 3. Obtaining competent independent legal advice in the creation and execution of your will can assist you in understanding your options and in also upholding the plan you create under this instrument. The lack of competent independent legal advice could undermine your plan, in the event this will is challenged pursuant to a claim of fraud, duress, or undue influence.
>
> 4. Before executing this will it is important to verbally indicate to the witnesses: (a) your name; (b) any medications you are taking that could impair your judgment; (c) those persons who would inherit if you died without a will; (d) whether this will represents a change in your historical estate plan and if so why; (e) the types of assets that will be governed by this will and an approximation of the overall value of your estate; and, (f) what you hope to accomplish by executing this will.

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[110] See also, Sandra D. Glazier, Esq., Thomas M. Dixon, Esq., and Thomas F. Sweeney, Esq., *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It. . . . And Litigating It,* Bloomberg BNA Tax Man. Memo., Vol. 56, No. 11, 185-209 (June 1, 2015) , as well as Bloomberg BNA Est. Gifts and Tr. J., Vol. 40, No. 4, 175-198 (July/Aug. 2015).

[111] *Id.*

[112] *Reilly v. McAuliffe,* 117 N.E. 2d 811 (1954).

[113] *Alomari v Ohio Dep't of Pub Safety*, 626 F Appx. 558, 570 (6th Cir. 2015).

[114] In *Haynes v. First Natl. State Bank of New Jersey,* 432 A. 2d 890 (1981), the court held that the quantum of evidence required to rebut the presumption once the presumption of undue influence was found to exist (when no independent counsel was utilized to provide advice to the testator) is a higher clear and convincing standard.

[115] *See*, Sandra D. Glazier, *Capacity and Ethical Considerations When Representing Vulnerable Adults*, Bloomberg BNA Estates, Gifts and Trusts Journal, Vol. 43, No. 3, p. 165 (May 10, 2018).

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While electronic wills are to some extent already here (and can be expected to increase in use), they are not without risk. Some of the authentication and preservation processes specified in some of the currently enacted electronic will statutes could provide a level of protection against modification of documents that may not be available with regard to paper wills. Nonetheless, the absence of competent independent advice of counsel presents other risks that have yet to be fully considered in current and proposed statutory schemes.

These statutes may or may not open a door to the admission of documents that historically would have been overlooked by family, heirs, and fiduciaries. Could electronic wills statutes that do not provide limitations on the manner in which electronic wills are created, and require the formalities of due execution and witnesses, enlarge a personal representative's obligation in searching for a will (and even if a will is found) to see if a notation on a cell phone, computer, tablet, the cloud, another electronic record, slip of paper/material, and any other form of documentation indicates a (contrary) expression of the decedent's dispositive intent? What the electronic will statutes can provide is a requirement of formality akin to that required for paper wills; but, care must be taken against creating a process that glosses over (if not ignores) the importance of independent competent counsel, as doing so could actually have an adverse effect on implementation of a decedent's intent.

Given the apparent move away from testamentary instruments created after due consideration of competent legal advice, should instruments created without the benefit of such counsel be afforded the historical presumptions of validity that requires a contestant to rebut that presumption by a preponderance or clear and convincing evidence? Perhaps the better course is to recognize, from their inception, that instruments created without the benefit of competent legal advice be afforded some lower level of recognition that thereby places a greater burden on the proponent of such instruments to demonstrate that they accurately reflect the testator's intentions.

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