

TECHNOLOGY ADRIFT: IN SEARCH OF A ROLE FOR ELECTRONIC WILLS

ADAM J. HIRSCH

INTRODUCTION	828
I. CLASSICAL STATUTES	829
<i>A. Statute of Wills</i>	830
1. The Writing Requirement	830
2. The Signature Requirement	835
<i>B. Incorporation by Reference</i>	836
<i>C. Living Trusts</i>	838
II. NEOCLASSICAL STATUTES	840
<i>A. Harmless Error</i>	840
<i>B. Choice of Law</i>	843
III. MODERN STATUTES	846
IV. THE CASE LAW	851
<i>A. American Decisions</i>	851
<i>B. Foreign Decisions</i>	855
V. VIRTUES AND VICES OF ELECTRONIC WILLS	859
<i>A. Theory</i>	859
<i>B. Empirical Evidence</i>	870
VI. TOWARD A POSTMODERN STATUTE	873
<i>A. E- for Emergency</i>	873
<i>B. Anti-Electronic Wills</i>	889
CONCLUSION	895
APPENDIX	897
TRIBUNAL DE GRANDE INSTANCE [TGI] [ORDINARY COURT OF ORIGINAL JURISDICTION] METZ, CIV., AUG. 17, 2018, 17/01794:	897
TINGSRÄTT [TR] [DISTRICT COURT] 2012-11-16 T5746-11:	900
HOVRÄTT [HOVR] [COURT OF APPEAL] 2013-06-13 T11306-12:	903

TECHNOLOGY ADRIFT: IN SEARCH OF A ROLE FOR ELECTRONIC WILLS

ADAM J. HIRSCH*

Abstract: This Article addresses the law and public policy of electronic wills. The Article analyzes state statutes that either apply explicitly, or might apply implicitly, to wills of this type and concludes that judicial approval of electronic wills is already within the realm of possibility even in the many states that do not expressly allow them. The Article also examines the case law to date on this issue, both in the United States and in foreign jurisdictions, including several cases that have not previously been noted by American commentators. The Article then addresses the merits and demerits of electronic wills and presents the results of the first large-scale empirical study of popular attitudes toward these wills. In light of this analysis, the Article proposes a new approach: to bar electronic wills in general, but to permit them for estate plans made under emergency conditions.

INTRODUCTION

To update an old saying, *the handwriting is on the screen*. Electronic wills (e-wills) are coming, and we cannot resist the onslaught of technology—or its infiltration of law—any more than we can hold back the tide. Our distant descendants will smile at wills inked upon paper as a quaint reflection of the times, just as today we smile at wills etched into clay tablets by our ancient ancestors.¹

Perhaps, perhaps. The day may come when all communication apart from oral speech is digitized for the reason that—like clay tablets—paper no longer exists, or at least ceases to be readily available.² That day lies in the future, however. Lawmakers must act in, and for, the here and now—ours being, it would seem, a transitional age, when paper and screen stand side by side as alternative channels of communication.

© 2020, Adam J. Hirsch. All rights reserved.

* Professor of Law, University of San Diego. M.A. 1979, J.D. 1982, Ph.D. 1987 Yale University. My thanks to David Horton, Krista Jenkins, Julia Kelety, and Bruce Stone for helpful comments and to Sara Pike for research assistance.

¹ Babylonian wills and related materials survive from the third millennium B.C., before papyrus was invented. See ASSYRIAN AND BABYLONIAN LITERATURE: SELECTED TRANSLATIONS 271–76 (Robert Francis Harper ed., 1904).

² The production of paper hinges on demand—but also on supply, in the face of looming deforestation. Paper wills cannot persist without trees! See Will Dunham, *Earth Has Three Trillion Trees but They're Falling at Alarming Rate*, REUTERS (Sept. 2, 2015), <https://www.reuters.com/article/us-science-trees/earth-has-3-trillion-trees-but-theyre-falling-at-alarming-rate-idUSKCN0R21Z620150902> [<https://perma.cc/R5AU-P9YZ>].

This Article addresses the public policy of electronic wills in the year 2020. I will strive to assess the subject pragmatically—neither idolizing technology nor launching a tired tirade against it. As a springboard for its analysis, the Article presents the results of the first large-scale empirical study of demand for, and popular assumptions concerning, e-wills.

In the pages following, I will argue that, as a general proposition, electronic wills serve poorly to fulfill the functions of testamentary transfers. Therefore, lawmakers ought to disallow them, under ordinary conditions. Yet, analysis of prevailing statutory law leads to the surprising conclusion that courts have room to find e-wills valid without any changes of current legislative text in many jurisdictions. Accordingly, the prevailing statutes need revising to clarify legislatures' intent to bar e-wills.

At the same time, I will argue that electronic wills can play a useful role today—and increasingly so—within the confined sphere of emergency estate planning. Ultimately, then, I offer a schizophrenic perspective on e-wills. I shall advocate permitting them when made under exigent circumstances, but prohibiting them under other circumstances.

The Article unfolds in stages. In Part I, I assess the prospects for judicial recognition of electronic wills under the traditional framework of inheritance law.³ In Part II, I ponder the same question in light of more recent embellishments to that framework.⁴ In Part III, I survey and compare the emerging statutes explicitly aimed at validating e-wills.⁵ In Part IV, I proceed to examine the extant body of case law on e-wills, both in the United States and abroad.⁶ Several of those cases are noted (and two are translated) for the first time in the American legal literature.⁷ In Part V, I assess the public policy of e-wills, further illuminated by an inaugural empirical study of popular attitudes toward these wills.⁸ Finally, in Part VI, I propose a new model for integrating e-wills into inheritance law.⁹

I. CLASSICAL STATUTES

Statutory law in the realm of inheritance is notoriously stagnant. If only because of “[g]eneral legislative disinterest,”¹⁰ the field is crawling with old

³ See *infra* notes 10–77 and accompanying text.

⁴ See *infra* notes 78–117 and accompanying text.

⁵ See *infra* notes 118–153 and accompanying text.

⁶ See *infra* notes 154–218 and accompanying text.

⁷ Original translations of cases from France and Sweden appear in the Appendix. Additional recent cases from Australia, Canada, and New Zealand are noted hereinafter.

⁸ See *infra* notes 219–295 and accompanying text.

⁹ See *infra* notes 296–428 and accompanying text.

¹⁰ Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 921 (1964).

vines. Time and again, courts operating in this area have faced the challenge of applying moldy statutes to modern problems—for instance, fitting posthumous conception into schemes of intestacy laid down when the very notion of a posthumously conceived heir would have been *inconceivable* to lawmakers.¹¹

And now, in the absence of legislation expressly disposing of electronic wills, courts must wrestle with their permissibility under statutes regulating will formalities enacted in an age when quill pens and inkwells ruled the workstation. Could a court pour the new wine of digital images into these old statutory bottles?

A. Statute of Wills

Every state has established formalizing rules for wills, set out within the “wills act” or “statute of wills.” These acts set protocols that vary in their details from state to state and that lawmakers have tended to prune back over time.¹² The essential requirements today are standardized. A testator can execute a will in writing that bears his or her signature, inscribed in the presence of at least two witnesses.¹³ Our first task is to consider whether an electronic will could qualify as properly executed under these strictures. On conventional principles of statutory construction, in five jurisdictions, the answer is *apparently so*, although that result seems to have ensued by accident. And in other jurisdictions, the same result is within the realm of interpretive possibility.

1. The Writing Requirement

The key lies in the wording of the statute of wills. Whereas the language of these acts varies among the jurisdictions, practically every one of them, including the one found in the Uniform Probate Code, requires testators to execute their wills “in writing.”¹⁴ Twenty-six states, as well as the Code, also allow unwitnessed holographic wills, whose terms appear in a “testator’s handwriting.”¹⁵ On orthodox construction, *handwriting* comprises a subset of writ-

¹¹ See *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 264 (Mass. 2002) (assaying the inheritance rights of posthumously conceived children under an intestacy statute that “has remained essentially unchanged for 165 years”).

¹² For a further discussion and references, see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1067–68 (1996). The trend in favor of trimming formalities began as early as the nineteenth century. See Adam J. Hirsch, *Waking the Dead: An Empirical Analysis of Revival of Wills*, 53 U.C. DAVIS L. REV. __ n.58 (forthcoming 2020).

¹³ See, e.g., UNIF. PROB. CODE § 2-502(a) (amended 2019), 8 pt. 1 U.L.A. 209 (2013). For a discussion of variations in the details of these requirements, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmts. f–p (AM. LAW INST. 1999–2011).

¹⁴ See, e.g., UNIF. PROB. CODE § 2-502(a)(1). Nuncupative (oral) wills are also permitted in fifteen states under limited circumstances. See *infra* note 314 and accompanying text.

¹⁵ UNIF. PROB. CODE § 502(b). For a tally of the states, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 (statutory note).

ing. Accordingly, statutes authorizing holographic wills fail to open up new vistas for the authorization of electronic wills. But what constitutes a writing? More exactly, can it include communication appearing on a screen?

First of all, no state requires that wills appear on paper; and in some instances, they do not. Historically, courts have probated wills penned on bedroom walls, chests of drawers, and other unlikely surfaces.¹⁶ Whether a screen likewise qualifies depends on the meaning of the word “writing” as a term of art. A computer screen differs from other surfaces in that it is protean: the image appears when a computer file is downloaded, only to disappear when another file replaces it. Whether this characteristic of *superficial impermanence* distinguishes a screen image from a writing depends on what elements lawmakers regard as definitive.

Definitions of the term “writing” may appear in either the probate code or a definitional section applicable to all statutes, in any given jurisdiction. Thirty-one states define the term in one way or another. Those definitions offer encouragement to advocates of electronic wills.

In five jurisdictions—Florida, Illinois, Iowa, Utah, and Virginia—a definitional section applicable to all statutes construes the term “writing” to include electronic communications.¹⁷ Given their inclusion within general provisions, these definitions’ implications for wills appear unintentional, and even unseen. Their obscurity is palpable in Florida, where lawmakers have bickered over substantive legislation to validate electronic wills.¹⁸ It dawned on no one to check definitional law, which indicates by its plain language that e-wills were already valid in the state.¹⁹

In twenty-six additional states, statutes define the term “writing” without any express reference to electronic communication. Nevertheless, seventeen of those statutes suggest exhaustiveness. A “[w]riting may be made in any manner,”²⁰ including “any representation of words.”²¹ Such terminology suggests a

¹⁶ See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 273–74 (8th ed. 2009) (in the 8th ed. only). For other odd examples, see THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 63, at 295 (2d ed. 1953); Elmer M. Million, *Wills: Witty, Witless, and Wicked*, 7 WAYNE L. REV. 335, 340–41 (1960). By the same token, any means of marking a surface will do. See, e.g., *In re Will of Bradway*, No. A-4535-16T3, 2018 WL 3097060, at *5–6 (N.J. Super. Ct. App. Div. June 25, 2018) (giving effect to a codicil penned in the testator’s blood).

¹⁷ See FLA. STAT. ANN. § 1.01(4) (West 2014); 5 ILL. COMP. STAT. 70/1.15 (1999); IOWA CODE ANN. § 4.1(39) (West 2013); UTAH CODE ANN. § 68-3-12.5(40) (West 2019); VA. CODE ANN. § 1-257 (2017). Professor David Horton was first to notice these statutes. See David Horton, *Tomorrow’s Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 568–69 (2017).

¹⁸ See *infra* notes 261–263 and accompanying text.

¹⁹ See FLA. STAT. ANN. § 1.01(4) (stipulating that “‘writing’ also includes information which is created or stored in any electronic medium.”).

²⁰ E.g., N.D. CENT. CODE ANN. § 1-01-37 (2019).

²¹ E.g., OHIO REV. CODE ANN. § 1.59(J) (West 2004). The remaining statutes are: COLO. REV. STAT. § 2-4-401(17) (2017); DEL. CODE ANN. tit. 1, § 302(23) (2011) (“or otherwise”); IND. CODE § 29-1-5-2(a) (2019); ME. STAT. tit. 1, § 72(28) (2014); MO. REV. STAT. 1.020(22) (2016); N.H. REV.

legislative preference for inclusion within the category of “writings.” Seven more statutes are open-textured, stating things that a writing “includes.”²² Such phrasing admits of the possibility of organic growth. Notably, among the thirty-one states that define a “writing” by statute, not one establishes a definition that is comprehensive. Only two appear by their wording to preclude electronic communication.²³

Nineteen states, together with the Uniform Probate Code, fail to define the term “writing” at all.²⁴ Nonetheless, we can deduce that electronic wills fail to comprise writings in jurisdictions that have adopted the Code’s terminological framework. The Code expressly defines the term “record” to mean “information that is inscribed on a tangible medium *or* that is stored in an electronic or other medium and is retrievable in perceivable form.”²⁵ Thereafter, the drafters authorize “record[s]” when they intend to allow electronic communication.²⁶ Several additional sections use the compound phrase “writing or other record.”²⁷ By distinguishing writings from records, the drafters imply that the category of writings is less inclusive than records.²⁸ Six states follow this nomenclature, although in four of them it is overlaid upon preexisting general

STAT. ANN. § 21:23 (1963); N.C. GEN. STAT. § 12-3(10) (2017); OKLA. STAT. tit. 25, § 28 (1910); R.I. GEN. LAWS § 43-3-16(b) (2019); S.D. CODIFIED LAWS § 2-14-2(35) (2018); TENN. CODE ANN. § 1-3-105(36) (2017); TEX. GOV’T CODE ANN. § 312.011(17) (West 2019); VT. STAT. ANN. tit. 1, § 142 (2019); W. VA. CODE § 2-2-10(c) (2017); WIS. STAT. § 990.01(48) (2018).

²² *E.g.*, ALA. CODE § 1-1-1(2) (2019) (“The word ‘writing’ includes typewriting and printing on paper.”). One statute uses the phrase “may include, but is not limited to.” MISS. CODE ANN. § 1-3-61 (2018). The remaining statutes are: ALASKA STAT. § 01.10.060(a)(14) (2019); ARIZ. REV. STAT. ANN. § 1-215(45) (2016); GA. CODE ANN. § 1-3-3(23) (2019); MICH. COMP. LAWS § 8.3q (2019); MONT. CODE ANN. § 1-1-203(7) (2011). One of these states (Alaska) nevertheless excludes electronic communication from the definition of “writing” by virtue of other nomenclature, and another (Arizona) expressly permits e-wills. *See infra* notes 29, 118.

²³ *See* N.Y. GEN. CONSTR. LAW § 56 (McKinney 2019) (“[W]riting and written include every legible representation of letters *upon a material substance, except when applied to the signature of an instrument.*”) (emphasis added); 1 PA. CONS. STAT. § 1991 (2019) (defining “written” as “[e]very legible representation of letters or numerals *upon a material substance*”) (emphasis added). *Cf.* W. VA. CODE § 2-2-10(c) (defining “in writing” to include “any representation of words” but simultaneously defining signature to include electronic signatures; whether the second definition creates a negative inference regarding the first is unclear).

²⁴ *See* UNIF. PROB. CODE § 1-201 (amended 2019), 8 pt. 1 U.L.A. 46 (2013) (“General Definitions”). The states lacking either an omnibus or a probate-code-specific definition of a “writing” are: Arkansas, California, Connecticut, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, Oregon, South Carolina, Washington, and Wyoming. One of those states (Nevada) expressly permits e-wills, however. *See infra* note 118.

²⁵ UNIF. PROB. CODE § 1-201(41) (emphasis added).

²⁶ *See id.* §§ 2-120(f)(1), 2-121(e)(1), 8 pt. 1 U.L.A. 129, 135.

²⁷ *Id.* § 2-1105(c), 8 pt. 1 U.L.A. 390; *id.* §§ 5B-102(7), 5B-109(b)–(c), 5B-114(h), 5B-119(d)(3), 8 pt. 3 U.L.A. 290, 298, 304, 310.

²⁸ *See id.* § 2-502 cmt., 8 pt. 1 U.L.A. 209 (qualifying “any reasonably permanent record” as a “writing”); *id.* § 2-609 cmt., 8 pt. 1 U.L.A. 267 (using “a letter” as an example of a writing).

definitions of “writings” that are expansive—thus illustrating the risk of self-contradiction when Uniform Acts are imported wholesale into state codes.²⁹

In the other states without statutory definitions, we are thrown back on general meanings. The primary definition for a “writing” in Black’s Law Dictionary has evolved. In older editions, the definition appeared to preclude electronic wills. A writing comprised “letters or marks placed upon paper, parchment, or other material substance.”³⁰ Both by its plain meaning and under the *ejusdem generis* canon, this definition contemplates a physical surface. But in more recent editions, a “writing” is defined as “[a]ny intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form This includes hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.”³¹

Of course, this more expansive definition was not in effect when the writing requirement for wills first appeared. For this reason, its relevance is doubtful. In the absence of a state statute authorizing dynamic interpretation of legislation, orthodox rules of construction require courts to construe statutory text according to its original meaning.³² That said, the problem has arisen before, and its resolution in the past suggests the potential for judicial acceptance of electronic wills.

Consider typewritten wills. We take for granted today that these satisfy the writing requirement. Yet, when the statute of wills was enacted “the only means of writing a will was by pen and ink or pencil in the hands of the scrivener; there was then no such instrument as a typewriter.”³³ In the wake of this innovation, a few states updated their statutes of wills expressly to validate typewritten wills.³⁴ Most did not, leaving open the question whether “writings” included documents created by “manipulation of a typewriting machine.”³⁵ Even so, typewritten wills began to appear late in the nineteenth century.³⁶

²⁹ See ALASKA STAT. § 13.06.050(46) (2019); COLO. REV. STAT. § 15-10-201(44.5) (2019); ME. STAT. tit. 18-C, § 1-201(47); N.M. STAT. ANN. § 45-1-201(43) (West 2019); N.D. CENT. CODE ANN. § 30.1-01-06 (2017); UTAH CODE ANN. § 75-1-201(42) (West 2013). Notwithstanding these provisions, Colorado, Maine, North Dakota, and Utah all set the statutory meaning of “writings” broadly within their general definitional law. See *supra* notes 17, 20–21 and accompanying text.

³⁰ *Writing*, BLACK’S LAW DICTIONARY (6th ed. 1990).

³¹ *Id.* (10th ed. 2014). The change occurred in 2009. Compare *id.* (8th ed. 2004), with *id.* (9th ed. 2009).

³² The Uniform Probate Code mandates purposive construction but makes no provision for dynamic construction. See UNIF. PROB. CODE § 1-102(a) (amended 2019), 8 pt. 1 U.L.A. 35 (2013).

³³ *Adams’ Ex’x v. Beaumont*, 10 S.W.2d 1106, 1107 (Ky. 1928); see also *In re Dreyfus’ Estate*, 165 P. 941, 941–42 (Cal. 1917) (making the same observation).

³⁴ See *Roush v. Wensel*, 15 Ohio C.C. 133, 134 (1897); see also Percy Bordwell, *The Statute Law of Wills* (pt. 1), 14 IOWA L. REV. 1, 10 (1928) (remarking three such statutes).

³⁵ *Dreyfus’ Estate*, 165 P. at 941.

³⁶ See *Thompson v. Thompson*, 68 N.W. 372, 373 (Neb. 1896); *In re Hardenburg’s Will*, 33 N.Y.S. 150, 151–52 (Gen. Term 1895).

*They were accepted without challenge.*³⁷ In effect, everyone read the statutes dynamically, and the meaning of a “writing” moved with the times. It could move again in our time, history suggests, without any revision of existing statutes. As an early court remarked:

There are cases where a word in a statute aptly describing a thing then well known has been extended so as to include some other thing afterwards invented or used to accomplish the same or a similar purpose and within the general statutory intent and object. For example, “carriage,” meaning a wheeled vehicle, has been held to include the subsequently invented bicycle.³⁸

At the end of the day, the issue could hinge on purposive analysis—to wit, whether construing “writings” to include electronic wills would “carry out the spirit and object of the statutory provision.”³⁹

And that, we can say with confidence, is debatable. In another early case, a court rejected a will written in chalk on a slate, because “[i]mpressions upon it are easily removed, and replaced, without leaving any trace of the change.”⁴⁰ In the opinion of the court, it was not a close question: “Writing upon such material does not . . . even reasonably accomplish the purpose [of] . . . the statute [of wills].”⁴¹ The modern Restatement would construe “writings” less restrictively, but not boundlessly: they “require a medium that allows the markings to be detected. A will, for example, scratched in the paint on the fender of a car would be in writing, but one ‘written’ by waving a finger in the air would not be.”⁴² A computer screen produces detectable markings—just not indelible ones. For a court to find a screen image a “writing” would hardly qualify as judicial legislation.

Finally, we may observe, in two jurisdictions, the relevant acts fail to stipulate that even an executed will must appear in writing. In Arkansas and Tennessee, the general statute of wills only requires signatures by the testator and witnesses.⁴³ The language of these acts dates to 1947 and 1941, respective-

³⁷ See *Thompson*, 68 N.W. at 373; *Hardenburg’s Will*, 33 N.Y.S. at 151–52. Contemporary treatises asserted that typewritten wills satisfied the writing requirement without citing to a single case. See WILLIAM HERBERT PAGE, A CONCISE TREATISE ON THE LAW OF WILLS § 159 (1901); JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 246 (1904); see also Bordwell, *supra* note 34, at 10; cf. *Dreyfus’ Estate*, 165 P. at 941–42 (holding, in a case of first impression, that a will typed on a typewriter by the testator’s own fingers did not qualify as a “handwrit[ten]” holographic will).

³⁸ *Dreyfus’ Estate*, 165 P. at 942.

³⁹ *Id.*; see also *supra* note 32.

⁴⁰ *Reed v. Woodward*, 11 Phila. Rep. 541, 543 (Ct. Com. Pl. 1875).

⁴¹ *Id.* The court added that “[t]he purpose of the statute is obvious. It was to avoid the uncertainty and danger attending proof of n[on]cupative wills.” *Id.* at 542.

⁴² RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. i.

⁴³ See ARK. CODE ANN. § 28-25-103(a) (West 2019) (“The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses.”); TENN. CODE

ly (although the second one was reenacted as recently as 2016). The same omission appears in a federal statute, establishing formalizing rules for the wills of members of the armed forces, expressly superseding state probate law by federal preemption.⁴⁴ None of these acts includes any language or commentary indicating that lawmakers eliminated the writing requirement as an advertent choice. Nevertheless, by their plain text, these statutes raise the possibility that an electronic will in Arkansas and Tennessee, or by a member of the armed forces wherever domiciled, is valid if it meets the signature requirement—the matter to which we next turn.

2. The Signature Requirement

The writing requirement to one side, state statutes of wills invariably require testators to “sign” their wills.⁴⁵ Once again, the validity of an electronic will turns on the meaning of this word as a term of art. Historically, courts have accepted alternatives, such as a fingerprint or a document stamp, to a signature by hand—but would an electronic facsimile suffice?⁴⁶

In most jurisdictions, the answer is unclear. The word “signed” or “signature” is left undefined in twenty-five states, again creating the potential for organic growth.⁴⁷ In these states, if a court were to find electronic wills to comprise writings, then it could also find electronic signatures to comprise signatures—the two definitions could evolve *pari passu*.

Among the twenty-five states that do define signatures, six authorize electronic ones.⁴⁸ Five other states authorize e-signatures for records “other than a will,” thereby implicitly requiring traditional signatures for wills under the *ex-*

ANN. § 32-1-104(a) (2016) (“The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses . . .”).

⁴⁴ See 10 U.S.C.A. § 1044d(a), (c) (2016) (requiring that a will be “executed,” signed, witnessed, and notarized).

⁴⁵ See, e.g., UNIF. PROB. CODE § 2-502(a)(2) (amended 2019), 8 pt. 1 U.L.A. 209 (2013).

⁴⁶ See *In re Romaniw’s Will*, 296 N.Y.S. 925, 935–36 (N.Y. Sur. Ct. 1937) (accepting a fingerprint); *Phillips v. Najar*, 901 S.W.2d 561, 562 (Tex. Ct. App. 1995) (accepting a document stamp); see also *Hassoun v. Reliastar Life Ins. Co.*, 288 F. Supp. 3d 1334, 1353–55 (S.D. Fla. 2018) (accepting a thumbprint on a life insurance contract).

⁴⁷ The states are: Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, Virginia, Washington, and Wyoming. Nonetheless, two of these states (Indiana and Nevada) expressly validate e-wills. See *infra* note 118 and accompanying text.

⁴⁸ See ALASKA STAT. ANN. § 13.06.050(50) (2019); 5 ILL. COMP. STAT. 70/1.15; IOWA CODE ANN. § 4.1(39); N.H. REV. STAT. ANN. § 564-B:1-103(16) (2017); TENN. CODE ANN. § 1-3-105(30) (defining signatures to include any “symbol or methodology executed . . . to authenticate a writing or record” where the same statute defines “record” to include electronic communication); W. VA. CODE § 2-2-10(c).

pressio unius canon.⁴⁹ This provision originated in the Uniform Probate Code and reinforces the conclusion that electronic wills cannot take effect under the Code.⁵⁰ Seven more states likewise exclude e-signatures from the definition of signatures.⁵¹ In the remaining seven states, and under the United States Code, no inference can be drawn from the local definition.⁵²

Ultimately, then, the signature requirement fails to pose an insuperable obstacle to the validation of electronic wills in most states. Among those that define a “writing” expressly to include digital images, two explicitly define a “signature” in the same way;⁵³ in the others, the meaning of the term “signature” is unclear.⁵⁴ Among states that do not expressly require wills to be written but do require signatures, one defines a “signature” to include digital images;⁵⁵ the others define the term either vaguely or not at all.⁵⁶

B. Incorporation by Reference

In most states today, a will can refer to unexecuted provisions and thereby incorporate those provisions into the will, even though they were physically absent when the will was executed.⁵⁷ Incorporation by reference began as a common-law doctrine but today is widely codified.⁵⁸ Could a conventional

⁴⁹ See COLO. REV. STAT. § 15-10-201(47.5); ME. STAT. tit. 18-C, § 1-201(52); N.M. STAT. ANN. § 45-1-201(46) (West 2019); N.D. CENT. CODE ANN. § 30.1-01-06; UTAH CODE ANN. § 75-1-201(46). Nonetheless, two of these states set vague general definition of signatures without reference to e-signatures, again illustrating the risk of amalgamating Uniform Acts into preexisting state codes. See N.D. CENT. CODE ANN. § 1-01-49(16); UTAH CODE ANN. § 68-3-12.5(28) (West 2019).

⁵⁰ See UNIF. PROB. CODE § 1-201(45) (amended 2019), 8 pt. 1 U.L.A. 49 (2013). The Code fails to establish a definition of signatures that does apply to wills. See *id.*

⁵¹ See DEL. CODE ANN. tit. 1, § 302(23); MICH. COMP. LAWS § 8.3q; MISS. CODE ANN. § 1-3-61; MO. REV. STAT. § 1.020(22) (2016); N.C. GEN. STAT. § 12-3(10); VT. STAT. ANN. tit. 1, § 142 (by implication); WIS. STAT. § 990.01(38) (except for a “person [who] is unable to write”).

⁵² See ALA. CODE ANN. § 1-1-1(4); ARIZ. REV. STAT. ANN. § 1-215(36); GA. CODE ANN. § 1-3-3(19); MONT. CODE ANN. § 1-1-203(5); 1 PA. CONS. STAT. § 1991; S.D. CODIFIED LAWS § 2-14-2(25); TEX. GOV'T CODE ANN. § 312.011(14). One of these states (Arizona) expressly validates e-wills. See *infra* note 118. The United States Code is silent on the matter of e-signatures. See 1 U.S.C. § 1 (2018).

⁵³ See 5 ILL. COMP. STAT. 70/1.15; IOWA CODE ANN. § 4.1(39); *supra* note 17 and accompanying text.

⁵⁴ See FLA. STAT. ANN. § 1.01 (no definition); UTAH CODE ANN. § 75-1-201(46) (authorizing e-signatures for records); *id.* § 68-3-12.5(28) (stating what a signature “includes” without reference to e-signatures); VA. CODE ANN. §§ 1-257, 59.1-481(b)(1) (2017) (failing to define signatures but defining writings to include ones “whether an electronic signature authorized by . . . Title 59.1 is or is not affixed,” which could be read to limit e-signatures to ones validated by Title 59.1, which explicitly excludes wills).

⁵⁵ See TENN. CODE ANN. § 1-3-105(30).

⁵⁶ Federal law falls into the first category and Arkansas into the second. See 1 U.S.C. § 1; *supra* notes 43–44 and accompanying text.

⁵⁷ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.6.

⁵⁸ Incorporation by reference is today codified in twenty-eight states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts,

will incorporate provisions found on a computer file simply by referring to them as disposing of part of the estate—forming what we can dub a *semi-electronic* will?

The answer depends on the limits of incorporation by reference. By tradition, a testator can only incorporate provisions (1) that exist when the will is executed, (2) that the will refers to expressly, and—crucially for present purposes—(3) that are in *writing*.⁵⁹

The confinement of incorporation by reference to a “writing” under most of the state statutes means that semi-electronic wills raise no distinct issues. One’s validity, like that of a fully-electronic will, turns on how any given state defines the term “writing.” Still, in the moiety of states where incorporation by reference remains a common-law doctrine, the writing requirement associated with the doctrine can evolve more flexibly than its twin requirement as a will formality, which is bridled by universal codification. What is more, variations in the vocabulary of three state statutes raise the prospect that incorporation by reference operates under a more relaxed standard. In Indiana, Wisconsin, and Ohio, as elsewhere, a will must be in “writing.”⁶⁰ In Indiana, by comparison, a will can incorporate by reference “a writing of any kind.”⁶¹ An incidental turn of phrase, or does the second term convey a broader meaning? Then in Wisconsin, a will can incorporate by reference “another writing or document,” which suggests a broader scope than mere writings, although a “document” is left undefined in the state.⁶² Finally, in Ohio, more significantly, a will can incorporate by reference a “document, book, record, or memorandum.”⁶³ Where-

Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Utah, Virginia, Washington, and Wisconsin. In the remaining states, except for four where incorporation by reference has not gained acceptance, the doctrine takes effect as common law. The four outliers are: Connecticut, Georgia, Louisiana, and New York. See LAWRENCE P. KELLER, WILLS, at app. I (rev. ed. 2019); 2 PAGE ON THE LAW OF WILLS § 19.19–.22 (rev. ed. 2003 & Supp., Jeffrey A. Schoenblum ed. 2017) [hereinafter PAGE].

⁵⁹ See UNIF. PROB. CODE § 2-510 (amended 2019), 8 pt. 1 U.L.A. 228 (2013); *supra* note 57. The Uniform Probate Code contains a second, exclusively statutory variant of incorporation by reference confined to tangible personal property that again requires a writing but also a *signature*, and which further allows the writing to postdate the will. See UNIF. PROB. CODE § 2-513 (amended 2019), 8 pt. 1 U.L.A. 231 (2013). Versions of this rule appear in thirty states: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and Wyoming. Only one of those states (Nevada) deviates from the writing requirement. See *infra* note 145 and accompanying text.

⁶⁰ IND. CODE § 29-1-5-2(a) (2019); OHIO REV. CODE ANN. § 2107.03 (West 2012); WIS. STAT. § 853.03 (2019). Indiana and Ohio make limited provision for nuncupative wills. See IND. CODE § 29-1-5-4; OHIO REV. CODE ANN. § 2107.60. Indiana today allows e-wills. See *infra* note 118.

⁶¹ IND. CODE § 29-1-6-1(h). Among these three states, only Indiana makes special provision for references to tangible personal property and here reverts to the requirement of a “writing.” See *id.* § 29-1-6-1(m).

⁶² WIS. STAT. § 853.32(1); see also *id.* §§ 851.01–.31, 990.01.

⁶³ See OHIO REV. CODE ANN. § 2107.05 (West 2018).

as a “record” again goes undefined in Ohio, its ordinary meaning includes electronic communications.⁶⁴ This tweak implies that semi-electronic wills could take effect in Ohio, even if fully-electronic wills could not.

C. Living Trusts

Wills are not the exclusive means of disposing of property upon death. By establishing a revocable “living” trust, persons can retain all incidents of ownership over all manner of property and provide for its delivery to beneficiaries upon death without going through probate. Under modern law, living trusts have become perfect substitutes for wills.⁶⁵ But because they comprise inter vivos transfers, settlors who create living trusts need not comply with the statute of wills.⁶⁶

Does the irrelevance of the statute of wills make an electronic living trust valid? No published case has ever addressed the question. Nonetheless, as a general proposition in most jurisdictions, prior elements of trust law suggest that the answer is *yes*. Under the Uniform Trust Code, operative in thirty-four states,⁶⁷ settlors of a living trust need abide by no formalities. All the Code requires is a “declaration” by the settlor of the trust’s existence.⁶⁸ Although the Code fails to define the term “declaration,” its plain meaning is not confined to any given medium of communication.⁶⁹

⁶⁴ See *id.* § 1.59; *Record*, BLACK’S LAW DICTIONARY, *supra* note 30.

⁶⁵ UNIF. TRUST CODE art. 6, gen. cmt. (amended 2010), 7C U.L.A. 545 (2006) (acknowledging that living trusts are the “functional equivalent” of wills). Under modern law, the trustee of a living trust owes no fiduciary duties to death beneficiaries, and if the settlor doubles as trustee, he or she need not retitle trust property in the name of the trust. See *id.* §§ 401 cmt., 603(b), 7C U.L.A. 478, 553 (2006); RESTATEMENT (THIRD) OF TRUSTS § 74(1) cmts. b–e (AM. LAW INST. 2003–2012); see also RESTATEMENT (THIRD) OF TRUSTS § 74 reporter’s notes (citing cases).

⁶⁶ See RESTATEMENT (THIRD) OF TRUSTS § 25.

⁶⁷ These are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

⁶⁸ See UNIF. TRUST CODE § 401 (amended 2010), 7C U.L.A. 478, 489 (2006); see also IND. CODE § 29-1-5-9 (parroting this rule in a non-Uniform statute). By comparison, the Uniform Probate Code gives effect to living trusts set down in a “written instrument.” UNIF. PROB. CODE § 6-101 (amended 2019), 8 pt. 3 U.L.A. 354 (2013). This provision serves as a safe harbor and “does not invalidate other arrangements by negative implication,” including “oral trust[s],” which the drafters observe are “already generally enforceable under trust law.” *Id.* § 6-101 cmt. This provision is in effect in thirteen states, although all except two of them are also Uniform Trust Code states: Alaska (not a Uniform Trust Code state), Arizona, Colorado, Kentucky, Massachusetts, Michigan, Montana, Nebraska, New Mexico, North Dakota, South Dakota (not a Uniform Trust Code state), Virginia, and Wisconsin.

⁶⁹ See UNIF. TRUST CODE § 103 (amended 2010), 7C U.L.A. 413 (2006); *Declaration*, BLACK’S LAW DICTIONARY, *supra* note 30. The Uniform Electronic Transaction Act, enacted in forty-seven states, gives effect expressly to an electronic “transaction” but, among trusts, the Act only applies to

Judicial doctrine parrots the Uniform Trust Code. The third Restatement of Trusts avers that all a settlor needs to do in order to create a living trust is to declare it.⁷⁰ Case law confirms the Restatement.⁷¹ Although lawmakers traditionally have contraposed written and oral trusts, technological change suggests a broader dichotomy between *written and unwritten* trusts.⁷² The absence of a writing requirement for living trusts implies the validity of electronic declarations of trust, irrespective of how broadly or narrowly state law defines writings.

Still, we must take note of statutory variations.⁷³ In eight states, a settlor can only execute an inter vivos trust in a signed writing.⁷⁴ The same is true in a ninth state, but only when the settlor doubles as trustee.⁷⁵ In three more states, inter vivos trusts require a writing, but no signature need appear.⁷⁶ All told, then, in twelve jurisdictions, the definitions of writings and signatures again become relevant to the validity of an electronic living trust.

The same could be true in two more states whose statutes are unclear. Acts in these states render “oral trusts” unenforceable.⁷⁷ Doubtless, the drafters again intended to contrapose written and oral trusts, without imagining that, in modern times, some trusts might be neither.

business trusts. See UNIF. ELEC. TRANSACTIONS ACT § 3(a) & cmt. 1 & Legislative Note Regarding Possible Additional Exclusions under Section 3(b)(4) cmt. 1 (1999), 7A pt. 1 U.L.A. 502, 504 (2017).

⁷⁰ See RESTATEMENT (THIRD) OF TRUSTS §§ 20, 25(1).

⁷¹ See, e.g., *Vander Molen v. Kennard*, 169 N.W. 2d 662, 663 (Mich. Ct. App. 1969) (finding evidence of an “oral revocable trust” sufficient to submit the question of the trust’s existence to a jury).

⁷² Although the Restatement titles one of the relevant sections “Validity of Oral Trusts,” the text of the provision frames the rule as a negative: “[A] writing is not necessary to create an enforceable inter vivos trust” RESTATEMENT (THIRD) OF TRUSTS § 20. The accompanying comment states that “a property owner may declare a trust . . . during life . . . without a writing,” but then adds, “[t]hus . . . enforceable trusts . . . may be created orally.” *Id.* § 20 cmt. Other possibilities created by the absence of a writing requirement did not occur to the drafters—not, at least, in 2003, when this section was composed. See *id.* § 13 cmt. b (asserting that “the required manifestation of intention to create a trust may be by written or spoken words or by conduct,” which conceivably could include electronic communication) (emphasis added).

⁷³ To the extent that it disposes of real property, an electronic living trust would again require a writing under the statute of frauds in all but a few jurisdictions. For a tally of these statutes, see GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 61–64 (2d rev. ed. 1984 & Supp. Amy M. Hess et al., eds. 2014).

⁷⁴ See ALASKA STAT. § 09.25.010(a)(9) (2019); FLA. STAT. ANN. §§ 732.502(1), 736.0403(2)(b) (West 2019) (requiring “testamentary aspects” of a living trust to be executed with will formalities); GA. CODE ANN. § 53-12-20(a) (2019); IND. CODE § 30-4-2-1.5(b) (2019); IOWA CODE ANN. § 633A.2103(1) (West 2003); LA. STAT. ANN. § 9:1752 (2019); LA. CIV. CODE ANN. art. 1833 (2019) (also requiring witnesses and notarization); MONT. CODE ANN. § 72-38-407 (2013); TEX. PROP. CODE ANN. § 112.004 (West 1984).

⁷⁵ See S.C. CODE ANN. § 62-7-401(a)(1)(ii) (2014).

⁷⁶ See DEL. CODE ANN. tit. 12, § 3545(a) (2019) (applicable only to living trusts, and requiring witnesses); N.J. STAT. ANN. § 3B:31-18 (West 2019); N.Y. EST. POWERS & TRUSTS LAW § 7-1.17(a) (McKinney 2019) (also requiring witnesses).

⁷⁷ 20 PA. CONS. STAT. § 7737 (2006); W. VA. CODE § 44D-4-407 (2011).

II. NEOCLASSICAL STATUTES

Nor is that all. Today, many states grant courts a larger arsenal of powers with which to validate wills. Whether those powers create new pathways to probate for electronic wills merits analysis.

A. Harmless Error

As revised in 1990, the Uniform Probate Code relaxes the requirements for executing a will by offering relief for testators who fail to execute their wills properly. Under the Code's so-called dispensing power, "[a]lthough a document or writing added upon a document was not executed in compliance with [the statute of wills], the document or writing is treated as [valid]" if "clear and convincing evidence [shows] that the decedent intended the document or writing to constitute . . . the decedent's will."⁷⁸ This doctrine is exclusively statutory.⁷⁹ Six states have enacted the Code's provision verbatim,⁸⁰ and five others have adopted modified versions of it.⁸¹

Could a court in one of those jurisdictions give effect to an electronic will by recourse to the dispensing power? Although the power is remedial, wielded to excuse "harmless error[s]" of formality,⁸² the power does have limits. A court cannot approve a will created by oral declaration under this provision of the Code. That is the implicit message—which the drafters ought to have made explicit—of language stating that the dispensing power applies to "a document [that] was not executed in compliance" with the formal requirements for a will.⁸³ An oral will is not a document, hence the court has no power to approve one by virtue of the dispensing power in jurisdictions that require a writing. Even in a jurisdiction that allows witnessed, oral wills—as fifteen states do, two of which also grant courts a dispensing power—a court cannot use the power to cure an oral will that was improperly witnessed.⁸⁴

⁷⁸ UNIF. PROB. CODE § 2-503 (amended 2019), 8 pt. 1 U.L.A. 215 (2013).

⁷⁹ See *Litevich v. Prob. Court*, No. NNHCV126031579S, 2013 WL 2945055, at *22 (Conn. Super. Ct. May, 17, 2013).

⁸⁰ HAW. REV. STAT. § 560:2-503 (2019); MICH. COMP. LAWS § 700.2503 (2019); MONT. CODE ANN. § 72-2-523 (1993); N.J. STAT. ANN. § 3B:3-3 (West 2019); S.D. CODIFIED LAWS § 29A-2-503 (1995); UTAH CODE ANN. § 75-2-503 (West 1998).

⁸¹ CAL. PROB. CODE § 6110(2) (West 2019); COLO. STAT. § 15-11-503 (2010); OHIO REV. CODE ANN. § 2107.24 (West 2008); OR. REV. STAT. § 112.238 (2019); VA. CODE ANN. § 64.2-404 (2012). A more widespread judicial analogue is the substantial-compliance doctrine, but it cures only *insubstantial* failures to comply with formal requirements. The absence of a writing is not insubstantial. See *Quinn v. Quinn*, 498 N.E.2d 1312, 1314 (Ind. Ct. App. 1986) (concerning an insurance contract, to which a branch of the substantial-compliance doctrine applies, and citing earlier cases).

⁸² UNIF. PROB. CODE § 2-503 cmt. (amended 2019), 8 pt. 1 U.L.A. 215 (2013).

⁸³ *Id.* § 2-503.

⁸⁴ See *infra* note 314. The overlapping states are Ohio and Virginia, but their versions of the dispensing power fail to cover oral wills. See OHIO REV. CODE ANN. § 2017.24; VA. CODE ANN. § 64.2-404.

Whether a court could validate an electronic will by dint of the dispensing power turns on whether such a will comprises a “document” under this section of the Code.⁸⁵ Like a “writing,” the term “document” fails to appear in the Code’s definitional section.⁸⁶ Still, conventional principles of construction suggest that the dispensing power covers wills other than ones in “writing.” Whenever drafters differentiate terms, we presume that those terms refer to different things.⁸⁷ Moreover, by stating that the dispensing power covers a “document or writing,” the drafters imply that the power is more expansive, sprawling beyond mere writings.⁸⁸

Nonetheless, on further analysis, we can surmise that the terms “document” and “writing,” as used in the Code, were intended to function as synonyms. The comment accompanying the section creating the dispensing power says not a word about the drafters’ variance of terminology, implying its insignificance.⁸⁹ Furthermore, in other sections of the Code the drafters switch from the term “writing” to the term “document” as though the two were interchangeable.⁹⁰ Finally, as noted earlier, the Code employs a different term expressly to refer to communications that may be either tangible or electronic—namely, the term “record.”⁹¹ But that term fails to appear anywhere in the section of the Code creating the dispensing power.⁹²

But why, then, did the drafters confuse matters by introducing a new term into this provision when the word “writing,” as previously employed in the Code, would have sufficed? We can guess the answer from the context: As used in this section, the phrase “a document or writing added upon a document” refers to two different things—original wills and interlineations, where a

⁸⁵ See Horton, *supra* note 17, at 569 (suggesting this possibility).

⁸⁶ See UNIF. PROB. CODE § 1-201 (amended 2019), 8 pt. 1 U.L.A. 46 (2013).

⁸⁷ See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 224 (1975) (referring to this canon as the “presumption of formal consistency”).

⁸⁸ See *supra* text accompanying note 78. Similarly, many state statutes, including at least one inheritance-related statute, employ the phrase “written document,” implying that some documents are unwritten. See, e.g., ARIZ. REV. STAT. ANN. § 14-2510 (2019).

⁸⁹ See UNIF. PROB. CODE § 2-503 cmt. (amended 2019), 8 pt. 1 U.L.A. 215 (2013).

⁹⁰ Compare *id.* § 2-502(a)(1), 8 pt. 1 U.L.A. 209 (2013), with *id.* § 2-502(c); compare *id.* § 2-510, 8 pt. 1 U.L.A. 228 (2013), with *id.* § 2-510 cmt.; compare *id.* § 2-513, 8 pt. 1 U.L.A. 231 (2013), with *id.* § 2-513 cmt.

⁹¹ See *supra* notes 25–28 and accompanying text.

⁹² See UNIF. PROB. CODE § 2-503 & cmt. (amended 2019), 8 pt. 1 U.L.A. 215 (2013); see also UNIF. ELEC. WILLS ACT §§ 2(4), 6 (Alternative A) (UNIF. LAW COMM’N 2019) [hereinafter UNIF. E-WILLS ACT] (using the term “record readable as text” in a section establishing a dispensing power applicable to e-wills). The drafters of the Uniform Electronic Wills Act assume, albeit without analysis, that the Uniform Probate Code’s dispensing power fails to apply to e-wills. See UNIF. E-WILLS ACT § 6 (Alternative B) & Legislative Note (extending the dispensing power to e-wills in jurisdictions that already have that power for paper wills); see also ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 191 (10th ed. 2017) (concluding that the Uniform Probate Code’s dispensing power does not apply to e-wills on the basis of other items of evidence).

testator adds new language onto a preexisting will.⁹³ Subsequent references to a “document or writing” comprised shorthand for original wills and interlineations.⁹⁴ Still, the drafters could have expressed that idea simply and clearly, without recourse to two different terms. The phrase “a writing, or writing upon a writing,” if not pretty, would have gotten the point across. The drafters’ avoidance of repetition in their version of the text exemplifies what Henry Fowler called *elegant variation*—a suitable practice for literary prose, but an elementary blunder when formulating statutes.⁹⁵ Alertly, the Oregonians cleaned up the language of this section by banishing the term “document” from their rendition of the state’s dispensing power.⁹⁶

Ultimately, we must brand the Uniform Probate Code provision on harmless error as ambiguous—but an ambiguity courts should resolve by deeming electronic wills ineligible for reformation. These are not “writings,” nor are they “documents” that a court can reform. Insofar as e-wills are concerned, the Code’s arsenal of powers, properly construed, contains only blank cartridges, and the same is true of non-Uniform versions of the dispensing power.⁹⁷

Still, in the face of statutory ambiguity, we have no assurance that a court will interpret this provision properly. And in those states that have adopted the dispensing power where “writings” are defined more broadly than under the Code’s terminological framework, the power could apply to electronic wills—but it would then be superfluous, because the local statute of wills would itself suffice to validate an e-will. Only if a state defined a “writing” broadly to include electronic communication but a “signature” narrowly to exclude electronic signatures could the Code’s version of the dispensing power at last make a difference.

⁹³ See UNIF. PROB. CODE § 2-503 (amended 2019), 8 pt. 1 U.L.A. 215 (2013).

⁹⁴ See *id.*

⁹⁵ H.W. FOWLER & F.G. FOWLER, *THE KING’S ENGLISH* 184–89 (3d ed. 1931); see also DICKERSON, *supra* note 87, at 224–25.

⁹⁶ See OR. REV. STAT. § 112.238(1) (2019) (“[A] writing may be treated as if it had been executed in compliance with [the statute of wills] if the proponent of the writing establishes by clear and convincing evidence that the decedent intended the writing to constitute . . . [t]he decedent’s will”); cf. OHIO REV. CODE ANN. §§ 1.02, 2107.01, 2107.011, 2107.03, 2107.24 (employing the term “writing” exclusively in the statute of wills and the term “document” exclusively in the state’s version of the harmless-error provision, without defining either term).

⁹⁷ In several foreign jurisdictions, however, lawmakers expressly define documents more broadly than writings in connection with the dispensing power. See *infra* notes 197, 201; cf. Gökalp Y. Güner, Note, *No Paper? No Problem: Ushering in Electronic Wills Through California’s “Harmless Error” Provision*, 49 U.C. DAVIS L. REV. 1955, 1974–79 (2016) (arguing that the dispensing power in California could be construed to validate e-wills).

The dispensing power applies only to wills—living trusts fall outside the statute’s purview.⁹⁸ Therefore, this remedial rule could not possibly operate to give effect to an electronic living trust were one required to be written.

B. Choice of Law

Another possible avenue for the enforcement of electronic wills lies open to testators. Under the common law, a will must conform to the formalizing rules of the testator’s domicile at death; in addition, a will’s validity in respect of any real property located in another jurisdiction turns on the law of the situs.⁹⁹ By statute, however, most states have relaxed these rules.

In forty-six states today, a will may be validated according to the formalizing rules of another state.¹⁰⁰ The details of these statutes vary. Under the Uniform Probate Code’s version, enacted in twenty-one states, any “written will” that complies with the formalizing rules “at the time of execution of the place where the will [was] executed,” or the formalizing rules currently in effect in “the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national” is valid.¹⁰¹ This provision contains flaws.¹⁰² But the advent of choice-of-law legislation does raise the

⁹⁸ See UNIF. PROB. CODE § 2-503 (amended 2019), 8 pt. 1 U.L.A. 215 (2013). No counterpart of this provision appears in the Uniform Trust Code. For an argument that lawmakers ought to extend the dispensing power to trusts, see Horton, *supra* note 17, at 583–88.

⁹⁹ See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 239, 263 (AM. LAW INST. 1971).

¹⁰⁰ The four outliers are: Georgia, Mississippi, Virginia, and West Virginia.

¹⁰¹ UNIF. PROB. CODE § 2-506 (amended 2019), 8 pt. 1, U.L.A. 221 (2013). This provision is replicated in: Alabama, Alaska, Arizona, California, Colorado, Delaware, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Dakota, Utah, and Wyoming; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. e (AM. LAW INST. 1999–2011) (advocating the Code’s approach as judicial doctrine). For antecedents of the Code’s provision, see LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE § 50 (1946) [hereinafter MODEL CODE]; UNIF. WILLS ACT, FOREIGN EXECUTED (1910), *quoted in* 7 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 45.4.1.1, at 3185 n.14 (5th ed. 2010).

¹⁰² UNIF. PROB. CODE § 2-506 (amended 2019), 8 pt. 1 U.L.A. 221 (2013). The drafters rationalize this provision as protecting “the expectations of testators” who assume they have properly executed their wills. *Id.* § 2-506 cmt. With this end in view, the statute should not require compliance with the *current* rules for formalized wills in the state where the testator was domiciled or owned real property when he or she executed the will. See *id.* § 2-506. Non-Uniform versions correct this flaw. See IND. CODE § 29-1-5-5 (2019); TEX. EST. CODE ANN. § 251.053 (West 2015); WIS. STAT. § 853.05(1)(b) (2019). The Code’s version of the provision also fails to cover the reverse problem of revocation of a will by act, or by operation of law. The drafters of the Code had considered extending the provision to this structurally analogous problem but ultimately declined to do so. See UNIF. PROB. CODE § 2-506 cmt. (pre-1990 Art. 2), 8 pt. 1, U.L.A. 524 (2013). Non-Uniform provisions in two states do cover revocation. See N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(e) & (f) (McKinney 2019); OKLA. STAT. tit. 84, § 71 (2019); see also Edward W. Rothe, *Recent Decisions*, 48 MICH. L. REV. 699, 700 n.6 (1950) (citing four more former statutes). Still another difficulty is raised by the provision’s interconnection with another one dealing with multijurisdictional probate. See UNIF. PROB. CODE § 3-408 (amended 2019), 8 pt. 2 U.L.A. 101 (2013). Under this provision, a “final order” by a

prospect that an electronic will could take effect in a state where one would otherwise fail if a testator travels, migrates, or owns real property outside of his or her domicile.

Because the predominant version of this legislation is limited to *written* wills, it proves insignificant in most jurisdictions—if the domicile were to define writings expansively, then the statute of wills in the domicile should suffice to validate an electronic will.¹⁰³ Vice versa, if the domicile defines writings narrowly, then the choice-of-law rule excludes e-wills executed outside the domicile. In eleven jurisdictions, however, non-Uniform choice-of-law statutes give effect to wills executed in other states whether or not they are in writing.¹⁰⁴ In these jurisdictions, another issue arises: how does the statute define the *place* where a will was executed? Could a testator validly execute an e-will in a state that expressly allows them by creating one remotely, assisted by an e-wills firm operating in that state? Lawmakers in states that permit e-wills have addressed this issue, as we shall see,¹⁰⁵ but *their* choice-of-law rules fail to apply in other jurisdictions. The remaining states with choice-of-law statutes that could apply to unwritten wills need to amend their laws to clear up this question. Thus far, only one has done so.¹⁰⁶

court in the domicile as concerns, inter alia, determinations of proper execution of a will is binding on a court in the state where probate of real property occurs. *See id.* & cmt. But if a court in the domicile holds that a will has been *improperly* executed under the law of the domicile (including its choice-of-law rule), and that finding binds a court in the situs state which has adopted the Code, then Section 3-408 conflicts with Section 2-506, which allows a court in the situs state to apply other formalizing rules. This conflict could arise in seventeen states that have enacted Section 3-408: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. The conflict is inadvertent: neither section cross-references the other. *See id.* §§ 2-506 cmt., 3-408 cmt; *cf.* CAL. PROB. CODE § 12522 (limiting its non-Uniform analogue of Section 3-408 to instances where the court in the domicile *validates* the will, thereby avoiding the conflict). For other criticism of Section 2-506, see Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1291–301 (1992).

¹⁰³ Nonetheless, if disparities in definitions of *signatures* arise, then the choice-of-law rule could remain relevant.

¹⁰⁴ *See* CONN. GEN. STAT. ANN. § 45a-251 (West 1980); FLA. STAT. ANN. § 732.502(2) (West 2003) (but barring *nuncupative* and *holographic* wills); 755 ILL. COMP. STAT. ANN. 5/7-1 (West 1976) (but requiring a *signature*); IND. CODE § 29-1-5-5; KY. REV. STAT. ANN. § 394.120 (West 1972); N.H. REV. STAT. ANN. § 551:5 (2000); N.C. GEN. STAT. § 31-46 (2019); OHIO REV. CODE ANN. § 2107.18 (West 2018); OKLA. STAT. tit. 84, § 71; 20 PA. CONS. STAT. § 2504.1 (2019); WASH. REV. CODE ANN. § 11.12.020 (West 1990). The remaining fourteen out of the forty-six states with choice-of-law statutes have enacted non-Uniform statutes that, in addition to the twenty-one states with Uniform statutes, require a writing: Arkansas, Iowa, Kansas, Louisiana, Maryland, Nevada, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Wisconsin.

¹⁰⁵ These include one of the eleven states (Indiana) cited in note 104. *See infra* note 149 and accompanying text.

¹⁰⁶ That is the Ohio statute, as amended in 2019. *See* OHIO REV. CODE ANN. § 2107.18 (giving effect to wills that were valid at the time of execution under the law of the state where testators were “physically present” when they executed their wills). E-wills may nonetheless be valid in Ohio under its definition of “writings.” *See infra* notes 165–175 and accompanying text.

The Uniform Probate Code's choice-of-law provision pertains exclusively to wills.¹⁰⁷ Under judicial doctrine, analogous rules governing the validity of non-testamentary trusts—including living trusts—give effect to a trust, as regards personal property, under the law of any state the settlor designates in the governing instrument as determinative of the trust's rules “provided that this [designated] state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which . . . the trust has its most significant relationship”¹⁰⁸ Again, however, the law of the situs governs the validity of a trust with respect to any real property contained in the trust.¹⁰⁹ These choice-of-law principles should readily permit e-trusts funded with personal property, so long as the settlor is willing to name as trustee an individual or corporate fiduciary from a validating state.¹¹⁰ An e-trust is unlikely to offend a state's strong public policy, given the validity of trusts created by mere oral declaration in most states.¹¹¹ Today, twelve states operate under these judicial rules.¹¹²

The remaining states have enacted statutory choice-of-law provisions for non-testamentary trusts, most of which are sufficiently broad to validate electronic trusts. Although the Uniform Trust Code's choice-of-law provision fails to allow the settlor to name a state whose law governs the trust, the provision remains capacious, validating a trust under either the law of any state where the settlor is domiciled or has a place of abode, or where a trustee is domiciled or has a place of business, or where any trust property is located.¹¹³ Again, settlors can easily validate e-trusts under this provision by naming a trustee in a validating state. This provision exists today in thirty-four jurisdictions.¹¹⁴ Only

¹⁰⁷ See UNIF. PROB. CODE § 2-506 (amended 2019), 8 pt. 1, U.L.A. 221 (2013). Article 6 of the Uniform Probate Code, which covers living trusts, contains no analogous provision. *See id.* art. 6, 8 pt. 3 U.L.A. 347 (2013).

¹⁰⁸ RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 270; *see also id.* reporter's note (citing cases).

¹⁰⁹ *Id.* § 278.

¹¹⁰ Such an appointment forges a significant relationship to the designated state. *See id.* § 270 cmt. a.

¹¹¹ *See supra* Part I.C.

¹¹² These are: Alaska, California, Delaware, Hawaii, Idaho, Indiana, Louisiana, New York, Oklahoma, Rhode Island, South Dakota, and Texas.

¹¹³ *See* UNIF. TRUST CODE § 403 (amended 2010), 7C U.L.A. 483 (2006). For a criticism of this provision, *see* 7 SCOTT ET AL., *supra* note 101, § 45.4.2.1, at 3239–42.

¹¹⁴ Those are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Illinois, Kansas, Kentucky, Maine, Maryland (with variations), Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska (with variations), New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon (with variations), Pennsylvania, South Carolina, Tennessee, Utah, Vermont (with variations), Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Non-Uniform legislation in Georgia codifies the judicial rule allowing designation of the state whose trust law governs. *See* GA. CODE ANN. § 53-12-4(b)(1) (2019); *see also* NEV. REV. STAT. § 164.045(2) (2019) (ambiguous provision made irrelevant by passage of separate e-trust legislation).

in two states today are e-trusts less easily validated under non-Uniform choice-of-law statutes: Florida and Iowa.¹¹⁵ Statutory law in both of these states also requires settlors to formalize living trusts in a writing.¹¹⁶ Nevertheless, courts could hold valid an e-trust in either state because electronic documents come within the meaning of a “writing” under definitional law in both states.¹¹⁷

III. MODERN STATUTES

We come now to the emerging body of statutory law on e-wills. As of 2020, four states—Arizona, Florida, Indiana, and Nevada—have enacted legislation expressly validating these wills.¹¹⁸ Nevada’s act took effect in July, 2017, Indiana’s in July, 2018, Arizona’s in July, 2019, and Florida’s goes into effect in July, 2020.¹¹⁹ Another four states—California, New Hampshire, Texas, and Virginia—have considered electronic will legislation, but it is not currently on the statute book in any of those states.¹²⁰

The model lawmakers, too, have gotten into the thick of things. The National Conference of Commissioners approved a Uniform Electronic Wills Act in July of 2019.¹²¹ Although the Act functions as a freestanding Uniform Law, the drafters contemplate grafting their product into the Uniform Probate Code in due course.¹²²

¹¹⁵ See FLA. STAT. ANN. § 736.0403(1) (West 2019); IOWA CODE ANN. § 633A.1108(1) (West 2005).

¹¹⁶ See *supra* note 74.

¹¹⁷ See *supra* note 17.

¹¹⁸ See ARIZ. REV. STAT. ANN. § 14-2518 (2019); FLA. STAT. ANN. § 732.522 (West 2019); IND. CODE § 29-1-21-4 (2019); NEV. REV. STAT. § 133.085 (2017).

¹¹⁹ See *supra* note 118. Nevada’s 2017 act supersedes an earlier one from 2001 that was never implemented because it required software that did not yet, and still does not, exist. See Gerry W. Beyrer & Katherine V. Peters, *Sign on the [Electronic] Dotted Line: The Rise of the Electronic Will* 1–2 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3278363 [<https://perma.cc/6ZFK-XJGP>].

¹²⁰ See A.B. 1667, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (referred to committee); H.B. 3848, 86th Leg., Reg. Sess. (Tex. 2019) (referred to committee); A.B. 3095, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (withdrawn); H.B. 1403, 2018 Leg., Reg. Sess. (Va. 2018) (failed in committee); S.B. 40, 2017 Leg., Reg. Sess. (N.H. 2017) (failed in committee); H.B. 1643, 2017 Leg., Reg. Sess. (Va. 2017) (failed in committee); see also Council B22-0169, 22nd Council (D.C. 2017) (under review); Editor’s Message, 30 PROB. L.J. OHIO 33, 33 (2019) (noting that a proposal to validate e-wills will come before the Ohio State Bar Association Council of Delegates in May, 2020 and could become part of an omnibus bill due to be enacted later in 2020).

¹²¹ See UNIF. E-WILLS ACT, *supra* note 92. For promotional materials on the act, see *Why Your State Should Adopt the Uniform Electronic Wills Act*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3f29eae0-789f-66fe-4a27-0b76b0fe42e2&forceDialog=0> [<https://perma.cc/MHX2-HUG4>] [hereinafter Unif. Act white paper].

¹²² Memorandum from Susan Gary, Reporter, to the Drafting Comm. on Elec. Wills (Feb. 16, 2018), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=eba692fe-ab9b-8848-2ad9-d36dcc079de8&forceDialog=0> [<https://perma.cc/67TF-2SDG>].

Comparative analysis of the enacted legislation highlights issues that statutory drafters have needed to address. One concerns the formalities associated with electronic execution of a will. In Florida and Indiana, the same formal requirements apply to paper wills and electronic wills.¹²³ In Arizona, however, e-wills must be dated, a formality that fails to apply to paper wills.¹²⁴ Likewise in Nevada, e-wills require a date, unlike other wills; and whereas testators must execute paper wills in the presence of witnesses, those who execute e-wills can formalize them either with witnesses, or with a notary, or with just “[a]n authentication characteristic of the testator.”¹²⁵ Only Arizona’s act requires electronic signatures that are “unique” to the signatories.¹²⁶ Under the remaining statutes, and under the Uniform Act, a typed signature suffices.¹²⁷

In Arizona and Indiana, witnesses must be physically present for the execution of an electronic will.¹²⁸ In Nevada and under an optional provision of the Uniform Act, however, witnesses can participate remotely, via audio-visual links.¹²⁹ The drafters of the Uniform Act sought thereby to eliminate “hurdles” to validating e-wills, on the assumption that contacting witnesses electronically might be easier than assembling them physically.¹³⁰ Conceding that the bodily presence of witnesses suits their traditional role as sources of evidence concerning a testator’s state of mind and as bulwarks against duress or undue influence, the drafters of the Uniform Act claim, without adducing any evidence, that “remote attestation will not create excessive risks.”¹³¹ By contrast, the Flo-

¹²³ See FLA. STAT. ANN. § 732.522(3). Compare IND. CODE § 29-1-5-3(b), with *id.* § 29-1-21-4(a) (2018). The formal requirements in the Uniform E-Wills Act match those found in the Uniform Probate Code. Compare UNIF. PROB. CODE § 2-502(a) (amended 2019), 8 pt. 1 U.L.A. 209 (2013), with UNIF. E-WILLS ACT, *supra* note 92, § 5.

¹²⁴ Compare ARIZ. REV. STAT. ANN. § 14-2518(A)(4) (2019), with *id.* § 14-2502(A).

¹²⁵ Compare NEV. REV. STAT. § 133.040 (2017), with *id.* § 133.085(1)(b). An authentication characteristic is “a characteristic . . . that is capable of . . . recognition in an electronic record as a biological aspect of or physical act performed by that person . . . [such as] a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, [or] a digitized signature.” *Id.* § 133.085(5)(a).

¹²⁶ ARIZ. REV. STAT. ANN. § 14-1201(20). The Arizona statute also requires additional authenticating evidence: an image of “a government-issued identification card of the testator.” *Id.* § 14-2518(5); cf. IND. CODE § 29-1-21-4(a)(6) (permitting but not requiring “identity verification evidence”).

¹²⁷ See FLA. STAT. ANN. §§ 732.521(3), 732.522(1); IND. CODE §§ 29-1-21-3(9), 26-2-8-102(10); NEV. REV. STAT. § 132.118; UNIF. E-WILLS ACT, *supra* note 92, § 2(5) & cmt. ¶ 5.

¹²⁸ See ARIZ. REV. STAT. ANN. § 14-2518(A)(3)(a); IND. CODE §§ 29-1-21-3(1), 29-1-21-4(a)(1).

¹²⁹ See NEV. REV. STAT. § 133.088(1)(a); UNIF. E-WILLS ACT, *supra* note 92, § 5(a)(3) & Legislative Note.

¹³⁰ UNIF. E-WILLS ACT, *supra* note 92, § 5 cmt.

¹³¹ UNIF. ELEC. WILLS ACT § 5 cmt. (UNIF. LAW COMM’N, Discussion Draft, Apr. 27-28, 2019), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6a75029a-73a3-3fca-cd8e-512f17c4420e&forceDialog=0> [<https://perma.cc/99TN-RL4Z>] [hereinafter UNIF. E-WILLS ACT (2019 Discussion Draft)]. The final draft of the Act rephrased this assertion to sound less threatening: “remote attestation should not create significant new evidentiary burdens.” UNIF. E-WILLS ACT, *supra* note 92, § 5 cmt.

ridians offer a more refined approach to this issue. Florida's e-wills act permits remote witnessing only under the supervision of a notary public and only if a testator does not qualify as a "vulnerable adult."¹³² In addition, the testator must personally affirm that he or she is not under the influence of drugs or alcohol, has no long-term disability, and does not require daily care—thus carving out an exception for cases where a testator's capacity was in question, or where he or she might benefit from hands-on protection.¹³³

None of the existing electronic will statutes provide a mechanism for dispensing with formalities, and none of the existing e-will states has enacted a dispensing-power statute applicable to wills generally that could be interpreted to apply to e-wills.¹³⁴ The Uniform Act, however, contains an optional provision creating a dispensing power that would allow a court to waive the witnessing and signature requirements for e-wills.¹³⁵

The statutes also prescribe methods for revoking an electronic will. All permit revocation of an e-will by act, introducing in unison the new action of rendering text "unreadable."¹³⁶ In states that allow testators partially to revoke paper wills by act, the same is true of e-wills.¹³⁷ Using different terminology, the Uniform Act allows a testator to revoke an e-will by act, either by destroying the drive, or by deleting the file, or by typing language of cancellation, such as the word "revoked," onto the electronic document.¹³⁸

The drafters of the Uniform Act add that "[i]f a testator *prints a copy* of an electronic will, writing 'revoked' *on the copy* would be a physical act" that likewise can operate to revoke the will.¹³⁹ This last nuance appears problematic. Unexecuted copies of wills fail to qualify as performative documents, and

¹³² FLA. STAT. ANN. §§ 117.285(5)(c), 732.522(2) (West 2019). A "vulnerable adult" is a term of art defined under Florida law. *See id.* § 415.102(28).

¹³³ *See id.* § 117.285(5)(a)–(b). In order for remote witnessing to be valid, the testator must also reveal his or her location and identify "[w]ho is in the room with" the testator. *Id.* § 117.285(5)(d).

¹³⁴ *See supra* notes 80–81 and accompanying text.

¹³⁵ *See* UNIF. E-WILLS ACT, *supra* note 92, § 6 & Legislative Note.

¹³⁶ ARIZ. REV. STAT. ANN. § 14-2507(A)(2); FLA. STAT. ANN. § 732.506; IND. CODE § 29-1-21-8(c); NEV. REV. STAT. § 133.120(2)(b); *cf.* S.B. 40, 2017 Leg., 165th Sess. § 551-B:5(I) (N.H. 2017) (unenacted) (disallowing revocation of an e-will by act).

¹³⁷ Florida, Indiana, and Nevada permit only complete revocation by act. *See* FLA. STAT. ANN. § 732.506; IND. CODE §§ 29-1-5-6, 29-1-21-8(c); NEV. REV. STAT. § 133.120(1)(a), (2)(b). Arizona and the Uniform Acts permit partial revocation by act. *See* ARIZ. REV. STAT. ANN. § 14-2507(A)(2); UNIF. E-WILLS ACT, *supra* note 92, § 7(b)(2); UNIF. PROB. CODE § 2-507(a)(2) (amended 2019), 8 pt. 1 U.L.A. 222 (2013).

¹³⁸ *See* UNIF. E-WILLS ACT, *supra* note 92, § 7(b)(2) & cmt. The drafters had considered allowing revocation of an e-will only by subsequent executed writing but rejected the idea because "many people would assume that they could revoke their wills by deleting them." Memorandum from Suzanne Brown Walsh et al., to Unif. Law Comm'n (May 30, 2019), at 3, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=134c0ae2-a0ae-2752-1497-f47d8c1d9d75&forceDialog=0> [https://perma.cc/AG4J-8ZEZ] [hereinafter May 2019 Memo].

¹³⁹ UNIF. E-WILLS ACT, *supra* note 92, § 7 cmt. (emphasis added).

their handling by a testator is inconsequential.¹⁴⁰ The drafters' assertion therefore implies that a printout of an electronic will qualifies as an *executed* copy under the Uniform Act. Under traditional law, the revocation by act of one among a number of executed duplicates suffices to revoke a will.¹⁴¹ Yet, a testator might well view the printout of an e-will as a copy for review and thus treat it carelessly, or refer to it when considering changes. If the printout disappears, is the e-will again revoked by act? If a testator makes individual deletions in pen on the printout, is the e-will partially revoked by act? On the theory that the printout represents an executed document, the answer to both questions must be *yes*. The drafters of the Uniform Act are thereby asking for trouble—and those who ask for trouble usually get it.

The existing statutes vary in their breadth. Both Indiana and Nevada make separate provision for e-trusts, whereas Arizona's and Florida's act, together with the Uniform Act, are confined to wills.¹⁴² In Arizona, Florida, and Indiana, statutory provisions for incorporation by reference remain unchanged, suggesting that a testator cannot incorporate electronic records into a paper will (although the existing statutes in Florida and Indiana could be read more broadly).¹⁴³ In Nevada, incorporation by reference remains a common-law doctrine, leaving unclear the validity of a semi-electronic will.¹⁴⁴ Nonetheless, Nevada does, by a statute, permit wills to refer to a list disposing of tangible personal property, which the legislature amended to permit references to "a

¹⁴⁰ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. f (AM. LAW INST. 1999–2011); see also UNIF. E-WILLS ACT, *supra* note 92, § 7 cmt. ("Sending an email that says 'I revoke my will,' is not a physical act performed on the will itself because the email is separate from the will.").

¹⁴¹ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. f ("The testator need not perform a revocatory act on all the duplicates."); see also UNIF. E-WILLS ACT, *supra* note 92, § 7 cmt. (repeating this rule and offering examples in the context of e-wills).

¹⁴² See ARIZ. REV. STAT. ANN. § 14-2518; FLA. STAT. ANN. § 732.521(4); IND. CODE § 30-4-1.5-1 to -13; NEV. REV. STAT. § 163.0095; UNIF. E-WILLS ACT, *supra* note 92, § 2(3). The drafters of the Uniform Act confined its scope on the erroneous assumption that e-trusts were already valid under another uniform act. According to the drafters, the "UETA [Uniform Electronic Transactions Act] does not exclude inter vivos trusts, so this [E-Wills] Act is limited to wills." UNIF. E-WILLS ACT (2019 Discussion Draft), *supra* note 131, prefatory note. In reality, "[b]y virtue of the definition of transaction, trusts used outside the area of business and commerce would not be governed by this Act." UNIF. ELEC. TRANSACTIONS ACT § 3 cmt. 1 (1999), 7A pt. 1 U.L.A. 491, 504 (2017).

¹⁴³ See ARIZ. REV. STAT. ANN. §§ 14-2510, 14-2513 (allowing a will to incorporate "a written document" or "written statement"); FLA. STAT. ANN. §§ 732.512, 732.515 (requiring a writing in a jurisdiction that defines "writings" broadly, see *supra* note 17 and accompanying text); IND. CODE § 29-1-6-1(h) (allowing incorporation of "a writing of any kind"); cf. IND. CODE § 29-1-6-1(m) (confining incorporation of a list disposing of tangible personal property to "a written statement"). The Uniform Act contains no provision related to incorporation by reference. See UNIF. E-WILLS ACT, *supra* note 92.

¹⁴⁴ See *Soady v. First Nat'l Bank of Nev.* (*In re Estate of Foster*), 411 P.2d 482, 484 (Nev. 1966) (*dicta*).

written statement *or list contained in an electronic record*,” thereby expressly warranting some semi-electronic wills.¹⁴⁵

A common denominator in all four of the existing acts is their provision for a “custodian” of electronic wills, contemplated to comprise a firm in the business of storing these wills.¹⁴⁶ Under the Arizona, Florida, and Nevada statutes, self-proof of an e-will requires the participation of a custodian.¹⁴⁷ The Indiana statute merely grants testators the option of storing an e-will with a custodian.¹⁴⁸

One oddity in the Arizona and Indiana statutes, and in the Uniform Act, is their inclusion of a restrictive choice-of-law provision. In common, these provisions indicate that an electronic will must comply with the formal requirements of the place where the testator is “physically” or “actually” present when he or she executes the will, not “the place where the will is executed,” as the Uniform Probate Code more vaguely reads in respect of wills in general.¹⁴⁹ These provisions are supposed to clarify that a testator domiciled in a state that bars e-wills cannot execute one remotely in a jurisdiction that permits them.¹⁵⁰ Florida’s and Nevada’s e-will bills contemplate exactly this sort of remote exe-

¹⁴⁵ NEV. REV. STAT. § 133.045(1) (2017) (emphasis added). *See supra* note 59. California’s aborted e-wills act from 2018 would have amended both the incorporation-by-reference statute and the tangible personal property statute to permit semi-electronic wills, see A.B. 3095, 2017–2018 Leg., Reg. Sess. §§ 10–11 (Cal. 2018) (withdrawn), but the 2019 successor to this act fails to replicate these provisions. *See* A.B. 1667, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (referred to committee).

¹⁴⁶ *See* ARIZ. REV. STAT. ANN. §§ 14-1201(53), 14-2520; FLA. STAT. ANN. § 732.524–.525; IND. CODE § 29-1-21-3(4); NEV. REV. STAT. §§ 132.286, 133.320. A similar provision was dropped from the Uniform Act. *See infra* note 269.

¹⁴⁷ *See* ARIZ. REV. STAT. ANN. § 14-2519(2); FLA. STAT. ANN. § 732.523; NEV. REV. STAT. § 133.086(1)(b) (2017); *see also* ARIZ. REV. STAT. ANN. § 14-2505(B) (requiring that wills have disinterested witnesses if they are *not* self-proved).

¹⁴⁸ *See* IND. CODE § 29-1-21-10 (2019); *cf.* H.B. 1643, 2017 Leg., Reg. Sess. § 64.2-403.1(C)(1) (Va. 2017) (unenacted) (*requiring* the participation of a qualified custodian, without which an e-will is invalid).

¹⁴⁹ *Compare* ARIZ. REV. STAT. ANN. § 14-2506, IND. CODE § 29-1-21-7 (2018), and UNIF. E-WILLS ACT, *supra* note 92, § 4(1), *with* UNIF. PROB. CODE § 2-506 (amended 2019), 8 pt. 1, U.L.A. 221 (2013). Ohio has also amended its choice-of-law statute to include this restriction. *See supra* note 106. Unlike the Uniform Probate Code, the Uniform E-Wills Act validates an e-will if (1) it complies with current law in the state where the testator was “physically located” when he or she executed the e-will, not with the law as it existed at the time when the testator was physically located in that state; and (2) if it complies with the law of the state where the testator is “domiciled or resides,” not the state where the testator is domiciled or “has a place of abode.” *Compare* UNIF. E-WILLS ACT, *supra* note 92, § 4(2), *with* UNIF. PROB. CODE § 2-506 (amended 2019), 8 pt. 1 U.L.A. 221 (2013). The accompanying comment neither remarks nor explains these inconsistencies. *See* UNIF. E-WILLS ACT, *supra* note 92, § 4 cmt.

¹⁵⁰ The Uniform Act offers the following example of the application of its choice-of-law rule: “Gina lived in Connecticut and was domiciled there While at home she goes online, prepares a will, and executes it electronically using Nevada law. The will is valid in Nevada but not in Connecticut, unless Connecticut adopts the E-Wills Act.” UNIF. E-WILLS ACT, *supra* note 92, § 4 cmt.

cution.¹⁵¹ But what the drafters of the Uniform Act, along with the Arizonans and Indianans, fail to grasp is that tacking such a restriction onto an e-wills statute is pointless: *All states adopting the Uniform Act intend to validate e-wills*. More thematically, Nevada's e-will bill provides that "[a]n electronic will that is executed or deemed to be executed in or pursuant to the laws of another state . . . is a valid electronic will in this State."¹⁵² A restrictive choice-of-law provision would have its desired impact only if enacted in a jurisdiction that rejects the Uniform Act and disallows e-wills.

Nevada goes a step further even than to permit remote execution. Its statute purports to grant courts in Nevada jurisdiction over, and thus the right to probate, electronic wills deemed to have been executed in Nevada, even by nonresidents.¹⁵³ Were other states to accede to this claim of jurisdiction, Nevada could become a hub for e-wills created by citizens regardless of where they are domiciled.

IV. THE CASE LAW

A. American Decisions

Cases testing the validity of electronic wills in the United States are sparse. The e-will statutes are too novel to have generated even a single suit, as of yet. In states operating under traditional statutes, varieties of e-wills have featured in three cases, although none has reached a high court. In other states, the matter remains unprecedented.¹⁵⁴

In the first case, *Taylor v. Holt*, decided in 2003, the Court of Appeals of Tennessee assessed the validity of a will prepared on a computer by a testator who had affixed to the will electronically "his stylized cursive signature" in the presence of witnesses.¹⁵⁵ The testator then printed out the will and witnesses

¹⁵¹ See FLA. STAT. ANN. § 732.522(4); NEV. REV. STAT. § 133.088(1)(e) (2017). Nevada's provision for remote execution requires either witnesses, a notary, or a qualified custodian to be physically located or organized in Nevada. NEV. REV. STAT. § 133.088(1)(e); see also S.B. 40, 2017 Leg., 165th Sess. § 551-B:6(IV) (N.H. 2017) (unenacted) (similar provision).

¹⁵² NEV. REV. STAT. § 136.185(4) (2017); see also H.B. 1403, 2018 Leg., Reg. Sess. § 64.2-403.1(R) (Va. 2018) (unenacted) (similar provision). An earlier version of Florida's e-will legislation had included a similar provision, see H.B. 277, 2017 Leg., 119th Sess., § 732.527 (Fla. 2017) (vetoed), but it was omitted from the version enacted in 2019. Florida's choice-of-law statute remains unamended and is ambiguous on this issue. See FLA. STAT. ANN. § 732.502(2).

¹⁵³ NEV. REV. STAT. § 136.185(1); see also H.B. 1403, 2018 Leg., Reg. Sess. § 64.2-443(C) (Va. 2018) (unenacted) (similar provision).

¹⁵⁴ In several cases, will drafts discovered on computers have been introduced as evidence of the contents of alleged paper wills that have gone missing. See *In re Last Will and Testament of Sandstrom*, No. 8948-MA, 2016 WL 1304841, at *9 (Del. Ch. Apr. 4, 2016); *In re Estate of Steed*, 152 S.W.3d 797, 814-16 (Tex. Ct. App. 2004).

¹⁵⁵ *Taylor v. Holt*, 134 S.W.3d 830, 830-31 (Tenn. Ct. App. 2003) (internal quotation marks omitted).

added their own signatures in pen.¹⁵⁶ The court found that this manner of signing met the statutory definition in Tennessee, which allows “any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record.”¹⁵⁷ On that basis, and without further analysis, the court held the will validly executed.¹⁵⁸

Although the will at issue in *Taylor* was eventually committed to paper, the court’s sufferance of this unusual mode of execution represents a straw in the wind. If the court was disposed to construe an open-textured definition of “signatures” broadly to permit electronic ones, would it be equally amenable to reading an open-textured definition of “writings” broadly? We cannot know, but the opinion does suggest one court’s preparedness to validate electronic methodology in the absence of an express warrant from the state legislature.¹⁵⁹

Along the way, *Taylor* also featured a new twist on an old problem that escaped notice by the court: In what order must the formalities of execution proceed? Courts have long divided on this question as it regards the order of signatures.¹⁶⁰ If a witness signs before the testator does, some courts hold the resulting will valid. “[T]he whole transaction must be regarded as one continuous uninterrupted act,” and “[i]n acts substantially contemporaneous it cannot be said that there is any substantial priority,” the Supreme Court of Michigan ruled, even though “the usual and more orderly way of executing a will is for the testator to sign first”¹⁶¹ To hold otherwise, the court added, would be “to sacrifice substance for mere form.”¹⁶² Other courts have made the sacrifice, giving effect to a will only if the testator signs first. “[U]ntil the testator signs, there is nothing [for witnesses] to attest,” the Supreme Court of Georgia reasoned.¹⁶³

In *Taylor*, the parties did sign in the proper order. Rather, it was the commitment of the will to writing that was disorderly. Here, the testator signed before materializing the will. These facts present not an electronic will problem, but an electronic production problem. By extension, courts could resolve it in either of two ways. As the Michiganders might say, the sequence of events in *Taylor* occurred *substantially contemporaneously*, even though the testator

¹⁵⁶ See *id.* (“[The witnesses] then each signed their name below [the decedent’s] and dated the document next to their respective signatures.”).

¹⁵⁷ *Id.* at 832–33 (quoting TENN. CODE ANN. § 1-3-105 (1999)).

¹⁵⁸ *Id.* at 833–34.

¹⁵⁹ See *id.*; cf. *Litevich v. Prob. Court*, No. NNHCV126031579S, 2013 WL 2945055, at *22 & n.17 (Conn. Super. Ct. May, 17, 2013) (holding that an “authentication and confirmation process” required by a firm that offered online legal drafting services did not in itself qualify as a signature).

¹⁶⁰ See PAGE, *supra* note 58, § 19.139 (collecting cases).

¹⁶¹ *Horn’s Estate v. Bartow*, 125 N.W. 696, 698 (Mich. 1910) (internal quotation marks omitted).

¹⁶² *Id.*

¹⁶³ *Brooks v. Woodson*, 13 S.E. 712, 712 (Ga. 1891); see also, e.g., *Marshall v. Mason*, 57 N.E. 340, 340 (Mass. 1900) (Holmes, C.J.) (finding that this ordering requirement is “founded on good sense and the plain meaning . . . of the statute”).

would have proceeded *in a more orderly fashion* by printing out the will before signing it. Still, as the Georgians might respond, until the testator printed out the will *there was nothing to sign*.

The court's silence on this issue in *Taylor* suggested that it regarded the order of signing and materialization as irrelevant. Otherwise, the court would have had to rule on whether the will already comprised a "writing" when the testator signed electronically—a ruling that could have implied the validity of a fully-electronic will—but the court failed to reach that question. Yet, prior courts in Tennessee had followed the Georgians' lead and insisted on conventional ordering, at least in respect of testators' and witnesses' signatures.¹⁶⁴ Against this background, *Taylor* could only muddy the legal waters, and we can fault the opinion on that account.

In the next American case, *In re Estate of Castro*,¹⁶⁵ decided by a probate court in Ohio in 2013, the testator never materialized the will at all—here, a true electronic will lay at issue.¹⁶⁶ Lacking "any paper or pencil," the testator composed his will on a tablet computer, using a stylus pen, a month before his death, when he was mortally ill.¹⁶⁷ Both he and the witnesses added their cursive signatures to the tablet while the testator lay in hospital.¹⁶⁸ Survivors thereafter offered it for probate.¹⁶⁹

A will in Ohio must be "in writing."¹⁷⁰ Ohio's probate code fails to define this term.¹⁷¹ The court neglected, though, to cite the general statutory definition of a writing, which in Ohio "includes any representation of words."¹⁷² With little to go on, the court ruled that data stored on a tablet qualified as a writing. "To rule otherwise would put restrictions on the meaning of 'writing' that the General Assembly never stated," the court concluded.¹⁷³ On the same basis, and in the absence of a definition of "signed" or "signature" anywhere in the Ohio statutes, the court held this requirement met as well.¹⁷⁴ Hence, the court admitted the will to probate.¹⁷⁵

¹⁶⁴ See *Simmons v. Leonard*, 18 S.W. 280, 282 (Tenn. 1892) ("There is no will to witness until it has been signed by the testator."); *In re Estate of Archer*, No. 3, 1989 WL 67198, at *2 (Tenn. Ct. App. June 21, 1989).

¹⁶⁵ *In re Estate of Castro* (Ohio C.P. Prob. Div. 2013), reprinted in 27 QUINNIPIAC PROB. L.J. 412 (2014) [hereinafter *Estate of Castro*].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 414.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 414–15.

¹⁷⁰ OHIO REV. CODE ANN. § 2107.03 (West 2011).

¹⁷¹ See *id.* § 2107.01.

¹⁷² *Id.* § 1.59(j). Instead, the court in *Castro* quoted a definition of "writing" found in the criminal code, while conceding that it was "not necessarily controlling." *Estate of Castro*, *supra* note 165, at 416.

¹⁷³ *Estate of Castro*, *supra* note 165, at 416.

¹⁷⁴ *Id.* at 417.

¹⁷⁵ *Id.* at 418.

Like *Taylor*, *Estate of Castro* stands for the proposition that a court can read definitional provisions to include electronic methodologies without explicit warrant. Whereas *Taylor* was confined to signatures, *Estate of Castro* extended this liberality to writings. The instant case appears another straw in the same breeze.

Finally, in the most recent American case, *In re Estate of Horton*,¹⁷⁶ decided by an appellate court in Michigan in 2018, a testator left behind a suicide note that included testamentary instructions which he typed, ending with a typed signature, on his cell phone.¹⁷⁷ The court observed that “an electronic note, which was unwitnessed [contrary to the statute of wills] and undated [contrary to the requirements for holographic wills in Michigan], does not meet . . . the formal requirements” for a will.¹⁷⁸ The court failed to address whether a will preserved electronically met the definition of a “writing,” as also required by the statute.¹⁷⁹

Nonetheless, the court affirmed the lower court’s ruling that admitted the will to probate.¹⁸⁰ The judges achieved this result by invoking the dispensing power, which in Michigan tracks the Uniform Probate Code.¹⁸¹ This provision empowered the court to waive formal requirements for execution so long as evidence confirmed the testator’s intent to create a will.¹⁸²

Still, a court can invoke the dispensing power only to ratify a “document or writing.”¹⁸³ In *Estate of Horton*, the court assumed without analysis that a digital image qualified, although the term “writing” is vaguely defined, and the term “document” nowhere defined, in the Michigan statutes.¹⁸⁴ By referring to the instant will as a “document” or an “electronic document,” the court may have accepted implicitly the interpretation that the term “document” means

¹⁷⁶ *In re Estate of Horton*, 925 N.W.2d 207 (Mich. Ct. App. 2018) (per curiam).

¹⁷⁷ *Id.* at 209.

¹⁷⁸ *Id.* at 212; see MICH. COMP. LAWS § 700.2502(1)(c) & (2) (2019).

¹⁷⁹ See MICH. COMP. LAWS § 700.2502(1)(a) & (2). In a footnote, the court accepted that “the electronic note does not contain a handwritten signature,” as required for holographic wills. *Estate of Horton*, 925 N.W.2d at 214 n.7; see MICH. COMP. LAWS § 700.2502(2) (requiring a “signature . . . in the testator’s handwriting”). The statute likewise requires the testator and witnesses to have “signed” an executed will. MICH. COMP. LAWS § 700.2502(1)(b). Although ventured without analysis, the court’s conclusion comports with Michigan’s general definition of signatures, mandating that they be in “the proper handwriting of the person.” See *id.* § 8.3q.

¹⁸⁰ *Estate of Horton*, 925 N.W.2d at 215.

¹⁸¹ Compare MICH. COMP. LAWS § 700.2503, with UNIF. PROB. CODE § 2-503 (amended 2019), 8 pt. 1 U.L.A. 215 (2013).

¹⁸² See *Estate of Horton*, 925 N.W.2d at 211–15.

¹⁸³ MICH. COMP. LAWS § 700.2503.

¹⁸⁴ See *Estate of Horton*, 925 N.W.2d at 212 (acknowledging this requirement). In Michigan, “[t]he words . . . ‘in writing’ shall be construed to include printing, engraving, and lithographing.” MICH. COMP. LAWS § 8.3q (2019); see also *id.* §§ 8.3a–8.3w, 700.1103, 700.1108 (failing to establish any additional definitions).

something broader than a “writing.”¹⁸⁵ But the court dropped a stitch in failing to engage in any exercise of construction, and the likely explanation is bad lawyering. Neither party to the suit briefed this issue.¹⁸⁶

Estate of Horton illustrates the potential of remedial statutes to give effect to an electronic will, at least when they are liberally construed. In fact, all of these cases point in the same direction. Courts are salvaging the resources they need to validate electronic wills out of existing law—and, although scarcely incontrovertible, the opinions are proving sufficiently credible to fend off appeals.¹⁸⁷

B. Foreign Decisions

When we venture past our shores, more cases appear. Electronic wills have featured in reported cases in six foreign countries, operating under both common and civil law. Although none of those countries authorizes e-wills by statute, four of the six have used foreign versions of the dispensing power to give effect to them.

The earliest of the cases came down in the Canadian province of Québec in 1996.¹⁸⁸ This case tested the validity of a will contained on a floppy disk—technology that is obsolete today.¹⁸⁹ Derived from French civil law, Québec’s code permits testators to create either notarial, witnessed, or holographic wills.¹⁹⁰ Despite its continental origins, Québec’s code includes a dispensing power.¹⁹¹ The Québécois version provides that “[a] holograph will or a will made in the presence of witnesses that does not fully meet the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.”¹⁹²

¹⁸⁵ See *Estate of Horton*, 925 N.W.2d at 212–15; *supra* notes 85–97 and accompanying text.

¹⁸⁶ See Petitioner Brief, *Estate of Horton*, 925 N.W.2d 207 (No. 339737); Brief in Support of Standing and Recognition of Will, *Estate of Horton*, 925 N.W.2d 207 (No. 339737); Petitioner Reply Brief, *Estate of Horton*, 925 N.W.2d 207 (No. 339737).

¹⁸⁷ *Estate of Horton*, 925 N.W.2d 844 (denying appeal); *Taylor*, 134 S.W.3d at 830 (noting denial of appeal by state Supreme Court on May 10, 2004). No appeal was reported in *Estate of Castro*.

¹⁸⁸ *Rioux v. Coulombe* (1996), 19 E.T.R. 2d 201 (Can. Que. Sup. Ct.), noted in Nicholas Kasire, *From Written Record to Memory in the Law of Wills*, 29 OTTAWA L. REV. 39 (1997).

¹⁸⁹ *Id.* ¶ 2.

¹⁹⁰ Civil Code of Québec, C.C.Q. 1991, art. 712 (Can.).

¹⁹¹ Eight additional Canadian provinces and territories have enacted other versions of the power. See Wills Act, C.C.S.M. 2014, c W150, s 23 (Can.); Wills and Succession Act, R.S.A. 2010, c W-12.2, s 37 (Can.); Wills, Estates and Succession Act, R.S.B.C. 2009, c 13, s 58 (Can.); Wills Act, R.S.N.S. 1989, c. 505, s 8A (Can.); Consolidated Wills Act, R.S.N.W.T (Nu) 1988, c W-5, s 13.1 (Can.); Wills Act, R.S.N.B. 1973, c W-9, s 35.1 (Can.); Probate Act, R.S.P.E.I. 1988, c P-21, s 70 (Can.) (requiring the testator’s signature); Wills Act, S.S. 1996, c W-14.1, s 37 (Can.). Canada’s other four provinces and territories have failed to enact a dispensing power.

¹⁹² Civil Code of Québec, C.C.Q. 1991, art. 714 (Can.).

On one hand, this provision is not limited to instruments that meet any one or more of the formal requirements for holographic or witnessed wills, including the type of surface on which a will must appear. On the other hand, the provision does demand “essential” conformity with the formal requirements, and courts could thereby read it to implement something more like a substantial-compliance doctrine.¹⁹³ Finding that prior courts had interpreted the provision haphazardly, either allowing or precluding waivers of basic formalities, the instant court resolved on a liberal approach and gave effect to the will by virtue of the dispensing power.¹⁹⁴ Under the facts of the case, the court was “quite convinced, and even certain, that the disk . . . reflects . . . without ambiguity the last wishes” of the testator.¹⁹⁵

The most recent electronic-will case worldwide came down in the Canadian province of British Columbia in 2019.¹⁹⁶ Unlike Québec’s version of the dispensing power, the one in effect in British Columbia explicitly applies to “data that . . . is recorded or stored electronically.”¹⁹⁷ Thus armed, the court gave effect to a document stored on the testator’s home computer as a will.¹⁹⁸

In Australia, courts have had to judge the validity of electronic wills eight times, and in seven of those instances probated the wills at issue. Australia spearheaded the dispensing power—the original statute dated to 1975 in the state of South Australia.¹⁹⁹ Today, the power exists in all eight Australian states and territories.²⁰⁰ And in all of them, the power expressly covers digital images.²⁰¹ Resting on this textual foundation, in decisions between 2002 and 2018, Australian courts have probated e-wills contained in an unsent text message,

¹⁹³ *Id.*; see *supra* note 81.

¹⁹⁴ See *Rioux*, 19 E.T.R. 2d 201, ¶¶ 9–20, 30.

¹⁹⁵ *Id.* ¶ 29 (translated from the original French).

¹⁹⁶ See *Hubschi Estate (Re)* (2019), 52 E.T.R. 4th 216 (Can. B.C. Sup. Ct.). In a third Canadian case heard in the province of Saskatchewan, the court declined to invoke the dispensing power to give effect to a putative will contained in an e-mail message on the ground that it only gave directions for the decedent’s funeral and disposition of his remains rather than for the distribution of the decedent’s property. See *Buckmeyer Estate (Re)* (2008), 42 E.T.R. 3d 80, ¶¶ 5, 18–33 (Can. Sask. Q.B.).

¹⁹⁷ *Wills, Estates and Succession Act*, R.S.B.C. 2009, c 13, s 58 (Can.).

¹⁹⁸ See *Hubschi Estate*, 52 E.T.R. 4th 216, ¶¶ 1, 27, 59–60.

¹⁹⁹ See *Wills Act Amendment Act (No. 2) 1975* (SA) s 9 (Austl.).

²⁰⁰ See *Wills Act 2008* (Tas.) s 10 (Austl.); *Succession Act 2006* (NSW) s 8 (Austl.); *Wills Act 2000* (NT) s 10 (Austl.); *Wills Act 1997* (V) s 9 (Austl.); *Succession Act 1981* (Qd) s 18 (Austl.); *Wills Act 1970* (WA) ss 32, 34 (Austl.); *Wills Act 1968* (ACT) s 11A (Austl.); *Wills Act 1936* (SA) s 12 (Austl.).

²⁰¹ In Queensland, for example, the dispensing power applies to “any paper or other material on which there are marks,” together with “any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).” *Acts Interpretation Act 1954* (Qd) s 36 sched. 1 (Austl.); see also *Legislation Act 2001* (ACT) Dictionary pt. 1 (Austl.) (similar provision); *Interpretation Act 1987* (NSW) s 21 (Austl.) (same); *Wills Act 2015* (NT) s 10(1) (Austl.) (same); *Acts Interpretation Act 1915* (SA) s 4 (Austl.) (same); *Acts Interpretation Act 1931* (Tas.) s 24 (Austl.) (same); *Interpretation of Legislation Act 1984* (V) s 38 (Austl.) (same); *Wills Act 1970* (WA) s 32(1) (Austl.).

on a USB stick, on a smart phone, on a lap top, on a notebook, and on a hard drive unit.²⁰² In one case, however, the court denied probate to an e-will, declining to wield the dispensing power for want of sufficient evidence of testamentary intent.²⁰³

The validity of electronic wills likewise arose in a pair of South African cases from 2002 and again in 2010. South Africa, too, has imported the dispensing power, confining it to “document[s],” which go undefined in the republic.²⁰⁴ Both South African courts utilized the power to probate wills set out in an e-mail and on a personal computer respectively, assuming without analysis that each qualified for remediation.²⁰⁵

In New Zealand, a court in 2012 ruled that a decedent’s e-mail directed to her drafting attorney, together with handwritten notes by that attorney, could take effect via the dispensing power.²⁰⁶ A more recent decision from New Zealand suggests a creative theory whereby courts might give effect to an electronic will even under limited versions of the dispensing power. “Adopting a purposive approach,” a court in 2018 gave effect to an audio-will on the ground that a postmortem transcript of the audio recording qualified as a writing subject to the dispensing power.²⁰⁷ This theory would apply equally to e-wills, assuming other courts construe dispensing-power statutes as inapplicable to electronic records but pertinent to transcripts.

In the absence of a dispensing power, foreign courts have rebuffed beneficiaries’ efforts to probate electronic wills thus far. The issue has arisen twice under civil law—first in Sweden in 2012, and again in France in 2018.²⁰⁸

²⁰² See *In re Currie* [2015] NSWSC 1098, ¶ 32 (Austl.) (USB stick); *Yazbek v. Yazbek* [2012] NSWSC 594, ¶¶ 24–25 (Austl.) (laptop); *In re Nichol* [2017] QSC 220, ¶ 3 (Austl.) (unsent text message); *In re Yu* [2013] QSC 322, ¶ 1 (Austl.) (document stored on smartphone); *Re Michael* [2016] 126 SASR 299, ¶¶ 3, 36 (Austl.) (laptop); *Montgomery v. Taylor (In re Will of White)* [2018] VSC 16, ¶¶ 28, 73–74 (Austl.) (notebook); *In re Trethewey* [2002] VSC 83, ¶ 8 (Austl.) (hard drive unit).

²⁰³ See *Mahlo v. Hehir* [2011] QSC 243, ¶¶ 1, 41–45 (Austl.) (document found on a home computer).

²⁰⁴ See Interpretation Act 33 of 1957 § 2 (S. Afr.); Wills Act 7 of 1953 §§ 1, 2(3) (S. Afr.).

²⁰⁵ See *Van der Merwe v. The Master* 2010 (6) SA 544 (SCA) at 544, 545, 548–49 (S. Afr.) (e-mail), noted in Sylvia Papadopoulos, Comment, *Electronic Wills with an Aura of Authenticity*: Van der Merwe v. Master of the High Court and Another, 24 S. Afr. MERCANTILE L.J. 93 (2012); *Macdonald v. The Master* 2002 (5) SA 64 (N) at 64, 68–71 (S. Afr.) (personal computer), noted in Michael C. Wood-Bodley, *Macdonald v. The Master: Computer Files and the ‘Rescue’ Provision of the Wills Act*, 121 S. Afr. L.J. 34 (2004).

²⁰⁶ See *In re Estate of Feron* [2012] 2 NZLR 551 at [21, 24–26] & exhibits B, C (HC) (N.Z.) (requesting parties’ consent before issuing a declaration, which the parties provided, see *id.* [2012] NZHC 2074 at [3–4]). The dispensing power in New Zealand applies to a “document,” which the statute defines as “any material on which there is writing.” Wills Act 2007, ss. 6, 14 (N.Z.). The court ruled that an e-mail came within this definition. *Estate of Feron* [2012] 2 NZLR 551 at [15].

²⁰⁷ *Pfaender v. Gregory* [2018] NZHC 161 at [32–34, 54] (N.Z.). The court acknowledged that an audio recording fell outside the scope of New Zealand’s dispensing power. See *id.* at [30].

²⁰⁸ See Appendix (translating both cases).

The Swedish case concerned an alleged will transmitted to one of the beneficiaries via a text message sent on a smart phone.²⁰⁹ Swedish law allows wills that are self-written and signed by the testator under some circumstances.²¹⁰ The district court held in 2012 that it could read these protocols, codified in 1958, purposively and dynamically in light of technological change.²¹¹ On this basis, the district court held the text message valid as a will. The appellate court reversed this decision in 2013, insisting on a strict interpretation of the Swedish code.²¹² Although the text message qualified as “self-written,” the court observed that “it is not possible to sign a text message,” and it was therefore ineffective as a will.²¹³

The French case came before the court of the city of Metz in 2018.²¹⁴ Once again, the purported will appeared in a text message transmitted by the testator to a beneficiary, which the solicitor refused to honor.²¹⁵ Rather than seek a dynamic interpretation of the formal requirements for a holographic will, which is valid only if “entirely written, dated, and signed by the hand of the testator,”²¹⁶ a beneficiary challenged this provision as contravening the Declaration of the Rights of Man of 1789, an element of the French constitution, on the theory that it infringed on freedom of testation.²¹⁷ Characterizing this argument as “frivolous,” the court held holographic will formalities constitutional as serving to protect testators from fraud and mistake.²¹⁸ Because a text message fails to meet those formalities, it could not qualify as a will under French law.

Like American courts, foreign courts are giving effect to e-wills under existing law, although not invariably so. As we shall see, foreign cases also hold

²⁰⁹ Tingsrätt [TR] [District Court] 2012-11-16 T5746-11 (Swed.).

²¹⁰ ÄRVDA BALK [ÄB] [INHERITANCE CODE] 10:3 (Swed.).

²¹¹ “Due to the unprecedented technological development that has taken place since the introduction of the current provisions . . . and the impact of those developments on the way people communicate, it should, in the opinion of the District Court, be possible in this way to declare one’s will.” Tingsrätt [TR] [District Court] 2012-11-16 T5746-11 (translated from the original Swedish).

²¹² Hovrätt [HovR] [Court of Appeals] 2013-06-13 T11306-12 (Swed.). (“According to [the Swedish code] the will must be self-written and signed by the testator. The law permits no exception from these requirements.”) (translated from the original Swedish).

²¹³ *Id.*

²¹⁴ Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Metz, civ., Aug. 17, 2018, 17/01794 (Fr.).

²¹⁵ *Id.* The text message sought to disinherit the testator’s wife as beneficiary of part of his estate. *Texting Is Not an Acceptable Way of Writing Will, French Court Rules*, BBC (Aug. 17, 2018), <https://www.bbc.com/news/world-europe-45228513> [<https://perma.cc/4HBE-R3AR>]. The testator and his wife were in the process of divorcing, and she asserted that “[m]y husband divorced me by text.” *Id.*; see also Isabelle Corpart, High Court of Metz, 17-08-2018, no. 17/01794, Summary (on file with author) (reporting additional background information).

²¹⁶ CODE CIVIL [C. CIV.] [CIVIL CODE] art. 970 (Fr.).

²¹⁷ Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Metz, civ., Aug. 17, 2018, 17/01794.

²¹⁸ *Id.* (translated from the original French).

significance as data points—revealing fact patterns that can guide our policy analysis of the issues at hand.

V. VIRTUES AND VICES OF ELECTRONIC WILLS

*“Hail happy Times, when speculators weep,
And undisturb’d, inactive lawyers sleep!”*²¹⁹

Such is the state of the law in 2020. But, as always, law remains malleable. The scholar’s remit is to probe public policy, so that we may re-form, and reform, our law. Would granting citizens the opportunity to create electronic wills contribute to the public good? This question has already occasioned much discussion, some of it fair-minded and some of it not. A number of firms—LegalZoom, Willing, among others—stand to profit from the legalization of e-wills. Their voices have injected a polemical element into the debate.²²⁰

A. Theory

One disarmingly simple justification offered for allowing electronic wills is that they satisfy popular demand. “Many potential testators want to execute a will online. Many more will want to in the future,” the drafters of the Uniform Act aver.²²¹ This reasoning calls to mind Professor Lewis Simes’s rationale for freedom of testation: “A compelling argument in favor of it is that it

²¹⁹ PETER MARKOE, *THE TIMES*, A POEM 5 (Philadelphia, Prichard & Hall 1788).

²²⁰ For an industry white paper posted by Willing, see *Modernizing the Law to Enable Electronic Wills*, <https://willing.com/learn/modernizing-the-law-to-enable-electronic-wills.html> [<https://perma.cc/T6HE-BGC4>] [hereinafter *Modernizing the Law*]. For major recent analyses, see LAW COMMISSION OF ENGLAND AND WALES, *MAKING A WILL* 105–29 (2017), <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/Making-a-will-consultation.pdf> [<https://perma.cc/9VT8-N39T>] [hereinafter *LAW COMMISSION*]; Horton, *supra* note 17, at 563–77; Michael J. Millo-nig, *Electronic Wills: Evolving Convenience or Lurking Trouble?*, 45 *EST. PLAN.*, May 2018, at 27; *Developments in the Law—More Data, More Problems*, 131 *HARV. L. REV.* 1714, 1790–811 (2018). For earlier analyses, see 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 (2007); Scott S. Bodderly, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 *REAL PROP., TR. & EST. L.J.* 197 (2012); Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Elec-tronic Will*, 42 *U. MICH. J.L. REFORM* 105 (2008); Christopher J. Caldwell, Comment, *Should E-Wills Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 *U. PITT. L. REV.* 467 (2002). References to other analyses shall appear hereinafter.

²²¹ Turney P. Berry, *Update on ULC Activity in Estate Planning*, *TR. & EST.*, Feb. 2018, at 11, 12; see also Memorandum from Suzanne Walsh et al. to Elec. Wills Drafting Comm. (Oct. 2, 2017), at 1, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ab76c652-5ef5-68b6-b468-7dbe1b8d5c78&forceDialog=0> [<https://perma.cc/88ZU-B3F3>] [hereinafter Oct. 2017 Memo], *quoted infra* at note 280. An industry white paper makes the same assertion. See *Modernizing the Law*, *supra* note 220, preamble (“A Note from Willing”).

accords with human wishes.”²²² In a democracy, citizens should get what they want.

It is not quite so easy as that. Whereas freedom of testation embodies a political right, electronic wills comprise *merely one means* of exercising a right that testators already enjoy. These wills fail to realize any novel political aspiration. By analogy, citizens have the right to vote—but if they favored exercising that right electronically from their homes, would democratic values compel lawmakers to bow to this desire? In a representative democracy, lawmakers need not accommodate popular preferences at a granular level. Debate over e-voting has thus addressed its utility, not its popularity.²²³ By the same token, lawmakers should focus first and foremost on the objective merits of e-wills.

One virtue of electronic wills is the ease with which testators can create them. As the drafters of the Uniform Act remark, “electronic devices . . . are handy or comfortable” for people to use.²²⁴ By making testation “quick, inexpensive and convenient,” e-will legislation “could encourage more testators to make their wills,” industry advocates chime in, and the drafters of the Uniform Act are now touting e-wills explicitly on this basis.²²⁵ When citizens exercise their right of testation, they produce social benefits, all else being equal.²²⁶

Upon analysis, though, the potential gain appears small. Testators can enjoy the comforts and convenience of digital technology without creating electronic wills. Nowadays, surely, most wills begin as paperless drafts on a computer file, sometimes created with will-drafting software. Only as a final step, when a will is ready for execution, does a testator print a hard copy onto paper.²²⁷ By allowing testators to execute e-wills, lawmakers would forego the last step. Under such a legal regime, testators no longer need to own, or have access to, a printer. That represents an advantage, but a marginal one. It could spur testation, but probably not to a significant extent.

Nor is all else equal. Firms specializing in electronic wills are poised to promote them as instruments they can help to create and store, for a fee. Firms

²²² LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955).

²²³ See, e.g., Alex Tapscott, *It's Time for Online Voting*, N.Y. TIMES, Nov. 5, 2018, at A27.

²²⁴ Oct. 2017 Memo, *supra* note 221, at 1.

²²⁵ Modernizing the Law, *supra* note 220, text above n.145; Unif. Act white paper, *supra* note 121, at 1.

²²⁶ See Iris J. Goodwin, *Access to Justice: What to Do About the Law of Wills*, 2016 WIS. L. REV. 947, 951–56; Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2187–89 (2011); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 877–85, 891–98 (2013).

²²⁷ See, e.g., *In re Estate of Mowdy*, 973 P.2d 345, 349 (Okla. Civ. App. 1998) (concerning a will that began as a draft on a home computer and was later executed); *Canody v. Hamblin*, 816 S.E.2d 286, 287 (Va. 2018) (same). Likewise, wills drafted by attorneys: “It’s no big secret, lawyer[s’] [w]ills are all on computers. Probably everybody [sic] is pretty much the same. You use a computer-type thing.” *Wickert v. Burggraf*, 570 N.W.2d 889, 891 (Wis. Ct. App. 1997) (quoting testimony by drafting attorney).

intend to target individuals who “find traditional estate planning . . . expensive or burdensome.”²²⁸ Whether firms would be doing those individuals a favor is hardly clear. F. Scott Fitzgerald observed that the “rich . . . are different from you and me.”²²⁹ *So are the poor*. While the rich fret about estate taxes, the poor respond to transaction costs. The price of executing a will, which causes you and me to yawn, represents a significant expense when one struggles to make ends meet. Fortunately for the less fortunate, intestacy law offers citizens a costless estate plan. It remains imperfect, but the price is right. If firms can convince poor individuals to purchase e-wills they could do without, they would not produce a social benefit. What is more, the do-it-yourself wills created online are widely regarded as weak products.²³⁰

A second argument for allowing electronic wills is that doing so accords with popular expectations about what the law already provides. The drafters of the Uniform Act posit that as “[p]eople increasingly turn to electronic tools to accomplish life’s tasks, including legal tasks[,] . . . some . . . assume that they will be able to execute all their estate planning documents electronically”²³¹ By matching the law with common assumptions, we avoid instances where a naïve testator executes an e-will in the false belief that one is valid. Lawmakers thereby reduce error costs.

Lawmakers have pursued this strategy before. The doctrine of revocation by act, for instance, clashes with the stricter formalizing rules for executing wills that went into effect in Great Britain in the nineteenth century.²³² Lawmakers chose to leave the doctrine intact because it reflected “the habit[s] of Englishmen,” as a contemporary commentator observed.²³³

²²⁸ Modernizing the Law, *supra* note 220, at text above n.145.

²²⁹ F. SCOTT FITZGERALD, *The Rich Boy*, in ALL THE SAD YOUNG MEN 5, 5 (James L. W. West III ed., Cambridge Univ. Press 2007).

²³⁰ For recent discussions and further references, see Goodwin, *supra* note 226, at 956–61; David Horton, *Do-It-Yourself Wills*, 53 U.C. DAVIS L. REV. (forthcoming 2020) (observing, however, that wills created online have not generated increased litigation); Emily S. Taylor Poppe, *The Future Is Bright Complicated: AI, Apps, and Access to Justice*, 72 OKLA. L. REV. 185, 206–08 (2019) (observing a want of empirical evidence on the quality of wills created online); Kelly Purser & Tina Cockburn, *Will Formalities in the Twenty-First Century—Promoting Testamentary Intentions in the Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford*, 2019 WIS. L. REV. FORWARD 69 *passim*, <https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2019/11/An-Australian-Response-to-Professor-Crawford.pdf> [<https://perma.cc/8JDA-TDBY>]. *But cf.* Unif. Act white paper, *supra* note 121, at 1 (claiming that “[t]he Uniform E-Wills Act will . . . allow qualified professionals to offer online estate planning services to persons who might not otherwise make a plan.”). Nonetheless, e-will firms explicitly disclaim that they offer professional advice. *See infra* note 255 and accompanying text.

²³¹ UNIF. E-WILLS ACT, *supra* note 92, prefatory note.

²³² *See* An Act for the Amendment of the Laws with Respect to Wills 1837, 1 Vict. c. 26, § 9 (Eng.).

²³³ EDWARD SUGDEN, SPEECH OF THE RIGHT HONOURABLE SIR EDWARD SUGDEN IN THE HOUSE OF COMMONS 32 (London, John Murray 1838); *see also supra* note 102 (quoting a comment in the Uniform Probate Code).

Turn the clock forward two centuries, and we find digital technology molding new habits as it enters all walks of life—nowadays, men and women seek love at first *site*. But whether, in truth, those habits have fostered expectations about the validity of electronic wills remains uncertain. Unlike revocation by act, e-wills have no history, so any assumptions people make about them derive from logic. And, it seems safe to say, most people are used to performing legal tasks offline. The question demands empirical inquiry, and we shall return to it presently.²³⁴

The key difference between paper and electronic wills is not the process of their formulation—at least so long as both must be executed—but the manner of their preservation. E-wills lie in cyberspace instead of physical space. Industry advocates maintain that the “safe harbor for the creation and storage of electronic documents by a reliable custodian” functions to preserve the integrity of e-wills “just as well as, if not better than, paper documents.”²³⁵ Firms offering encrypted storage of e-wills as part of their service would undertake to guard them effectively.

Still, dangers are lurking here. An electronic record deteriorates more rapidly than paper records do, and it relies on data-processing formats that become obsolescent, and possibly lost, over time.²³⁶ Nor can we rest assured that e-will firms will remain in business for an extended period. Many of them are start-ups with uncertain futures;²³⁷ if they dissolve, the wills they store could

²³⁴ See *infra* notes 293–294 and accompanying text.

²³⁵ Modernizing the Law, *supra* note 220, text above n.113.

²³⁶ See Beyer & Hargrove, *supra* note 220, at 893–95; Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 PROB. L.J. OHIO 195, 197 (2009).

²³⁷ Willing initially failed to raise seed capital in the founder’s native Miami but eventually succeeded in Silicon Valley. See Nancy Dahlberg, *Where There’s a Will There’s a Way: Miami, Silicon Valley, and Back*, MIAMI HERALD (Sept. 13, 2015), <https://www.miamiherald.com/news/business/biz-monday/article-34992528.html> [<https://perma.cc/R8FS-4KRV>]. Willing’s corporate headquarters in Miami does not even have a telephone. But the company is now being taken over by MetLife. See *MetLife to Acquire Digital Estate Planning Capabilities*, BUSINESSWIRE (Nov. 20, 2019), <https://www.businesswire.com/news/home/20191120005864/en/MetLife-Acquire-Digital-Estate-Planning-Capabilities> [<https://perma.cc/2BZ3-Q3V9>]. Trust & Will, which prepared the inaugural e-will in Nevada in 2019, is the third venture launched by its founder. See Danny Crichton & Arman Tabatabai, *Trust & Will Closes First Electronic Will in the US (Plus \$2m Investment)*, EXTRA CRUNCH DAILY (Jan. 24, 2019), <https://techcrunch.com/2019/01/24/trust-will-closes-first-electronic-will-in-the-us-plus-2m-investment> [<https://perma.cc/E7KY-SWHS>]; Brittany Meiling, *Barbo Bounces Back with New Company and Same Tenacity*, SAN DIEGO BUS. J. (Aug. 25, 2017), <https://www.sdbj.com/news/2017/aug/25/barbo-bounces-back-new-company-and-same-tenacity/> [<https://perma.cc/PX74-2TWV>]; Brittany Meiling, *Death and Tech: San Diego Startup Trust and Will Gets \$6M to Build Out Electronic Estate Planning Business*, SAN DIEGO UNION-TRIB. (Dec. 17, 2019), <https://www.sandiegouniontribune.com/business/technology/story/2019-12-17/death-and-tech-san-diego-startup-trust-will-gets-6m-to-build-out-electronic-estate-planning-business> [<https://perma.cc/6Q4E-LNT2>]; Cody Barbo, *Trust & Will*, REPUBLIC: J. (Apr. 30, 2019), <https://republic.co/blog/cody-barbo-trust-and-will> [<https://perma.cc/5ENF-CS4G>]. Similarly, the founder of Qwill has “been working in the start-up world for 10-plus years now” and before then “spent time working all kinds of jobs.” *Why I Qwill: Meet Greg Glass*, <https://blog.qwill.io/2018/07/>

get lost in the shuffle, just as paper wills retained by attorney scribes sometimes vanish when the attorneys retire. Finally, the risk of hacking hangs over these firms, which could prove a target for tampering, ransomware, or privacy-infringement. Capital One, Equifax, Facebook, Marriott—and the list goes on—have all fallen victim to data breaches in the recent past.²³⁸ Hackers always manage to stay a step ahead of the encryptors.²³⁹ If behemoths like Facebook are vulnerable, then so too are e-will firms. Cognizant of the danger, one prospective e-will firm seeks to absolve itself of any potential liability.²⁴⁰

There could still be an element of truth to the industry's talking point, insofar as electronic wills stored with a firm are safer than paper wills strewn about testators' residences. But even a true fact deceives when it is broadened into a false generalization. On one hand, testators might fail to inform anyone that a firm is storing their e-wills, and the firm itself might never learn of their deaths. And on the other hand, testators might decline a firm's offer to store their e-wills—the extent of this preference needs inquiry.²⁴¹ If kept on a home computer's hard drive, or on a memory stick, e-wills stand at risk of accidental loss or want of discovery, no less than paper wills. Just as some testators hide their paper wills, testators executing e-wills have sometimes protected them with a password, hindering access post mortem.²⁴² But the other, darker side of the coin is extrinsic fraud, if interested parties do have access. To be sure, paper wills can also be falsified: allegations of page-substitution fraud arise from

09/why-i-qwill-meet-greg-glass [https://perma.cc/84XJ-7C58]. For a survey, see Eilene Zimmerman, *Start-Ups for the End of Life*, N.Y. TIMES, Nov. 3, 2016, at B4.

²³⁸ See *List of Data Breaches*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_data_breaches [https://perma.cc/E8GD-7TWB] (“Most breaches occur in North America It is estimated that in first half of 2018 alone, about 4.5 billion records were exposed.”). Breaches are not invariably the work of criminals; sometimes carelessness is to blame. See Margaret Cronin Fisk, *First American Financial Sued Over Alleged Data Breach*, BLOOMBERG (May 28, 2019), <https://www.bloomberg.com/news/articles/2019-05-28/first-american-financial-sued-over-alleged-client-data-breach> [https://perma.cc/XC5F-BGAN]; Annie Massa, *BlackRock's Data Leak Strikes 20,000 Advisers*, BLOOMBERG (Jan. 21, 2019), <https://www.bloomberg.com/news/articles/2019-01-21/blackrock-s-data-leak-strikes-20-000-advisers-mostly-at-lpl> [https://perma.cc/MHP5-E58K].

²³⁹ See *Computer Security: Why Everything Is Hackable*, THE ECONOMIST, Apr. 8, 2017, at 69.

²⁴⁰ See *Terms of Service*, WILLING, <http://willing.com/terms> [https://perma.cc/U2UQ-A88S] (“You provide us your data at your own risk . . .”).

²⁴¹ See *infra* text accompanying note 295.

²⁴² “[A] testator, in order to avoid a disclosure of its contents, will frequently hide the will in some secret recess difficult to discover; and so it oftentimes happens that . . . his will is . . . never found.” *Simpson v. Cornish*, 218 N.W. 193, 202 (Wis. 1928). Password-protected e-wills have posed comparable challenges. See *In re Currie* [2015] NSWSC 1098, ¶ 32 (Austl.) (noting that efforts to circumvent the password succeeded only after initial failure by “computer experts”); *Yazbek v. Yazbek* [2012] NSWSC 594, ¶¶ 24–25 (Austl.) (noting that the password was discovered through trial and error); *Hubschi Estate (Re)* (2019), 52 E.T.R. 4th 216, ¶¶ 15, 23 (Can. B.C. Sup. Ct.) (observing that a member of the decedent’s foster family was able to unlock his password-protected computer); see also *In re Quinn* [2019] QSC 99, ¶¶ 8, 23 (Austl.) (concerning a video-will recorded on a password-protected iPhone, which survivors were unable to access, leading the court to rely on a copy located on the testator’s computer).

time to time.²⁴³ But e-wills magnify the problem—now testators face the novel risk of *word*-substitution fraud. If “[t]he statute of wills is a statute against fraud,” then e-wills appear incompatible with lawmakers’ objectives.²⁴⁴

Furthermore, testators who produce paper wills have at their disposal dependable means of protection, both from accidental loss and extrinsic fraud, if they have the wisdom to use them. Testators can store their wills in a fire-proof safe (either their own or a box at their bank). Or, in twenty-eight states today, testators can deposit their wills with the probate court for safekeeping until death.²⁴⁵ Either alternative offers greater security and likelihood of discovery than electronic storage, whether with a firm or at home.

Industry advocates claim that electronic wills promise “more certainty in property succession, speedier distributions of property and fewer estate disputes”—a legal panacea!²⁴⁶ None of these claims stands up to analysis. The means by which a will is communicated has no effect on the certainty of the communication. A will is as clear as its scrivener, whether the words appear in print or in silica. Likewise, distribution occurs as speedily or slowly as probate occurs. We have no reason to anticipate more rapid probate of any particular kind of will.

²⁴³ See, e.g., *In re Estate of Ciaffoni*, 446 A.2d 225, 225–26 (Pa. 1982) (per curiam). Computer-generation of paper wills has exacerbated the problem by enabling perfect imitation of authentic pages. See *Canody v. Hamblin*, 816 S.E.2d 286, 289–90 (Va. 2018).

²⁴⁴ *Newman v. Bost*, 29 S.E. 848, 850 (N.C. 1898). Courts judging e-wills have recognized the danger of fraud. See *In re Estate of Horton*, 925 N.W.2d 207, 213 n.5 (Mich. Ct. App. 2018) (per curiam); *Yazbek* [2012] NSWSC 594, ¶ 26; *Mahlo v. Hehir* [2011] QSC 243, ¶¶ 30–31 (Austl.); *Rioux v. Coulombe* (1996), 19 E.T.R. 2d 201, ¶ 26 (Can. Que. Sup. Ct.); see also *In re Estate of Steed*, 152 S.W.3d 797, 815 (Tex. Ct. App. 2004) (noting, in connection with a computer copy of a missing paper will submitted for probate, that “[t]here was . . . evidence that the . . . sons took the computer hard drives from [the testator’s] office and that the drives were not recovered until several months later”). Industry advocates compare e-wills to e-commerce, asserting by analogy “the sound policy of Congress, and of nearly every American state, that electronic documents and signatures should be treated exactly the same as paper documents and ink signatures.” *Modernizing the Law*, *supra* note 220, text below n.9. The difference, however, is that a testator—unlike a commercial actor—is unavailable to testify as to the authenticity of a will. See *In re Estate of Weston*, 833 A.2d 490, 492 (D.C. 2003) (quoting *In re Lee’s Estate*, 80 F. Supp. 293, 294 (D.D.C. 1948)) (observing that “[i]n no other field of law should more care be taken over a decision to lessen requirements than in the field of Wills where the introduction of fraud must be guarded against to a greater extent because . . . the lips of the main ‘witness’ (the testator) are sealed”). Federal and state e-commerce acts have historically excluded wills from their purview. See *Federal Electronic Records and Signatures in Commerce Act*, 15 U.S.C.A. § 7003(a)(1) (West 2012); *UNIF. ELEC. TRANSACTIONS ACT* § 3(b)(1) & cmt. 4 (1999), 7A pt. 1 U.L.A. 491, 502 (2017) (concluding that this exclusion “is largely salutary given the unilateral context in which such records are generally created”).

²⁴⁵ See, e.g., *UNIF. PROB. CODE* § 2-515 (amended 2019), 8 pt. 2 U.L.A. 234 (2013). The states providing for storage by the court are: Alaska, Arkansas, Colorado, Delaware (in certain counties), Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin.

²⁴⁶ *Modernizing the Law*, *supra* note 220, text above n.145.

Surely, lawmakers should seek to avert estate disputes. Survivors, and taxpayers who subsidize the court system, are made better off when “undisturb’d, inactive lawyers sleep.”²⁴⁷ Unfortunately, electronic wills are bound to foment litigation, not to forestall it.

The principal difficulty emerges from the protean nature of electronic files which, when one contains a will, parties would have to prove in probate as an accurate representation of the performative document. If a testator writes over a paper will, the interlineation is apparent. If a testator revises an electronic will, metadata reveals when the file was last modified, hence whether the change postdated the will’s execution, but unless the user activates a track-changes program metadata does not reveal the nature of the change.²⁴⁸ This opaqueness can doom e-wills to disputation. If a testator adds material, then a court must disallow the change. But if a testator deletes a clause from an e-will, then he or she effects a partial revocation by act, which some e-will statutes do allow.²⁴⁹ Or if a testator makes a revision without any substantive significance—capitalizing or correcting the spelling of a word, let us say—then the change is inconsequential. In want of evidence about the nature of a revision, an e-will is *proof-proof*, so to speak.

Industry advocates are not unaware of this problem and they offer a facile response:

[A]n evidentiary examination of metadata may result in the denial of probate to many electronic documents whose data history is insufficient to authenticate an uncorrupted will. We would not object to this result—indeed, it is merely a consequence of a stringent evidentiary inquiry. . . . This fact should not prevent the admission of those electronic wills that *do* pass muster.²⁵⁰

In other words, so long as probate courts act as gatekeepers to police electronic wills, we can breathe easily. But that argument is casuistry. Quite apart from the litigation needed to resolve these issues, which industry advocates gloss over at this juncture, we face a second concern—the amplification of error costs. Ignorant testators sometimes seek to amend their wills informally. When a testator writes over the words of a paper will, the court can strike the interlineations.²⁵¹ But if e-wills are legalized, and a testator modifies one in unknown ways, then the court will have no choice but to reject the will in its entirety. In short, by inviting testators to create e-wills, lawmakers would condemn more estate plans to failure in probate. Contrarily, by confining wills to

²⁴⁷ See MARKOE, *supra* note 219, at 5.

²⁴⁸ See Yazbek [2012] NSWSC 594, ¶ 49.

²⁴⁹ See *supra* note 137 and accompanying text.

²⁵⁰ Modernizing the Law, *supra* note 220, n.123.

²⁵¹ See, e.g., *Mothershed v. Howell* (Estate of Lyles), 615 So.2d 1186, 1188–90 (Miss. 1993).

paper, lawmakers improve the odds that their contents are eventually susceptible to proof.

Still another problem stems from the replicability of an electronic will. If a testator makes a Xerox copy of a paper will, courts can distinguish the copy from the original document. By contrast, copies of e-wills are identical, and if a testator makes a back-up on a different drive immediately after executing a will—as computer users might do reflexively—it could bear an identical time stamp.²⁵² Which one, then, comprises the performative document? If testators completely or partially delete one but not the other, have they effectively revoked their wills in whole or in part? Again, we face evidentiary uncertainty, the very lifeblood of litigation.²⁵³

Possibly the most disturbing dimension of electronic wills concerns their commercial ramifications. An industry white paper asserts that firms intend to “[m]ake the benefits of the legal system more accessible to vulnerable populations This benefit would be particularly applicable to elderly or ill people”²⁵⁴ And the narrative concludes with a disclaimer: “This white paper relates to general information only and does not constitute legal advice.”²⁵⁵

If all of this sounds familiar, it should. In the later decades of the twentieth century, firms exploited the enthusiasm for living trusts by aggressively marketing boilerplate products through seminars held at retirement communities and even door-to-door solicitations.²⁵⁶ Some firms got sued for the unauthorized practice of law.²⁵⁷ E-will firms promise to become the trust mills of

²⁵² See *In re Currie* [2015] NSWSC 1098, ¶ 41 (Austl.) (noting discovery of “a number of identical copies” of an e-will, along with “a very similar document”).

²⁵³ It is unclear even whether the Uniform Act distinguishes copies of e-wills made immediately from those made at a later time. See UNIF. E-WILLS ACT, *supra* note 92, § 7 cmt. (paragraphs headed “Multiple Originals” and “Intent to Revoke,” second example). In Indiana, in order to revoke an e-will by act, a testator must delete all copies; and if copies are entrusted to custodians, the testator must make “best efforts” to contact each one and order their deletion. See IND. CODE § 29-1-21-8(b) & (c) (2018).

²⁵⁴ Modernizing the Law, *supra* note 220, text above n.145.

²⁵⁵ *Id.* at text below n.146. Willing’s terms of service reiterate that “Willing is not a law firm and does not provide any legal advice.” *Terms of Service*, *supra* note 240.

²⁵⁶ These firms became known as trust mills. See generally Tom Elden, *Living Trust Mills—the Scam That Keeps on Taking*, NAT’L ASS’N ATT’YS GEN.: CONSUMER PROTECTION REP., May 1999, at 1. For a (very) early warning, see SUGDEN, *supra* note 233, at 17 (anticipating that changes to the British statute of wills in 1837 would “introduce into the country a set of pettifoggers, not attorn[neys] or professional persons, but a description of persons calling themselves agents, and I know of no character more dangerous”).

²⁵⁷ See, e.g., *Fla. Bar v. Am. Senior Citizens All., Inc.*, 689 So.2d 255, 256–59 (Fla. 1997). One critic has even questioned whether living trusts drafted by such firms are legally valid. See Steven G. Nilsson, *Are Living Trusts Void When Commercially Formed Through the Unauthorized Practice of Law?*, FLA. B.J., Apr. 1995, at 24. But see *Franklin v. Chavis*, 640 S.E.2d 873, 877 (S.C. 2007) (giving effect to a will drafted by a nonlawyer).

the twenty-first century.²⁵⁸ (Of course, door-to-door solicitations have become passé—my own visit to the Willing website earned me an advertisement for the firm and its products on my Facebook account.) Firms hope to exploit the current enthusiasm for all things electronic, edged with old-fashioned hostility to the legal profession. They offer clients the chance to make their wills (as Willing’s advertisement soothingly assured me) “the modern way—at your own pace, from the comfort of your home. Answer simple questions. Print and sign.”²⁵⁹ Or just sign, if the movement for e-wills comes to fruition.

In a word, these firms hope to make a killing on death. And when profits are on the line, problems of public choice enter the picture. Intent on trafficking their products in states with large retirement populations, e-will firms have engaged lobbyists to press for validating legislation.²⁶⁰ When The Florida Bar’s statutory drafting committee refused to propose an e-wills act, the lobbyists bypassed it, proceeding directly to the state legislature with open purse strings.²⁶¹ The act passed in 2017 but was vetoed by the governor.²⁶² Undaunted, legislators enacted a new version of the bill in 2019, with a different governor in office who signed the legislation.²⁶³ Strikingly, voting on this non-ideological measure broke down along party lines, not only in Florida but in Arizona as well—a telltale of strategic lobbying.²⁶⁴ It is no coincidence, then,

²⁵⁸ Whether preparation of wills online constitutes unauthorized practice of law has yet to be resolved through litigation. See Catherine J. Lancot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811 *passim* (2002). The drafters of the Uniform Act nonetheless aver that the e-wills planned online will be crafted by “qualified professionals.” Unif. Act white paper, *supra* note 121, at 1.

²⁵⁹ Willing advertisement (on file with author).

²⁶⁰ See Sam Harden, *Electronic Wills, Access to Justice, and Corporate Interests*, LAWYERIST (Mar. 20, 2017), <https://lawyerist.com/electronic-wills-access-justice-corporate-interests> [<https://perma.cc/D6JF-36RT>]; Millonig, *supra* note 220, at 29. Willing acknowledges engaging in “efforts to pass the Electronic Wills Act in a number of states.” Modernizing the Law, *supra* note 220, preamble (“A Note from Willing”).

²⁶¹ See REAL PROP., PROB. & TR. LAW SECTION FLA. BAR, WHITE PAPER ON PROPOSED ENACTMENT OF THE FLORIDA ELECTRONIC WILLS ACT, <https://www.flprobate litigation.com/wp-content/uploads/sites/206/2017/05/RPPTL-Electronic-Wills-Act-White-Paper-Final.pdf> [<https://perma.cc/7LTA-42KH>].

²⁶² See Letter from Rick Scott, Governor of the State of Fla., to Ken Detzner, Sec’y of State of the State of Fla. (June 26, 2017), <https://www.flgov.com/wp-content/uploads/2017/06/HB-277-Veto-Letter.pdf> [<https://perma.cc/AFJ6-NP69>].

²⁶³ See *supra* note 118 and accompanying text.

²⁶⁴ See *Roll Call: FL H0409, 2019, Regular Session*, LEGISCAN, <https://legiscan.com/FL/rollcall/H0409/id/850770> [<https://perma.cc/9TMW-WVCK>]; *Roll Call: AZ HB2656, 2018, Fifty-Third Legislature 2nd Regular*, LEGISCAN, <https://legiscan.com/AZ/rollcall/HB2656/id/748264> [<https://perma.cc/F885-WA7G>]. In California, proposed e-will legislation is officially sponsored by LegalZoom, see *Hearing on A.B. 1667 Before the A. Comm. on Judiciary*, 2019–2020 Leg., Reg. Sess. 6 (Cal. 2019), and the bill’s author summarized its purpose by paraphrasing Willing’s promotional materials. Compare *id.* at 4, with *Modernizing the Law*, *supra* note 220, text above n.145. LegalZoom is continuing its efforts to promote e-will legislation in California. See LegalZoom Comments in Response to CJA Probate Committee Comments of 2.28.2020 (on file with author).

that the existing e-will statutes display similarities of drafting, and even of nomenclature.²⁶⁵ Firms have hijacked the legislative process, shaping the acts to their liking.

Enter the Uniform Law Commission. The drafters of the Uniform Act acknowledge “[p]ressure from companies wishing to expand services” while maintaining their determination “not [to] enshrine a particular company or business model in the statute[,]”²⁶⁶ unlike what they describe as the “industry-drafted bills.”²⁶⁷ In point of fact, the drafters of the Uniform Act have succeeded in producing a more neutral product.²⁶⁸ The Act’s provision for remote witnessing could be viewed as favorable to the industry, but the Act contains no provision for remote execution by a non-domiciliary of the enacting state, and the current draft also strikes out provisions for a “qualified supervisor” that had appeared in an earlier draft.²⁶⁹

Yet, if the drafters of the Uniform Act imagine that they are taking the wind out of the industry’s sails, they could not be more wrong. Promulgation of this act will add momentum to electronic-will legislation generally, and even states that adopt model laws have a long tradition of tinkering with them. Doubtless, industry lobbyists will be back in the cloakroom, bending ears and twisting arms to tweak the legislation.²⁷⁰ If anything, this Uniform Act plays into the industry’s hands.

All of which raises the specter of industry influence behind the scenes.²⁷¹ This Uniform Act has an unusual legislative history. The Joint Editorial Board

²⁶⁵ See *supra* notes 136, 146 and accompanying text.

²⁶⁶ UNIF. E-WILLS ACT (2019 Discussion Draft), *supra* note 131, prefatory note (capitalization omitted); see also Oct. 2017 Memo, *supra* note 221, at 2. Nonetheless, the final draft of the Act discretely omitted any reference to pressure from companies. See UNIF. E-WILLS ACT, *supra* note 92, prefatory note.

²⁶⁷ Memorandum from Suzanne Walsh et al. to Unif. Law Comm’n (June 8, 2018), at 3, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=442fc3a6-ba53-f1db-fce6-c52d81340e0c&forceDialog=0> [<https://perma.cc/2C6B-7FHZ>].

²⁶⁸ See *id.* at 1 (“The drafting committee has taken advice and counsel from estate planning lawyers, notaries, software companies and others in developing this Act.”).

²⁶⁹ Compare UNIF. E-WILLS ACT, *supra* note 92, §§ 1–12, with UNIF. ELEC. WILLS ACT §§ 5, 7 (UNIF. LAW COMM’N, Discussion Draft, Mar. 2–3, 2018), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=fcdfd231-d8cf-45ad-51aa-b49ce86d8c1b&forceDialog=0> [<https://perma.cc/WP4Q-2GHM>]; see also *supra* notes 146–148, 153 and accompanying text.

²⁷⁰ For an acknowledgment by a member of the Joint Editorial Board for Uniform Trust and Estates Acts that these model laws are “subject to capture from . . . interest groups” prior to enactment by state legislatures, see Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31, 32–35 (2019) (quotation at 34). For an example of a Uniform Act that has undergone widespread tinkering by the enacting states, see Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP., TR. & EST. L.J. 325 *passim* (2011).

²⁷¹ Scholars assert that some acts developed under the aegis of the Uniform Law Commission have fallen under the sway of special interests even before they were promulgated. Grant Gilmore characterized Article 4 of the U.C.C. as resembling the work product of “a committee of dogs [as-

for Uniform Trusts and Estates Acts, which proposes projects, voted in 2016 to recommend appointment of a study committee “to examin[e] the feasibility of an electronic will”²⁷² By the time it reached the Committee on Scope and Program a month later, however, the Joint Editorial Board’s recommendation had mutated into a proposal for formation of a *drafting* committee, skipping the customary first step of a study committee.²⁷³

When and how the recommendation got altered goes unexplained in the minutes of the two committees. As a consequence of the change, the Uniform Law Commission plunged ahead without first contemplating in a methodical way the merits of electronic-will legislation.²⁷⁴ That decision is all the more surprising in light of the project’s exceptionality: The guidelines of the Uniform Law Commission call for “avoid[ing]” subject areas that are “entirely novel and with regard to which neither legislative nor administrative experience is available” along with those that are “controversial because of disparities in . . . policies . . . among the states.”²⁷⁵ Electronic wills are nothing if not controversial.²⁷⁶ Moreover, when this Uniform project began, only a single state—Nevada—had an e-will statute, and even the Nevadans had, and contin-

signed] to draw up a protective ordinance for cats.” Letter from Grant Gilmore to Donald J. Rapson (Oct. 8, 1980), *quoted in* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 104 (1993); *see also* Patchel, *supra*, at 98–101, 120–45 (discussing the influence of interest groups); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1822–51 (1994) (same).

²⁷² *Minutes of the Joint Editorial Board for Uniform Trust and Estates Acts*, at 4 (Dec. 2, 2016), <http://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1847a073-bebb-ce49-fc0a-6eadd93fe214&forceDialog=0> [<https://perma.cc/R397-JKQT>] [hereinafter *Minutes*].

²⁷³ *See Midyear Meeting of the Committee on the Scope and Program: Minutes*, at 7 (Jan. 13, 2017), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=904b2437-5173-3fb9-6017-70f9f304f2f7&forceDialog=0> [<https://perma.cc/EPS2-BMBZ>]. Study committees ordinarily precede drafting committees. *See* Nat’l Conference of Comm’rs, *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts*, UNIF. LAW COMM’N § 4(c), <https://www.uniformlaws.org/projects/overview/newprojectcriteria> [<https://perma.cc/ASK7-K6A2>] [hereinafter *Statement*].

²⁷⁴ The Uniform Law Commission is supposed to undertake projects only after first determining that they would “produce significant benefits to the public through improvements in the law.” *Statement*, *supra* note 273, § 1(c)(3).

²⁷⁵ *Id.* § 1(f)(1) & (2) (section heading omitted). The drafters justify this Act as useful to promote uniformity of the law. *See* UNIF. E-WILLS ACT, *supra* note 92, prefatory note. Yet, so long as a large majority of states forbids e-wills, a Uniform Act validating them will have the opposite effect. What is more, states adopting e-will statutes are already crafting fairly similar acts as a consequence of industry influence. *See supra* Part III.

²⁷⁶ *See supra* note 220 (citing to scholarly discussions). Even industry sources concede that the e-wills have occasioned “both strong support and strong opposition.” *Modernizing the Law*, *supra* note 220, preamble (“A Note from Willing”). Likewise, the drafters of the Uniform E-Wills Act: “This controversy [over e-wills] is widespread, evidenced among drafting committee members, members of our advisors, and lawyers in audiences whom we have addressed about this topic.” Turney P. Berry & Suzanne B. Walsh, *Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You*, PROB. & PROP., Sept./Oct. 2019, at 62, 63.

ue to have, no experience whatsoever with the legislation.²⁷⁷ A secondary effect of the decision to proceed immediately to the drafting stage was to expedite the project. Finally, it cannot go unmentioned that two members appointed to serve on the drafting committee have had an association with Willing.²⁷⁸ Of course, irregularities of process alone prove nothing—but neither do they instill confidence in the impartiality of decisions made in connection with this project.

Among all of these concerns, perhaps most frightening is the drafters' *absence* of fear. They have produced a product that the Uniform Law Commission touts as ideal legislation, meriting enactment throughout the nation—and they dare to paint on a blank canvas.²⁷⁹

B. Empirical Evidence

To glean further insight into the public policy of electronic wills, I have conducted (appropriately enough) an electronic survey of public attitudes toward these vehicles. I collected data over a series of months in 2018 via e-questionnaires circulated by Qualtrics, a market-research firm, generating just over one thousand responses each month.

"We hear that people want to be able to execute wills electronically," the drafters of the Uniform Act report.²⁸⁰ Such demand would not in itself justify e-will legislation, given alternative outlets for the exercise of freedom of testation. Still, the nature and extent of this demand is worth investigating, if only

²⁷⁷ The first e-will in Nevada was executed in January of 2019. See Mary Gopalan, *Trust & Will and Notarize Partner to Deliver End-to-End Digital Will*, WEALTHADVISOR (Jan. 25, 2019), <https://www.wealthadviser.co/2019/01/25/272422/trust-will-and-notarize-partner-deliver-end-end-digital-will> [<https://perma.cc/ZK5E-HQTJ>]; see also Dan DeNicuolo, *The Future of Electronic Wills*, 38 BIFOCAL 75, 78 (2017) (noting that Nevadan estate planners unanimously disclaim any experience with e-wills). The absence of widespread legislation was noted in the minutes of the meeting that had recommended the study committee. See Minutes, *supra* note 272, at 4.

²⁷⁸ These are Professors John Langbein and Robert Sitkoff, respectively. Willing's website lists both as having "endorsed" Willing's white paper on e-wills. See Modernizing the Law, *supra* note 220, preamble (text above "A Note from Willing"). The website also lists both as members of Willing's Legal Advisory Board, see *id.*, although Professor Sitkoff reports that this Board is "defunct." E-mail from Robert Sitkoff, Professor of Law, to Adam J. Hirsch (Apr. 30, 2019) (on file with author). I have made multiple inquiries to Willing about the current composition of its Legal Advisory Board and have received no replies. At any rate, the Uniform Law Commission's conflicts-of-interest policy is limited to barring committee members from "accepting compensation . . . for influencing the work of the Conference." NAT'L CONFERENCE OF COMM'RS, CONFLICT OF INTEREST POLICY (Jan. 18, 1998) (on file with author).

²⁷⁹ The drafters freely concede their own ignorance: "In the next few years, we should begin to have empirical evidence of whether remote witnesses are boon or folly to buttress our various unsupported instinctual reactions." Turney P. Berry & Suzanne Walsh, *Uniform E-Wills Act Approved*, WEALTHMANAGEMENT.COM (Oct. 23, 2019) (para. titled "E-Will Requirements"), <https://www.wealthmanagement.com/print/111492> [<https://perma.cc/Y2CM-9RSN>]. Nevertheless, "your state should enact" this untested act now! See Unif. Act white paper, *supra* note 121.

²⁸⁰ Oct. 2017 Memo, *supra* note 221, at 1.

to determine whether commercial interests—which hope to *create* demand—have had a hand in manipulating the situation.

What the drafters ‘heard’ was a report of data from a pair of entrepreneurs assessing the feasibility of a start-up electronic storage firm for e-wills, who sat in on one of the drafting committee meetings as observers.²⁸¹ The data consisted of a survey of 220 persons conducted on SurveyMonkey (a do-it-yourself online survey tool).²⁸² This survey found that a striking 53.6% of respondents would be “interest[ed]” in having an e-will.²⁸³ The question, however, was framed—properly for commercial purposes—in marketing terms: “Imagine there was a service that allowed you securely and reliably to store your estate plan in the cloud, so that it could never be lost or destroyed . . . Assuming the price was reasonable, is this something that would interest you?”²⁸⁴ Additional questions followed to gauge the price elasticity of demand.²⁸⁵

Framed as a disinterested inquiry, my own survey suggests weaker public demand for e-wills.²⁸⁶ The survey was conducted twice (with different follow-up questions), but we cannot consolidate the data because a handful of the respondents may have overlapped between the two surveys. Among the first group of respondents, 33.2% preferred an e-will, while 66.8% preferred a paper will. Interest in an e-will appeared higher among the second group: 43.5% versus 56.5%. These data probably overestimate demand for e-wills for two reasons. One is sample bias: Despite deep internet penetration in the United States, the subpopulation that can take an e-survey overrepresents those who might prefer to have an e-will.²⁸⁷ The second, more significant, reason is preference endogeneity: The fact that my survey raised the possibility of an e-will suggested an idea that might never have occurred to respondents otherwise.

Intriguingly, an age bulge appeared within both groups taking the survey. Both the oldest and the youngest respondents expressed stronger preferences for paper wills than those in middle age.²⁸⁸ We can only speculate about the

²⁸¹ E-mail from Susan N. Gary, Reporter, to Adam J. Hirsch (July 9, 2018) (on file with author).

²⁸² Private survey by Jonathan Gosting and Anh-Kiet Ngo (on file with author).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ My question read: “Suppose wills that are written and signed electronically on computers were legally valid, even if they were never printed out and signed by hand. Would you rather make a computer will, or would you prefer to make a traditional will that is written on paper and signed by hand?” The order of clauses in the last sentence were rotated randomly. The raw data are on file with author.

²⁸⁷ See generally Jelke Bethlehem, *Selection Bias in Web Surveys*, 78 INT’L STAT. REV. 161 (2010) (discussing “methodological problems” with electronic surveys).

²⁸⁸ Within the first group of respondents (with a mean age of 43.8), those aged thirty and younger preferred a paper will over an e-will by a margin of 61% to 39%. For those aged above thirty but below fifty: 56% to 44%. For those aged fifty and older: 82% to 18%. This pattern was even more pronounced among the second group of respondents (with a mean age of 43.9). Those aged thirty and younger preferred a paper will over an e-will by 59% to 41%. For those aged above thirty but below fifty: 44% to 56% (a different majority choice). For respondents aged fifty and older: 69% to 31%.

origins of this phenomenon. Perhaps middle-aged respondents wish to feel youthful by emulating what they assume would be the preferences of younger individuals—known in psychology as an “identification” effect—whereas the oldest ones are too set in their ways to emulate the young.²⁸⁹ Or perhaps middle-aged respondents are less wary than younger, more active, computer users, who better appreciate (either through acquaintances’ experiences or their own) the risks that would hang over an electronic will.

Overall, these data scarcely evoke an image of unstoppable hydraulic pressure for electronic wills by the American citizenry. No consumer groups are clamoring for this innovation,²⁹⁰ and any narrative positing a grass-roots movement for e-wills is fanciful. Lower interest by younger respondents also casts doubt on the Uniform Law Commissioners’ assumption that demand will grow over time.²⁹¹ In truth, the impetus for e-wills traces singularly to commercial interests, and the stronger preference for e-wills expressed in the sales-oriented survey, noted earlier, suggests that skillful marketing could succeed in ginning up demand.²⁹²

Also meriting exploration is the Uniform Law Commissioner’s concern that citizens may wrongly assume electronic wills to be valid.²⁹³ If this misconception is common, lawmakers would forestall legal error by validating e-wills. To test this hypothesis, I asked one group of over 1,000 respondents whether “[i]n your opinion” a will written, signed, and witnessed on a computer but “never printed out on paper and never signed by hand” would be valid. 65.5% of respondents answered *yes*, and 35.5% answered *no*. This statistic suggests a significant risk of legal error—but it is not the end of the story. I asked the same group a follow-up question: “Did you base your answer on actual knowledge of the law, or on a logical assumption of what the law is?” Only 22% claimed to know the law. A further 52% had based their responses on a “logical assumption of what the law is,” while 26% had merely taken “a guess.”

These responses led me to ask a different question of another group of over 1,000 respondents: “Would you investigate the legal validity of a computer will before making one, or would you assume that a computer will is legally valid?”²⁹⁴ Filtering the data to include only the responses of those who ex-

²⁸⁹ “Identification occurs as individuals conform to an attitude or behavior . . . to derive satisfaction from the feeling of being similar to the model.” TERRELL G. WILLIAMS, *CONSUMER BEHAVIOUR* 419 (1982). Older Americans have tended to use technology more selectively than the young. See Katherine E. Olson et al., *Diffusion of Technology: Frequency of Use for Younger and Older Adults*, 36 *AGEING INT’L* 123, 142 (2011).

²⁹⁰ See Millonig, *supra* note 220, at 32.

²⁹¹ See *supra* note 221 and accompanying text.

²⁹² See *supra* text accompanying notes 281–285.

²⁹³ See *supra* note 231 and accompanying text.

²⁹⁴ The order of the clauses within the question was randomized.

pressed an interest in having an e-will, 66% indicated they would investigate before making an e-will, whereas 34% said they would take its validity for granted. These data suggest that legal error, although possible, is unlikely in this connection.

Finally, I inquired among the subset of respondents interested in having an electronic will whether they would prefer to “create . . . and store it on [a] home computer,” or instead “go to a company specializing in the creation and storage of computer wills, such as LegalZoom.”²⁹⁵ Although each option has risks, the problems of proof for self-stored e-wills appear greater. From this perspective, the results were worrisome: 59% indicated they would prefer to create and store their own e-wills, whereas 41% preferred to employ a company. Hence, if current legislative initiatives breathe life into the e-will industry, they may exhale even larger numbers of self-stored e-wills. These threaten to throw probate litigators into the briar patch.

VI. TOWARD A POSTMODERN STATUTE

*“Of course, people do go both ways!”*²⁹⁶

*“When you come to a fork in the road, take it!”*²⁹⁷

Having concluded that electronic wills should meet with disapproval, the question remains how broadly our indictment should extend. They are the worst of wills, but are they also the best of wills? Lawmakers need not march, headlong and headstrong, down a single path of the law. By making exceptions, lawmakers can pursue two paths at once. In this spirit, we may ponder whether *any* circumstances exist under which e-wills satisfy social needs. On reflection, I submit, the answer is *yes*. E-wills prove useful, and should be allowed, as a legal safety-net, when a testator has lost the ability to execute an ordinary will.

A. E- for Emergency

In medieval times, dictation of a will formed part of the last confession.²⁹⁸ The habit persisted, and as late as the nineteenth century in the United States, testation remained typically a last-minute affair.²⁹⁹ Today, of course, estate

²⁹⁵ Again, the order of clauses within the question was randomized.

²⁹⁶ THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939) (scene in which the Scarecrow gives directions to Dorothy).

²⁹⁷ YOGI BERRA & DAVE KAPLAN, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT! (2001).

²⁹⁸ FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 318–20, 340 (2d ed. 1968).

²⁹⁹ See Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 37–39 (1964).

planning earlier in life has grown commonplace. Still, many persons remain reluctant testators, for psychological or other reasons. The thought of perishing is terrifying—so they perish the thought. They avoid situations, such as estate planning, that force them to confront their own mortality.³⁰⁰ On top of that, a longstanding superstition warns against will making as a self-fulfilling prophecy, causing some to put it off.³⁰¹

The problem arises that when an individual neglects to execute a will while well and then suddenly falls ill, he or she must endeavor to make a will in a hurry. For some, death arrives too quickly, and intestacy results. Others execute their wills in the nick of time. Both scenarios feature regularly in the published reports.³⁰²

It seems unlikely that lawmakers could do much to overcome procrastination (putting aside the legitimacy of any such effort). The aversion to estate planning runs deep, and even those who devote themselves to the field are not immune.³⁰³ Lawmakers can contend with the problem indirectly, however, by easing the process of emergency testation.

Doing so is not without dangers. Testators who plan their estates as death nears might operate under the impairment of pain or fear, and they may lack time to contemplate their choices with care. The end is often the *bitter* end.³⁰⁴ Historically, lawmakers in some states placed limitations on freedom of testation that applied exclusively to emergency wills. Under mortmain statutes, a testator could not bequeath to charitable organizations when close to death “as a protection against hasty and improvident gifts,”³⁰⁵ and also “to protect [families] from any improper influences that might [be] exercised over him when in

³⁰⁰ See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1047–51 (2004) (discussing the psychological literature on “terror management”).

³⁰¹ See *In re Estate of Gutierrez*, 11 Cal. Rptr. 51, 54 (Ct. App. 1961); Hirsch, *supra* note 300, at 1048 & n.61. The superstition has British roots. See *Gillow v. Bourne* [1831] 162 Eng. Rep. 1417, 1419.

³⁰² See, e.g., *In re Estate of Dellinger v. 1st Source Bank*, 793 N.E.2d 1041, 1042 (Ind. 2003) (concerning a will executed one day before death); *In re Estate of Robinson*, 477 N.Y.S.2d 877, 878 (App. Div. 1984) (thirty-two minutes before death); cf., e.g., *Franicevich v. Peterson*, No. A138435, 2014 WL 126098, at *1–2 (Cal. Ct. App. Jan. 14, 2014) (concerning a testator who died before she could execute an intended will); *Babcock v. Malone*, 760 So.2d 1056, 1056 (Fla. Dist. Ct. App. 2000) (same); *In re Will of Kern*, 158 N.Y.S.2d 454, 455 (Sur. Ct. 1956) (same).

³⁰³ The author of a renowned nineteenth-century treatise on wills, Thomas Jarman, died intestate—a story his embarrassed publishers sought to suppress. See R.E. MEGARRY, *MISCELLANY-AT-LAW* 172 (1955).

³⁰⁴ For an early recognition, see Statute of Uses 1536, 27 Hen. 8 c. 10, preamble (Eng.) (observing that testators “visited with Sickness, in their extreme Agonies and Pains,” may plan their estates “indiscreetly and unadvisedly”); see also, e.g., *McKee v. McKee’s Ex’r*, 160 S.W. 261, 264 (Ky. 1913) (citing similar concerns about wills executed near death).

³⁰⁵ *In re Dwyer’s Estate*, 115 P. 242, 245 (Cal. 1911).

extremis.”³⁰⁶ These statutes are extinct today.³⁰⁷ Lawmakers instead rely on doctrines of testamentary capacity and undue influence to protect against poorly planned or tainted estate plans.³⁰⁸

Prevailing doctrines aim rather to facilitate emergency estate planning. One example appears within the law of gifts. Persons ordinarily cannot make a gift revocable.³⁰⁹ But lawmakers have carved out an exception for persons who anticipate imminent death. Those persons, and those alone, are free to make revocable gifts, known in acknowledgment of their distinctness as gifts *causa mortis*.³¹⁰ These gifts serve, in effect, as a form of estate planning.³¹¹ And whereas courts have long expressed misgivings about gifts *causa mortis* as “an invasion into the province of the statute of wills,”³¹² they are justified on the ground of exigency: “A person who fears he or she is about to die should have available some simple means of having his or her final wishes effectuated in regard to the disposition of personal property in the event of death.”³¹³

In the same vein, in a quarter of the states, lawmakers have relaxed the rules of testation for those who need it most urgently. Whereas wills ordinarily must be committed to writing, fifteen jurisdictions make an exception, allowing testators to create their wills by oral declaration (a nuncupative will) when their lives are in jeopardy.³¹⁴ As with gifts *causa mortis*, courts have expressed unease about the doctrine. “[T]he policy of the law . . . declares that a nuncupative will is never favored,” the Supreme Court of Pennsylvania averred.³¹⁵ Far more states acknowledged nuncupative wills in the past than do today.³¹⁶

³⁰⁶ Bell v. Miss. Orphans Home, 5 So.2d 214, 217 (Miss. 1941).

³⁰⁷ The last American mortmain statute was repealed in 1997. See GA. CODE ANN. § 53-2-10 (repealed 1997).

³⁰⁸ See Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 299–315, 346–55 (2017).

³⁰⁹ WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES § 4.5 (5th ed. 2017).

³¹⁰ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (AM. LAW INST. 1999–2011).

³¹¹ See, e.g., Foster v. Reiss, 112 A.2d 553, 556 (N.J. 1955) (“[A] gift *Causa mortis* is essentially of a testamentary nature . . .”).

³¹² *Id.*; see also, e.g., Bessett v. Huson (*In re Estate of Bessett*), 39 P.3d 220, 222 (Or. Ct. App. 2002).

³¹³ RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 31.3 cmt. a (AM. LAW INST. 1992).

³¹⁴ These are: Indiana, Kansas, Mississippi, Missouri, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont, Virginia, Washington, and West Virginia. Three of the fifteen confine nuncupative wills to small estates, and seven more limit them to soldiers and sailors in harm’s way. See VT. STAT. ANN. tit. 14, § 6 (repealed 2018); *id.* tit. 14, § 7 (amended 2018); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 851–52 nn.272–73 (2014).

³¹⁵ Mellor v. Smyth, 69 A. 592, 595 (Pa. 1908); see also ATKINSON, *supra* note 16, § 76, at 367 & n.37.

³¹⁶ In 1960, forty-two states authorized nuncupative wills. See John B. Rees, Jr., *American Will Statutes: I*, 46 VA. L. REV. 613, 637–38 (1960). Whereas early model lawmakers approved of nuncu-

Once again, their rationale lies in exigency. Blackstone ventured that “favour ought to be shewn to [a nuncupative will], when the testator is surprized by sudden and violent sickness,” but not otherwise.³¹⁷ American courts reiterate this sentiment. Nuncupative wills represent a “special indulgence, as a last resort . . . which has no foundation but necessity.”³¹⁸ And again: “The law wisely discriminates between written and unwritten wills, and permits the latter only in cases of urgent necessity.”³¹⁹

Another genre of will also finds justification in this concern. Twenty-six states today permit testators to produce handwritten wills without witnesses, known as holographic wills.³²⁰ Unlike nuncupative wills, holographic wills are not confined to the eleventh-hour, and they can function as cheap alternatives to executed wills for testators of modest means.³²¹ Still, commentators recommend holographic wills only as vehicles for emergency estate planning.³²² Within this precinct, their value derives not from economy but from the ease and speed with which a testator can create them, forgoing an execution ceremony. Given their more widespread validity, holographic wills have eclipsed their nuncupative counterparts as vehicles for testation near death.³²³

The United States is not alone in having set off emergency estate planning as a discrete problem. Civil law jurisdictions have put in place rules identifying the same problem. Ordinarily under German law, a testator must either declare a will before a notary or prepare a holographic will.³²⁴ At the same time, “[i]f it is feared that the testator will die sooner than it is possible to make a will be-

pative wills, *see* MODEL CODE, *supra* note 101, § 49, their successors did not. *See* UNIF. PROB. CODE § 2-502 (amended 2019), 8 pt. 1 U.L.A. 209 (2013).

³¹⁷ 2 BLACKSTONE, COMMENTARIES *501.

³¹⁸ *Martin v. Rutt (In re Rutt's Estate)*, 50 A. 171, 171 (Pa. 1901) (quoting the opinion below).

³¹⁹ *Prince v. Hazleton*, 20 Johns. 502, 515 (N.Y. 1822).

³²⁰ *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 statutory note (tallying the states).

³²¹ *See, e.g.*, UNIF. PROB. CODE § 2-502(b) (amended 2019), 8 pt. 1 U.L.A. 209 (2013). For a further discussion *see* Hirsch, *supra* note 12, at 1073–75.

³²² *See* GERRY W. BEYER, TEXAS LAW OF WILLS § 19:12 (4th ed. 2018); Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP., TR. & EST. L.J. 27, 58 (2008); Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 361–62 (2016) (polling attorneys); *see also In re Estate of Brackenridge*, 245 S.W. 786, 788–89 (Tex. Civ. App. 1922) (observing that “[t]he provisions as to holographic wills were evidently enacted to enable a person to prepare his own will, when he cannot procure the assistance of others . . .”), *rev'd*, *Brackenridge v. Roberts*, 267 S.W. 244 (Tex. 1924).

³²³ *See* Clowney, *supra* note 322, at 58–59 (tabulating the frequency of emergency holographic wills); *see also* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1137–38 (2015) (noting anecdotal examples). For a famous Canadian example, *see* W.M. Elliott, *Wills—Writing Scratched on Tractor Fender—Granting of Probate*, 26 CAN. B. REV. 1242 (1948). *Cf.* Hirsch, *supra* note 314, at 853 n.283 (remarking a continuing stream of published cases concerning nuncupative wills, suggesting their persistence into modern times).

³²⁴ *See* BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], §§ 2231, 2247, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html [<https://perma.cc/76W7-J4CR>] (Ger.).

fore a notary,” the Germans allow a testator to create what they describe as an “emergency will” by declaring it before three witnesses.³²⁵ Similarly under Swedish law, a testator must ordinarily sign a written will in the presence of two witnesses.³²⁶ Nonetheless, if “illness or other emergency” intervenes, a testator can recite the will before two witnesses or “self-writ[e]” and sign it without witnesses.³²⁷

By bending over backward to facilitate emergency wills, lawmakers expand freedom of testation. At the same time, any relaxation of the requirements set by the statute of wills threatens the policies that will formalities advance. Those formalities guard wills against stale evidence or fraud, while certifying, via their ritual component, that any alleged expression of testamentary intent represented a finalized estate plan.³²⁸

We may observe, however, that this tension prevails irrespective of the circumstances. By relaxing the requirements for everyday wills, we would likewise promote freedom of testation, again at the expense of lowering our guard against error and fraud. In this light, how can we justify distinguishing emergency wills from other wills? Why not resolve the tension consistently, one way or the other?

On reflection, we can posit that the *ex ante* effect of adjustments of will formalities sets the two situations apart. If lawmakers loosened the formalization requirements applicable to everyday wills, fewer testators would trouble themselves to execute their wills in optimal ways. By contrast, if lawmakers carved out an exception for emergency wills, easing the requirements that pertain only to those wills, lawmakers would create no perverse incentives. Testators who make their estate plans under exigent circumstances fail to formalize them optimally out of necessity, not out of laxity.

What is more, the backdrop of an emergency will—its proximity to death—serves in part to compensate for waivers of formalities. Those with one foot in the grave appreciate the graveness of their actions—they realize they

³²⁵ See *id.* §§ 2249–2252.

³²⁶ See ÄRVDAALK [ÄB] [INHERITANCE CODE] 10:1 (Swed.).

³²⁷ *Id.* 10:3. The French code provides for emergency testation only for military personnel, persons under quarantine, persons on sea voyages, and persons on isolated islands. See CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 967–1001 (Fr.). In Great Britain, except for military personnel, neither nuncupative nor holographic wills are allowed under modern law, but gifts *causa mortis* remain valid. See An Act for the Amendment of the Laws with Respect to Wills 1837, 1 Vict. c. 26, §§ 9, 11 (Eng.). See generally ANDREW BORKOWSKI, *DEATHBED GIFTS: THE LAW OF DONATIO MORTIS CAUSA* (1999). Nuncupative wills are also permissible in China “in an emergency situation.” Zhonghua Renmin Gongheguo Jicheng Fa (中華人民共和國繼承法) [Law of Succession of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Apr. 10, 1985, effective Oct. 1, 1985), art. 17, 1985 P.R.C. LAWS (China) [hereinafter P.R.C. Law of Succession].

³²⁸ For a classic discussion, see Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–13 (1941).

must take a stand and finalize their estate plans.³²⁹ And when an estate plan comes to fruition on the heels of death, less time remains for evidence to deteriorate or for would-be perpetrators to commit fraud.

Whether nuncupative wills nonetheless implicate too many risks for lawmakers to tolerate remains a question.³³⁰ Be that as it may, advancing technology now offers lawmakers the opportunity to reconfigure the category of emergency will-making. Electronic wills are unlikely to alter tropisms toward procrastination earlier in life. Estate plans are intimidating irrespective of their media of communication. But e-wills can serve usefully as vehicles for emergency estate planning, providing greater protection against error or fraud—greater, at least, than the low-tech alternative of a nuncupative will.

An electronic will is an alterable writing, but still something that people *read*. No resort to the memory of auditors is required to reconstruct one. But lawmakers need not stop there, for the same can be said of other modern communicative technologies. Testators could audio- or video-record emergency wills on portable devices that afford greater safety from misreporting or fraud than a nuncupative will. Indeed, these wills appear easier to authenticate than an e-will, and these, too, could ease the process of emergency estate planning for testators who must do it themselves, yet who have lost the use of their hands, or who simply lack skills of composition. One testator explained that he had prepared an emergency video-will, rather than a written one, because he was “no good with paperwork.”³³¹ In a string of foreign cases, courts have validated audio- and video-wills under foreign versions of the dispensing power.³³²

³²⁹ See *Sykes v. Sykes*, 2 Stew. 364, 369 (Ala. 1830) (observing that if an alleged maker of a nuncupative will had sensed imminent death “he would have evinced something of that hurried anxiety which fearful necessity seldom fails to produce”); *In re Estate of Horton*, 925 N.W.2d 207, 214 (Mich. Ct. App. 2018) (per curiam) (“The fact that decedent wrote a note providing for disposition of his property in anticipation of his impending death supports the conclusion that it was a final document”); *In re Russell* [2016] SASC 56, ¶ 19 (Austl.) (inferring performative intent to make a video-will from the circumstance “that he knew his death was imminent”); *Montgomery v. Taylor (In re Will of White)* [2018] VSC 16, ¶ 71 (Austl.) (inferring performative intent to make an e-will from testator’s “imminent suicide”).

³³⁰ Some inheritance scholars have favored abolishing nuncupative wills altogether, given “the frailties of oral proof,” see, e.g., ATKINSON, *supra* note 16, § 76, at 367, whereas others advocate “afford[ing] a dying man who has no opportunity to make a formal will the privilege of making a last minute oral disposition” Gulliver & Tilson, *supra* note 328, at 14. For references to additional discussions, see Hirsch, *supra* note 314, at 853 nn.280–83.

³³¹ *Mellino v. Wnuk* [2013] QSC 336, 1. 19 (Austl.); see also *In re Wai Fun Chan* [2015] NSWSC 1107, ¶ 38 (Austl.) (explaining that the testator “expressed a strong desire to *speak* to her children in making her intentions known to them”); *Radford v. White* [2018] QSC 306, ¶ 5 (Austl.) (“As I am too lazy [to write a will], I’ll just say it.”).

³³² See *Wai Fun Chan* [2015] NSWSC 1107, ¶ 67; *Treacey v. Edwards (In re Estate of Edwards)* [2000] NSWSC 846, ¶ 37 (Austl.); *In re Quinn* [2019] QSC 99, ¶ 45 (Austl.); *Radford* [2018] QSC 306, ¶ 26; *In re Estate of Carrigan* [2018] QSC 206, ¶ 26 (Austl.); *Mellino*, [2013] QSC 336, ll. 5–8; *Russell* [2016] SASC 56, ¶ 20 (dicta); *In re Wilden* [2015] SASC 9, ¶ 22 (Austl.); *In re Will of Lad-duhetti* (Unreported, Supreme Court of Victoria, McMillan, J., 20 Sept. 2013) (Austl.); *Pfaender v.*

With the possible exception of Indiana and Nevada, the modern American e-will acts fail to allow audio- or video-wills, by comparison, and the one American case on point held a tape-recorded will void for want of due execution.³³³

The drafters of the Uniform Electronic Wills Act expressly disallow audio- and video-wills, but their policy analysis fails to explore the utility of these vehicles as emergency wills.³³⁴ The drafters' principal concern was uncertainty, both of performative intent and substantive meaning: "[W]riting emphasizes seriousness of intent,"³³⁵ and "[p]eople are likely to be less precise when talking than when writing, and oral ramblings may be difficult to fol-

Gregory [2018] NZHC 161 at [53] (N.Z.); see also *Cassie v. Koumans* [2007] NSWSC 481, ¶¶ 9, 14–15 (Austl.) (dicta that a video-will could be held valid, but finding an absence of testamentary intent); *In re Estate of Standish* [2018] VSC 629, ¶ 46 (Austl.) (dismissing motion for summary judgment by contestant of audio-will); *Elphinstone Estate (Re)* (2017), 31 E.T.R. 4th 252, ¶ 11 (Can. B.C. Sup. Ct.) (leaving issue of validity to a subsequent hearing). Under Chinese law, audio-wills created in the presence of two or more witnesses are valid per se. See P.R.C. Law of Succession, *supra* note 327, art. 17.

³³³ See *Buckley v. Holstedt (In re Estate of Reed)*, 672 P.2d 829, 831–32 (Wyo. 1983). The existing e-will statutes all require electronic signatures, and none has any form of dispensing power. See *supra* notes 126–127, 134 and accompanying text. Nonetheless, in Indiana and Nevada the “electronic signature” of the testator and witnesses formalizing an e-will can comprise, inter alia, “an electronic sound.” See IND. CODE §§ 26-2-8-102(10), 29-1-21-3(9)–(10) (2019); NEV. REV. STAT. §§ 132.118, 133.085(1)(b) (2017); cf. ARIZ. REV. STAT. ANN. § 14-1201(20) (2019) (defining an “electronic signature” without reference to sound); FLA. STAT. ANN. § 732.521(3) (West 2019) (same). In lieu of witnesses, an e-will in Nevada can contain an “authentication characteristic of the testator,” which can comprise, inter alia, a “video recording.” NEV. REV. STAT. § 133.085(1)(b)(1) & (5)(a) (2017). An e-will must appear in an “electronic record,” which both Indiana and Nevada define broadly to include any record “stored by electronic means.” IND. CODE §§ 26-2-8-102(9), 29-1-21-3(8), (10); NEV. REV. STAT. §§ 132.117, 133.085(1)(a). *But cf.* IND. CODE § 29-1-21-5 (contemplating the videotaping of the execution of an electronic will for *evidentiary* purposes).

³³⁴ The will-execution *and* dispensing power provisions found in the Uniform Act both require a “record that is readable as text.” UNIF. E-WILLS ACT, *supra* note 92, §§ 5(a)(1), 6 (Alternative A). *But cf.* Unif. Act white paper, *supra* note 121, at 1 (claiming that “[t]he Uniform E-Wills Act is technology-neutral”).

³³⁵ UNIF. E-WILLS ACT (2019 Discussion Draft), *supra* note 131, § 5 cmt; cf. UNIF. E-WILLS ACT, *supra* note 92, § 5 cmt. (omitting discussion of the rationale for this restriction). The drafters had raised the issue of whether a testator who left “instructions on the lawyer’s voicemail” could thereby make a valid will. Memorandum from Suzanne Walsh et al. to Drafting Comm. on Elec. Wills (Jan. 21, 2019), at 2, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c8544002-3652-a2e7-7ba5-30204a4fffc7&forceDialog=0> [<https://perma.cc/PSS9-F2M2>] [hereinafter Jan. 2019 Memo]. Such instructions might or might not reflect testamentary intent. Yet, this problem is hardly unique to audio-wills: It also arises when a testator pens holographic instructions to an attorney for a will, see *Price v. Huntsman*, 430 S.W.2d 831, 832 (Tex. Civ. App. 1968), and it could arise again in connection with e-wills if a testator emailed instructions to an attorney for a will which beneficiaries seek to probate under the Uniform Act’s dispensing power. See *In re Estate of Feron* [2012] 2 NZLR 551 at [17–18] & exhibits B, C (HC) (N.Z.) (giving effect under the dispensing power to an e-mail from decedent to attorney together with attorney’s notes); see also *infra* note 421 and accompanying text. The drafters also fretted that “issues of proof and preservation of oral-only records would be too much for the legal system to adapt to now.” Berry & Walsh, *supra* note 276, at 62. Yet, courts admit sound recordings routinely into evidence today. See 2 MCCORMICK ON EVIDENCE § 215, at 35–39 (Kenneth S. Broun et al. eds., 7th ed. 2013).

low.”³³⁶ The drafters also worried that “if the statute authorizes video wills, people are likely to create companies to use that idea as a business model.”³³⁷

In point of fact, if a testator creates an audio- or video-will in anticipation of imminent death, the setting itself indicates seriousness of intent.³³⁸ What is more, homemade *written* wills also suffer from defects of expression, as countless courts have complained,³³⁹ and those same defects would bedevil courts construing electronic wills. Modern technology further blurs the distinction: the Uniform Act validates e-wills that appear as text which a testator created by voice-activation software.³⁴⁰ It is not the medium of communication but the want of professionalism that gives rise to incoherence. Finally, the drafters are doubtless correct about the commercial ramifications of validating audio-and video-wills. Companies that videotape will execution ceremonies for evidentiary purposes already exist.³⁴¹ But if this concern drove the drafters of the Uniform Act to forbid audio- and video-wills, then why did the same concern not cause them to tear up their act validating e-wills?³⁴²

By limiting electronic wills to emergencies, lawmakers would stymie their commercialization. And lawmakers would also sidestep another danger of high-tech estate planning—namely, that by the time an e-will matures it will have become inaccessible. Technology marches at a furious pace, which could prove the undoing of an e-will formatted with some soon-to-be-forgotten program.³⁴³ This risk disappears in connection with emergency estate planning. If an e-will matures on the heels of its execution, its technological currency is assured.

Of course, low-tech holographic wills present another option for testators who are pressed for time. Even in jurisdictions that prefer to bar holographic wills generally, lawmakers might allow them singularly as vehicles of emergency testation. But the difficulty now emerging is that fewer citizens possess the ability to handwrite documents. American schools no longer teach cursive

³³⁶ Jan. 2019 Memo, *supra* note 335, at 2.

³³⁷ *Id.*

³³⁸ See *supra* note 329 and accompanying text.

³³⁹ See, e.g., *In re Burt's Estate*, 44 A.2d 670, 672 (Pa. 1945) (describing the holographic will at issue as “a jumble of words”); *White v. Brown*, 559 S.W.2d 938, 939 (Tenn. 1977) (observing that “as in so many other cases involving wills drafted by lay persons . . . the words chosen by the testatrix are not specific enough to clearly state her intent”). A court faced with an audio-will that contained “vagaries” observed that this attribute was unremarkable: “[T]estamentary intentions need not be expressed perfectly. . . . Wills are sometimes vague and uncertain.” *Estate of Standish* [2018] VSC 629, ¶ 43.

³⁴⁰ See UNIF. E-WILLS ACT, *supra* note 92, § 5 cmt.

³⁴¹ See LAWRENCE M. FRIEDMAN, *DEAD HANDS* 68 (2009).

³⁴² For additional commentary on audio- and video-wills, published prior to the advent of smart phones, see ATKINSON, *supra* note 16, § 63, at 296; Gerry W. Beyer & William R. Buckley, *Videotape and the Probate Process: The Nexus Grows*, 42 OKLA. L. REV. 43, 49–61, 74–75 (1989). For a modern British perspective, see LAW COMMISSION, *supra* note 220, at 127–28.

³⁴³ See *supra* note 236 and accompanying text.

handwriting, and it is gradually becoming a lost art.³⁴⁴ Even those who still command the art may fail to keep pen and paper readily at hand.³⁴⁵ These factors help to explain resort to electronic wills in several published cases.³⁴⁶ And as incumbent vehicles of emergency estate planning grow less well adapted to a changing social environment, we need replacements to fill the legal niche. E-wills and audio-wills recorded on portable devices can serve that end—imperfectly, to be sure, but more serviceably than the holographic and nuncupative wills of old.

A glance at the trickle of published electronic-will cases suggests the importance of this element. Out of the eighteen cases reported globally thus far, nine involved e-wills made under clear conditions of urgency; in seven of those nine cases, the authors of e-wills committed suicide.³⁴⁷ Cases addressing

³⁴⁴ See Anne Chemin, *Handwriting vs. Typing: Is the Pen Still Mightier Than the Keyboard?*, THE GUARDIAN (Dec. 16, 2014), <https://www.theguardian.com/science/2014/dec/16/cognitive-benefits-handwriting-decline-typing> [https://perma.cc/4VMV-EBAE]; Ewen Hosie, *The Uncertain Future of Handwriting*, BBC (Nov. 8, 2017), <http://www.bbc.com/future/story/20171108-the-uncertain-future-of-handwriting> [https://perma.cc/HZH6-EP4A]; Katie Zezima, *Can You Read This? It's Cursive*, N.Y. TIMES, Apr. 28, 2011, at A15.

³⁴⁵ As a Swedish court weighing the validity of an e-will observed, “[t]hose who have a mobile phone in their pocket are probably far greater in number than those with paper and pen.” Tingsrätt [TR] [District Court] 2012-11-16 T5746-11 (Swed.) (translated from the original Swedish). A British survey of two thousand persons in 2014 found that one in three had written nothing “by hand in the previous six months.” See Chemin, *supra* note 344.

³⁴⁶ See *Estate of Castro*, *supra* note 165, at 414 (“Because they did not have any paper or pencil, [the testator’s brother] suggested that the will be written on his Samsung Galaxy tablet.”). In *Estate of Horton*, the decedent (aged 21) penned his suicide note, referring to an electronic document, in individually printed letters. Whereas the note was four sentences long, the electronic document was three full pages in length, which would have taken quite a while to write out in printed letters. See *Estate of Horton*, 925 N.W.2d at 209 (noting the testator’s age); Exhibits 1 & 2, *Estate of Horton*, 925 N.W.2d 207 (No. 339737).

³⁴⁷ See *Estate of Horton*, 925 N.W.2d at 209 (will created in anticipation of suicide); *Estate of Castro*, *supra* note 165, at 414–15 (will created one month before death); *In re Currie* [2015] NSWSC 1098, ¶¶ 28, 32 (Austl.) (will created three years before death); *Yazbek v. Yazbek* [2012] NSWSC 594, ¶¶ 4, 23, 49 (Austl.) (will created just prior to holiday, but over a year before death by suicide); *In re Nichol* [2017] QSC 220, ¶¶ 3, 13 (Austl.) (will created in anticipation of suicide); *In re Yu* [2013] QSC 322, ¶ 1 (Austl.) (will created on same day as suicide); *Mahlo v. Hehir* [2011] QSC 243, ¶¶ 1, 34–35 (Austl.) (document created two weeks before apparent suicide); *Re Michael* [2016] 126 SASR 299, ¶¶ 2, 10–14 (Austl.) (will create on the same day as attempted suicide, followed by successful suicide four months later); *Montgomery* [2018] VSC 16, ¶¶ 19–27 (will created on the same day as suicide); *In re Trethewey* [2002] VSC 83, ¶¶ 1–2 (Austl.) (will created five months before death); *Hubschi Estate (Re)* (2019), 52 E.T.R. 4th 216, ¶¶ 13, 17 (Can. B.C. Sup. Ct.) (document containing will modified on the date of death, while suffering complications from surgery); *Rioux v. Coulombe* (1996), 19 E.T.R. 2d 201, ¶ 2 (Can. Que. Sup. Ct.) (will created three months before suicide); *Buckmeyer Estate (Re)* (2008), 42 E.T.R. 3d 80, ¶ 5 (Can. Sask. Q.B.) (document indicated that decedent was “very sick and in his last days”); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Metz, civ., Aug. 17, 2018, 17/01794 (Fr.) (will created on same day as suicide, see Corpart, *supra* note 215); *Estate of Feron* [2012] 2 NZLR 551 at [2] & exhibit C (e-mail sent 48 days before death); *Van der Merwe v. The Master* 2010 (6) SA 544 (SCA) at 545–46 (S. Afr.) (will created eight months before death); *Macdonald v. The Master* 2002 (5) SA 64 (N) at 67 (S. Afr.) (will created

the validity of audio- and video-wills echo the same theme. Out of the fourteen cases to date worldwide, eight involved wills recorded close to death, and four of those eight anticipated suicide.³⁴⁸ The fraction of conventional wills prompted by emergencies is far lower, as American and British studies attest.³⁴⁹

The Swedish district court hearing one of these cases took the position that technological convenience justified electronic wills only under conditions of emergency.³⁵⁰ And one cannot but wonder whether American courts have

at uncertain time prior to suicide); Tingsrätt [TR] [District Court] 2012-11-16 T5746-11 (will created on same day as suicide).

³⁴⁸ See *Buckley*, 672 P.2d at 830–32 (audio recording, circumstances unclear); *Wai Fun Chan* [2015] NSWSC 1107, ¶ 35 (DVD recorded 3½ months before death); *Cassie* [2007] NSWSC 481, ¶ 1 (video recorded two years before death); *Edwards* [2000] NSWSC 846, ¶¶ 2, 6 (audio recorded sixteen days before death); *Quinn* [2019] QSC 99, ¶ 1 (video recorded four years before eventual suicide); *Radford* [2018] QSC 306, ¶¶ 2, 4–5 (video recorded fourteen months before death, prompted by risk of an accident that did ensue on the same day as the video was recorded); *Estate of Carrigan* [2018] QSC 206, ¶¶ 1, 9–14 (audio recorded on the day of suicide); *Mellino* [2013] QSC 336, ll. 10–12 (video recorded at unknown time while contemplating suicide); *Russell* [2016] SASC 56, ¶¶ 6, 12 (video recorded within one day of suicide); *In re Wilden* [2015] SASC 9, ¶¶ 2–3 (Austl.) (DVD recorded 8½ years before death); *Estate of Standish* [2018] VSC 629, ¶ 1 (audio recorded one week before death); *Will of Ladduhetti* (Unreported, Supreme Court of Victoria, McMillan, J, 20 Sept. 2013) (two web-cam videos recorded within one week of suicide); *Elphinstone Estate*, 31 E.T.R. 4th 252, ¶ 4 (video recorded two days before death); *Pfaender* [2018] NZHC 161 at [11–12] (audio recorded two weeks before death). For the most recent example, which has not yet generated judicial proceedings, see Travis Fedschun, *Canadian Manhunt Killers Recorded “Last Will and Testament” on Phone Before Killing Themselves*, FOX NEWS (Aug. 20, 2019), <https://www.foxnews.com/world/canadian-manhunt-killers-suicide-video-message-will> [<https://perma.cc/MX8X-6PLS>] (video recorded on iPhone prior to double suicide).

³⁴⁹ See JANET FINCH ET AL., *WILLS, INHERITANCE, AND FAMILIES* 57–58 (1996) (finding that 11% of British wills and one-third of British codicils were created within one year of death); Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 258–60 (2019) (finding that 3.4% of wills submitted for probate in Hamilton County, Ohio were created within one month of death); Horton, *supra* note 323, at 1129–30 (finding that 7% of wills submitted for probate in Alameda County, California were created within one month of death). Professor David Horton also noticed the disproportionate number of suicidal authors of e-wills and speculated that “[i]f that trend continues, electronic will cases may also degenerate into disputes over capacity.” Horton, *supra* note 17, at 575–76; see also UNIF. E-WILLS ACT, *supra* note 92, § 6 cmt. (repeating this observation). In fact, in two of the e-will cases, a suicidal testator’s capacity was challenged unsuccessfully. See *Montgomery* [2018] VSC 16, ¶¶ 4, 55–68; *Nichol* [2017] QSC 220, ¶¶ 47–57; see also Tingsrätt [TR] [District Court] 2012-11-16 T5746-11 (concluding that the testator was not suffering from a “mental disorder” due to alcohol consumption that would have disempowered him from making a will). Even when testamentary capacity is not contested, no presumption of capacity exists for improperly formalized wills under Australian law. See, e.g., *Estate of Carrigan* [2018] QSC 206, ¶ 17. Nonetheless, suicidality is not in itself indicative of testamentary incapacity under American law. See, e.g., *Finkler v. Purcell*, 46 P.2d 149, 153 (Cal. 1935) (“[A]ll persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law [of inheritance] has in mind.”); *Roche v. Nason*, 77 N.E. 1007, 1009 (N.Y. 1906) (similar observation).

³⁵⁰ “It should be emphasized that this reasoning does not in any way refer to ordinary wills but should only apply in cases where the testator is in distress.” Tingsrätt [TR] [District Court] 2012-11-16 T5746-11 (translated from the original Swedish).

also responded, *sotto voce*, to the equities presented by individual cases. Both *Estate of Castro* and *Estate of Horton* concerned testators who were at death's door—and, both times, courts chose to read vague definitional provisions broadly, upholding last-ditch efforts at estate planning.³⁵¹ Would those same courts have taken a permissive stance in the face of less sympathetic facts? Who can say? But, at a minimum, all of these cases demonstrate the potential of e-wills to save the day when emergencies arise.

Were lawmakers to set out a new category of emergency wills, it could borrow a requirement applicable to nuncupative wills to secure them further. Under a longstanding rule, witnesses must reduce nuncupative wills to writing within a short space of time.³⁵² This requirement appears useful in connection with electronic wills for the same reason: to safeguard evidence. Here, though, the risk is less deterioration of memory than vulnerability to tampering, although both could now be implicated. In one of the e-will cases, where the contestant questioned the provability of the will at issue, the court observed that an individual who had discovered and read the e-will testified that she “would ‘[a]bsolutely’ recognize if the [will] had been changed.”³⁵³ Obviously, paper evidence would provide greater security than recollections. This requirement appears less relevant to audio- or video-wills, which would require great sophistication to doctor—yet even those wills remain vulnerable to partial erasure by interested parties.

A key issue remaining is whether emergency e-wills should require a signature or witnesses, as under modern e-will legislation.³⁵⁴ Nuncupative wills have always required multiples witnesses.³⁵⁵ Holographic wills have never required any, but testators do have to sign them.³⁵⁶ Neither requirement appears well adapted to the purpose of emergency testation, where time is of the essence. A dying testator might be alone; and the difficulty of generating a cursive signature argues against anything more than a typed name. Among the eighteen published cases to date, only a single one has involved an e-will

³⁵¹ See *supra* notes 165–187 and accompanying text.

³⁵² This requirement appeared in the British statute of frauds of 1677 and was replicated in the Model Probate Code. See Statute of Frauds 1677, 29 Car. 2, c. 3, § 19 (Eng.); MODEL CODE, *supra* note 101, § 49(a)(2). It persists today in seven nuncupative-will jurisdictions in the United States. See Hirsch, *supra* note 314, at 854 n.287.

³⁵³ *Estate of Horton*, 925 N.W.2d at 213 n.5.

³⁵⁴ See *supra* notes 123–127 and accompanying text.

³⁵⁵ This requirement traces to the British statute of frauds. See Statute of Frauds 1677, 29 Car. 2, c.3, § 18 (Eng.). Traditionally, gifts causa mortis in the United States have not required witnesses, although the absence of such a requirement has caused courts to brand them as “dangerous things.” *Foster v. Reiss*, 112 A2d 553, 557 (N.J. 1955) (quoting *Dunn v. Houghton*, 51 A. 71, 78 (N.J. Ch. 1902)). Statutes in two states do require witnesses for gifts causa mortis. See Hirsch, *supra* note 314, at 848.

³⁵⁶ See, e.g., UNIF. PROB. CODE § 2-502(b) (amended 2019), 8 pt. 1 U.L.A. 209 (2013).

signed and witnessed longhand on a tablet.³⁵⁷ None of the others were witnessed, “[a]s can be expected,” one court observed.³⁵⁸ Five of the others included no signature, eight more included a typed signature (or initials), one included a digital facsimile of the testator’s signature, one included a handwritten signature on a label upon the electronic record, and in two cases the nature of the signature was unclear.³⁵⁹

In point of fact, when the will at issue appears on a smart phone, as in five of the cases, typing becomes the only option. And, of course, when the will is audio- or video-recorded, as in another sequence of cases, no manner of signing is possible. If lawmakers wish to allow these kinds of emergency wills, then necessity dictates procedural lenity. At the same time, the presence of a handwritten signature or other handwriting on a label, envelope, or side document should remain relevant to the authentication of electronic wills, even if not obligatory.³⁶⁰

In this respect, the current generation of e-will statutes is ill-suited to emergency testation. All require signatures and witnesses and none includes a dispensing power.³⁶¹ Only the Uniform Act could serve in this capacity. Its optional provision creating a dispensing power for e-wills would permit a court to validate an emergency e-will that lacked a signature and witnesses, a provision the drafters added (at least in part) with emergency wills in mind.³⁶²

Assuming they confined electronic wills to emergency estate planning, lawmakers would need to define that concept. They could do so in either of two ways. Lawmakers could establish a clear rule, allowing testators to create e-wills within a specified number of days of death. Mortmain statutes formerly

³⁵⁷ See *Estate of Castro*, *supra* note 165, at 415.

³⁵⁸ *Macdonald* 2002 (5) SA 64 (N) at 64, 69.

³⁵⁹ *No signature: Mahlo* [2011] QSC 243, ¶¶ 6, 41; *Hubschi Estate*, 52 E.T.R. 4th 216, ¶ 15; *Van der Merwe* 2010 (6) SA 544 (SCA) at 546; *Macdonald* 2002 (5) SA 64 (N) at 69; *Tingsrätt [TR]* [District Court] 2012-11-16 T5746-11. *Typed signature: Estate of Horton*, 925 N.W.2d at 209; *Yazbek* [2012] NSWSC 594, ¶ 26; *Nichol*, [2017] QSC 220, ¶ 14 (initials); *Yu*, [2013] QSC 322, ¶ 9; *Montgomery* [2018] VSC 16, ¶ 37; *Trethewey* [2002] VSC 83, ¶ 21; *Buckmeyer Estate*, 42 E.T.R. 3d 80, ¶ 5; *Estate of Feron* [2012] 2 NZLR 551 at [21] & exhibit C (HC) (first name only). *Facsimile signature: Michael* [2016] 126 SASR 299, ¶ 7. *Signature on label: Rioux*, 19 E.T.R. (2d) 201, ¶ 3. *Unclear: Currie* [2015] NSWSC 1098, ¶ 49 (“[T]he document was ‘signed’ by [the testator] . . .”) (probably implying by the use of punctuation marks that the signature was typed); *Tribunal de grande instance [TGI]* [ordinary court of original jurisdiction] Metz, civ., Aug. 17, 2018, 17/01794 (no discussion of the presence or absence of a signature).

³⁶⁰ See *Estate of Horton*, 925 N.W.2d at 213 n.5 (emphasizing the importance of a handwritten, but not signed, journal entry indicating the location of the e-will for the same purpose); *Rioux*, 19 E.T.R. 2d 201, ¶ 28 (emphasizing the importance of the signature on a label attached to the floppy disk to authenticate the document); see also *Edwards* [2000] NSWSC 846, ¶ 8 (noting that the testator signed labels both on an audio-will and on its container).

³⁶¹ See *supra* notes 123–127, 134 and accompanying text. Nor do any of these states have a general dispensing power that could be interpreted to apply to e-wills. See *supra* notes 80–81 and accompanying text.

³⁶² See UNIF. E-WILLS ACT, *supra* note 92, § 6 & cmt.

adopted this formula.³⁶³ Alternatively, lawmakers could impose a standard, allowing testators to create electronic wills when “in peril of death,” or some such language, as under existing gift causa mortis and nuncupative will statutes.³⁶⁴

On reflection, the second approach appears preferable from the standpoint of public policy. At a structural level, the characteristics of rules versus standards are well known. Although sometimes arbitrary, a bright-line rule produces certainty, which both facilitates planning and reduces litigation; by contrast, a standard does justice case by case, albeit at the cost of greater litigation.³⁶⁵ Oddly, emergency wills fail to implicate the usual tradeoff. Because testators cannot predict exactly when they will die, a formalizing rule limited to those expiring within a fixed time still generates uncertainty *ex ante*. And an electronic or recorded will could even engender uncertainty *ex post* (and thereby litigation) if the date of its creation was unclear.

At the same time, a standard can limit uncertainty by importing the preexisting store of precedents for determining emergency conditions applicable to either gifts causa mortis or nuncupative wills. Although sometimes analogized, these two instruments have operated historically according to different standards.³⁶⁶ And between the two, public policy is better served by looking to gifts causa mortis for guidance. These have produced a larger body of living law; the nuncupative-will cases are fewer, older, and moribund.³⁶⁷

Irrespective of whether we follow a rule or a standard, a problem remains: How do we determine when an electronic will came into existence? If it was prepared all at once, the answer will likely be clear; but a case could arise where a testator drafted a will on a computer, intending to paperize it eventually, and then finalized it electronically during an emergency. If lawmakers insisted that testators execute e-wills in the presence of witnesses, evidence of finalization would be available—that is one benefit of imposing an execution requirement. But in the absence of that requirement, which would impede emergency estate planning, the time when—if at all—the testator decided to render an electronic draft legally performative could present an issue of fact.

³⁶³ Statutory windows ranged between one month and one year prior to death. *See Note, Standing to Contest Wills Violating Charitable Bequest Statutes*, 50 COLUM. L. REV. 94, 94 nn.2–3 (1950).

³⁶⁴ *See, e.g.*, MONT. CODE ANN. § 70-3-201 (2019) (“in contemplation, fear, or peril of death,” applicable to gifts causa mortis); TENN. CODE ANN. § 32-1-106(a) (2019) (“in imminent peril of death,” applicable to nuncupative wills). Exact phrasing varies from state to state.

³⁶⁵ *See, e.g.*, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590–93 (1988).

³⁶⁶ *See Hazleton*, 20 Johns. Cas. at 513–14 (Chancellor Kent) (“a very close analogy”). Gifts causa mortis are valid within a wider temporal range of peril than nuncupative wills. *See Irish v. Nutting*, 47 Barb. 370, 387 (N.Y. Gen. Term 1867); *Nicholas v. Adams*, 2 Whart. 17, 22–23 (Pa. 1836); *Smith v. Sandt (In re Estate of Smith)*, 694 A.2d 1099, 1104 (Pa. Super. Ct. 1997).

³⁶⁷ They also produced conflicting precedents concerning the extent of the peril required to validate a nuncupative will. *See Baird v. Baird*, 79 P. 163, 165–67 (Kan. 1905) (remarking the conflict).

The same problem can arise in connection with holographic wills, which require no witnesses. In want of evidence regarding when a testator penned a holograph, courts face the difficulty of assessing the testator's state of mind at a time unknown, or even the difficulty of determining which among multiple candidates comprised the testator's *last* will.³⁶⁸ Three jurisdictions that allow holographic wills compensate for the lack of witnesses by requiring testators to date the will,³⁶⁹ and two more create adverse presumptions in the absence of date.³⁷⁰

Lawmakers could pursue a similar strategy for unexecuted emergency wills. In lieu of witnesses, the statute could require that a date appear on the face of the will.³⁷¹ The testator's act of opening an older electronic document and then adding a date during the period of the emergency would, through this semi-formal act, both suggest his or her intent to render the document legally performative and reveal the time when that intent crystalized. In want of a date, lawmakers could require a reference to the emergency within the contents of the electronic document or, alternatively, metadata showing that the testator initially created the document during the emergency—thereby allowing a court to infer performative intent from the circumstances. More flexibly, lawmakers might authorize courts to probate an electronic document shown to have been accessed during an emergency, or one identified in a paper document that either includes a date or evinces the emergency, such as a suicide note. Again, lawmakers could deem the act of accessing (and presumably reviewing) an electronic document at a fraught time, or of producing a referential paper document at such time, as sufficient to signal performative intent in respect of the electronic document.³⁷²

The extant electronic will cases suggest the adequacy of such rules. Among the eighteen published cases to date, both in the United States and elsewhere, one concerned an electronic record created in the presence of witnesses;³⁷³ seven concerned dated records;³⁷⁴ two concerned dated records whose subsequent date of modification was shown by metadata;³⁷⁵ six con-

³⁶⁸ See *In re Estate of Rozsypal*, Nos. B181023, B181024, 2006 WL 1000118, at *16 (Cal. Ct. App. Apr. 18, 2006) (raising this problem).

³⁶⁹ See LA. CODE CIV. PROC. ANN. art. 2883(a) (2019); MICH. COMP. LAWS § 700.2502(2) (2019); NEV. REV. STAT. § 133.090(1) (2017).

³⁷⁰ See CAL. PROB. CODE § 6111(b) (West 2019); NEB. REV. STAT. ANN. § 30-2328 (West 1980).

³⁷¹ Cf. *supra* notes 124–125 and accompanying text.

³⁷² See *Yazbek* [2012] NSWSC 594, ¶ 57 (“I infer from this evidence that Daniel opened [the document eighteen days before committing suicide] and looked at it. . . . He was content to leave [the document] on his laptop as it was and as it was later found.”).

³⁷³ See *Estate of Castro*, *supra* note 165, at 414.

³⁷⁴ See *Currie* [2015] NSWSC 1098, ¶ 33; *Nichol* [2017] QSC 220, ¶ 13; *Yu* [2013] QSC 322, ¶ 9; *Michael* [2016] 126 SASR 299, ¶¶ 9, 14; *Trethewey* [2002] VSC 83, ¶ 8; *Buckmeyer Estate*, 42 E.T.R. 3d 80, ¶ 5; *Estate of Feron* [2012] 2 NZLR 551 at [14] & exhibit C.

³⁷⁵ See *Montgomery* [2018] VSC 16, ¶¶ 19–21, 33; *Rioux*, 19 E.T.R. (2d) 201, ¶ 27.

cerned undated records whose date of creation, last amendment, and last access could be shown by metadata;³⁷⁶ one concerned an undated record identified in an undated, handwritten note, both of which identified the emergency;³⁷⁷ and one concerned a record identified in a dated, handwritten note.³⁷⁸ As for the fourteen audio- and video-will cases, two concerned dated recordings;³⁷⁹ four concerned witnessed recordings;³⁸⁰ one concerned a recording that referred to an emergency;³⁸¹ one concerned an undated recording whose metadata indicated the time of creation;³⁸² four concerned undated recordings whose time of creation was approximated through other means;³⁸³ one concerned a recording referred to in a dated but non-dispositive testamentary instrument;³⁸⁴ and one concerned a recording of unknown date.³⁸⁵

And consider the flip side of this problem: a testator could create an electronic will during an emergency yet manage to survive it. In a majority of jurisdictions, if the donor of a gift causa mortis cheats death, the gift is revoked by operation of law.³⁸⁶ But, of course, gifts causa mortis involve immediate transfers occasioned by mortality; it stands to reason that if donors recover, they will also want to recover their property. By contrast, emergency wills take effect upon death. A testator galvanized by an emergency to formulate an estate plan has no reason to revoke it once the danger has passed.³⁸⁷

³⁷⁶ See *Yazbek* [2012] NSWSC 594, ¶¶ 25, 49; *Mahlo* [2011] QSC 243, ¶ 4; *Hubschi Estate*, 52 E.T.R. 4th 216, ¶¶ 15, 17; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Metz, civ., Aug. 17, 2018, 17/01794 (text message); *Van der Merwe* 2010 (6) SA 544 (SCA) at 544, 545–46; *Tingsrätt* [TR] [District Court] 2012-11-16 T5746-11 (text message).

³⁷⁷ See *Estate of Horton*, 925 N.W.2d at 209.

³⁷⁸ See *Macdonald* 2002 (5) SA 64 (N) at 64, 67–68.

³⁷⁹ See *Quinn* [2019] QSC 99, ¶ 30; *Radford* [2018] QSC 306, ¶ 5.

³⁸⁰ See *Wai Fun Chan* [2015] NSWSC 1107, ¶ 35; *Estate of Standish* [2018] VSC 629, ¶ 1; *Elphinstone Estate*, 31 E.T.R. 4th 252, ¶ 11; *Pfaender* [2018] NZHC 161 at [13].

³⁸¹ See *Mellino* [2013] QSC 336, l. 12.

³⁸² See *Russell* [2016] SASC 56, ¶ 12.

³⁸³ See *Cassie* [2007] NSWSC 481, ¶ 7 (“[A] video recording made . . . probably in August 2003.”); *Wilden* [2015] SASC 9, ¶ 3 (“The DVD . . . appears to have been made on 11 May 2005.”); *Estate of Carrigan* [2018] QSC 206, ¶ 13 (“[D]uring the recording . . . a telephone ringing in the background [is] consistent with [a call made] at 5:24pm”); *Will of Ladduhetti* (Unreported, Supreme Court of Victoria, McMillan, J, 20 Sept. 2013) (relying on evidence stated in the affidavit of Sandy Allen Maloney).

³⁸⁴ See *Edwards* [2000] NSWSC 846, ¶ 6. In this case, because an executed will referred to an audio tape that the court certified as a will, the executed will technically functioned to republish the audio-will. See *id.* ¶ 37.

³⁸⁵ See *Buckley*, 672, P.2d at 830.

³⁸⁶ See RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 7.19, at 141 (Walter B. Raushenbush ed., 3d ed. 1975). But cf. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (taking the minority view that the gift remains effective unless the donor “revoke[s] within a reasonable time after the donor is no longer in apprehension of imminent death”).

³⁸⁷ For this reason, if a will refers expressly to a peril faced by the testator, courts prefer to construe the statement as explaining the inducement for testation, rather than as establishing a condition for the will’s effectiveness. See 1 PAGE, *supra* note 58, § 9.5.

Still, if a testator succeeds in navigating a peril and lives on, a gap will yawn between the time when the will was created and when it matures. During that interval, the risk of fraud and other evidentiary difficulties with informal wills again looms large. Presumably for this reason, a nuncupative will is valid, in jurisdictions that allow them, only if the testator succumbs to the peril.³⁸⁸ Following a brush with death, the testator has time to spare; he or she must then replace an emergency oral will with a traditional will. Lawmakers could justifiably impose the same obligation on the creator of an emergency e-will, on the same basis.

Yet in one other respect, the law applicable to emergency wills should diverge from that of emergency gifts. By the weight of authority, a donor cannot make a gift *causa mortis* in anticipation of suicide.³⁸⁹ Although suicide constitutes a self-created peril, it is peril nonetheless, and it is typically an impulsive act, leaving victims short of time.³⁹⁰ Suicidal testators have executed an out-sized fraction of both electronic and audio- and video-recorded wills.³⁹¹ Lawmakers should validate those wills irrespective of whether the attendant crisis was physical or psychological.³⁹²

³⁸⁸ See *Baird*, 79 P. at 166 (dicta); *In re Will of Yarnall*, 4 Rawle 46, 62 (Pa. 1833) (dicta) (observing that “if [the testator] recovers he . . . has time to make a written will”). The Model Probate Code codified this rule, which appears by statute in four jurisdictions. MODEL CODE, *supra* note 101, § 49 (a); see IND. CODE § 29-1-5-4(a); MO. REV. STAT. § 474.340(1) (2016); N.C. GEN. STAT. § 31-3.5(a) (2012); TENN. CODE ANN. § 32-1-106(a). Under German and Swedish law, emergency wills become void if the testator survives the peril by three months, see BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 2252 (Ger.); ÄRVDAVALK [ÄB] [INHERITANCE CODE] 10:3 (Swed.), or six months under French law, see CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 984, 987, 994 (Fr.), or “[w]hen the emergency situation is over” under Chinese law, see P.R.C. Law of Succession, *supra* note 327, art. 17.

³⁸⁹ For references, see Hirsch, *supra* note 314, at 846 n.237. No reported American case has addressed this issue in connection with nuncupative wills.

³⁹⁰ One study reporting data from China found that 92% of respondents made the decision to commit suicide less than a day before the attempt, 58.8% less than two hours before the attempt, and 40% less than ten minutes before the attempt. See Veronica Pearson et al., *Attempted Suicide Among Young Rural Women in the People’s Republic of China: Possibilities for Prevention*, 32 SUICIDE & LIFE-THREATENING BEHAV. 359, 362 (2002).

³⁹¹ See *supra* notes 347–348 and accompanying text.

³⁹² See *Tingsrätt* [TR] [District Court] 2012-11-16 T5746-11 (so ruling). Query, however, whether e-wills prompted by other sorts of self-created perils, such as daredevil pastimes, should qualify as emergency wills, given that testators have greater psychic opportunity to prepare ahead of time for a planned hazard. See *Radford* [2018] QSC 306, ¶¶ 4–5 (motorcycling); *Tingsrätt* [TR] [District Court] 2012-11-16 T5746-11 (parachuting, prior to suicide). Also, should subjective phobias suffice to create emergencies, or should the peril have to be objective? Phobic testators sometimes write “emergency” holographic wills before boarding planes. See *Osterkamp v. Weeks* (*In re Estate of Nelson*), 250 N.W.2d 286, 287 (S.D. 1977). For gift *causa mortis* cases raising this issue, see Hirsch, *supra* note 314, at 846 n.238.

B. Anti-Electronic Wills

Lawmakers who would address the law of electronic wills definitively need to do more than establish them within the discrete category of emergency estate planning. They need also to disestablish e-wills within the general category of *leisurely* estate planning. The prevailing mélange of enigmatic definitions, ambiguous harmless-error rules, and liberal choice-of-law rules enables courts, if so inclined, to countenance e-wills without a word of new legislation. Cases like *Taylor v. Holt*, *Estate of Castro*, and *Estate of Horton* are proof enough of that.³⁹³ To avert more such litigation, lawmakers must take affirmative steps to clarify the status of e-wills across the board, allowing them when they wish to allow them and forbidding them otherwise.

The current state of affairs arose unwittingly. That the Floridians enacted a definitional provision whose plain meaning makes possible electronic wills and then proceeded to brawl furiously over e-will legislation, oblivious to existing definitions, says it all.³⁹⁴ In point of fact, the Floridians would never have provided for e-wills deliberately in so inscrutable a fashion. Legislators do not “hide elephants in mouseholes.”³⁹⁵ But, manifestly, the herd sometimes strays from its assigned path, and then it is up to legislators to get a grip on their menagerie.³⁹⁶

To restore clarity in the wake of technological change, legislators should amend the law in several ways. Initially, they should modify state statutes of wills unequivocally to exclude digital communication from the definition of a “writing” and of a “signature” as required for wills. Legislators can do so by adding new definitions limited to this one statute, leaving in place general definitions that pertain to other instruments or materials. Such a provision would operate as the foundational anti-electronic will statute. Yet, as our review of existing law has shown, a foundational statute alone cannot suppress e-wills with assurance.

Legislators should also amend choice-of-law statutes that validate wills created beyond the testator’s domicile expressly to except electronic wills from the statute’s purview.³⁹⁷ To be sure, voiding e-wills that testators validly created elsewhere could confound their expectations. But wills of this sort are suffi-

³⁹³ See *supra* Part IV.A.

³⁹⁴ See *supra* text accompanying notes 261–263.

³⁹⁵ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (Scalia, J.).

³⁹⁶ The problem of unintended consequences is familiar to any student of legislation. For additional examples, see Adam J. Hirsch, *Disclaimer Law and UDPIA’s Unintended Consequences*, 36 EST. PLAN., Apr. 2009, at 34 *passim*.

³⁹⁷ The drafters of the Uniform E-Wills Act anticipate such legislation. See May 2019 Memo, *supra* note 138, at 2. Likewise, in seventeen states where, by statute, local law defers to the formalizing rules of the domicile as concerns real property located in those states, see *supra* note 102, legislators should carve out an exception for e-wills: If an e-will stands at issue, real property located in the state should be governed by the law of the situs, as under the common law.

ciently exotic that few testators are likely to presume their universal validity, as empirical evidence presented earlier suggests.³⁹⁸

One commentator posits that “the full faith and credit clause may require that a [state] court probate an electronic will that is valid under the laws of another state.”³⁹⁹ That would be so—if at all—only under unusual circumstances. In any event, the Full Faith and Credit Clause poses no constitutional obstacle to a choice-of-law provision that bars e-wills from probate.

The Clause demands fidelity “in each State to the public Acts . . . and judicial Proceedings of every other state.”⁴⁰⁰ In other words, the Clause binds state courts to respect *statutes enacted* and *judgments rendered* in sister states. Nevada’s electronic-will statute provides that an electronic will executed remotely in the state “will be governed by the laws of this State and subject to the jurisdiction of the courts of this State” if either a witness, notary, or qualified custodian for the will is located or organized in Nevada.⁴⁰¹ Does that mean a beneficiary can go to Nevada, obtain a court order validating an e-will created there, and insist that a court in the decedent’s domicile grant probate under the Clause, even though the domicile acknowledges only paper wills? The answer is *no*. The Clause requires a state to abide by extraterritorial judgments only insofar as choice-of-law principles qualify those judgments as controlling.⁴⁰² Even then, courts have asserted the right to reject extraterritorial law when it offends the public policy of the forum, notwithstanding the Clause.⁴⁰³ At any rate, under conventional choice-of-law principles, the law of the domicile governs probate of personal property, whereas the law of the situs governs probate of real property.⁴⁰⁴ Assuming, then, that a testator dies domiciled in State A, the fact that he or she executed a will with the assistance of a qualified custodian in State B makes no difference: The law of State A controls, and any deference State A pays to the law of wills in State B comprises a matter of local discretion, not a constitutional imperative.

³⁹⁸ See *supra* text accompanying notes 293–294.

³⁹⁹ Herbert A. Stroh, *From the Chair*, 24 CAL. TR. & EST. Q., no. 1, at 3 (2018).

⁴⁰⁰ U.S. CONST. art. IV, § 1, cl. 1.

⁴⁰¹ NEV. REV. STAT., § 133.088(1)(e) (2017).

⁴⁰² See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 297 (1992) (“[O]nly a single determinate set of choice-of-law rules can implement the Full Faith and Credit Clause. In this way, the Clause is like the contemporaneous Rules of Decision Act, which tells federal courts to apply state law in cases where it applies, but does not say when state law applies.”); see also PETER HAY ET AL., CONFLICT OF LAWS 54 (6th ed. 2018) (examining the case law); Millonig, *supra* note 220, at 35, 37 (drawing the same conclusion and citing to other sources).

⁴⁰³ See, e.g., *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 528–29 (N.Y. 1961). But cf. *id.* at 535 (Froessel, J., concurring) (questioning the majority’s conclusion that its judgment was compatible with the Clause).

⁴⁰⁴ See *supra* note 99.

As matters stand, only nine of the forty-six state choice-of-law statutes validating wills executed according to the formalizing rules of relevant sister states do so without qualification.⁴⁰⁵ Thirty-seven cover only written wills, thereby excluding nuncupative wills created outside the domicile.⁴⁰⁶ Ten are also confined to signed wills, thereby limiting the application of a sister state's harmless-error rule.⁴⁰⁷ And one excludes both nuncupative and holographic wills.⁴⁰⁸ An additional exclusion for electronic wills would coincide with these restrictions. None has ever provoked a challenge under the Full Faith and Credit Clause.

If a testator owned real property in a state other than the domicile, then the law of two (or more) states would govern the validity of his or her will. But under choice-of-law principles, the validity *vel non* of an electronic will in the domicile would have no bearing on its validity in a situs-state, and vice versa. Probate as to personal and real property would proceed "as if devised by separate wills."⁴⁰⁹ The Clause would require neither state to bow to the formalizing rules of the other, because each proceeding "establish[es] nothing beyond the limit of the State where the probate took place."⁴¹⁰

Only in the unusual situation where a court takes jurisdiction over probate proceedings other than in the normal course might the Clause operate. If a court in the domicile were to probate real property located in another state, then it would have to follow the formalizing rules of the situs; by the same token, if a court in a situs-state were to probate personal property, then it would

⁴⁰⁵ See *supra* note 104 and accompanying text.

⁴⁰⁶ See, e.g., UNIF. PROB. CODE § 2-506 (amended 2019), 8 pt. 1, U.L.A. 221 (2013). The states enforcing this restriction are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida (by implication), Hawaii, Idaho, Illinois (by implication), Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming.

⁴⁰⁷ This restriction originated in a former Uniform Act, long before the advent of the harmless-error provisions that made the restriction significant. See UNIF. WILLS ACT, FOREIGN EXECUTED (1910), *quoted in* 7 SCOTT ET AL., *supra* note 101, § 45.4.1.1, at 3185 n.14. The restriction exists today in: Illinois, Iowa, Kansas, Louisiana, Maryland, Nevada, New York, Oregon, Rhode Island, and Vermont.

⁴⁰⁸ See FLA. STAT. ANN. § 732.502(2) (West 2003). This statute is not expressly confined to written wills, however. See *id.* (referring to "[a]ny will").

⁴⁰⁹ *Trotter v. Van Pelt*, 198 So. 215, 217 (Fla. 1940).

⁴¹⁰ *Id.* (citing to prior cases); see also, e.g., *First Presbyterian Church v. Hodge (In re Barrie's Estate)*, 35 N.W.2d 658, 661 (Iowa 1949) ("It is generally held that the full faith and credit provision . . . does not render foreign decrees of probate conclusive as to the validity of a will, as respects real property situated in a state other than the one in which the decree was rendered . . .") (citing to prior cases); *Marr v. Hendrix*, 952 S.W.2d 693, 694–95 (Ky. 1997) (same); *In re Estate of Biggs*, 134 S.E.2d 737, 740 (W. Va. 1964) (same). In the most recent case, the issue was treated summarily and then appealed on other constitutional grounds. See *Lee v. Estate of Payne*, 148 So. 3d 776, 777–78 (Fla. Dist. Ct. App. 2013), *appeal denied* 132 So. 3d 221 (2013).

have to follow the formalizing rules of the domicile.⁴¹¹ In these cases, the Clause would function to enforce traditional choice-of-law principles, not to override them. To the extent, then, that a state seeks to give effect to electronic wills created by citizens of sister states, the Clause serves to constrain the state asserting such jurisdiction, rather than the state where the testator was domiciled. Nevada's e-will legislation permits Nevada courts not merely to prove, but to probate e-wills "executed or deemed to be executed in [Nevada] or pursuant to the laws of this State," if the custodian of the will had an office there.⁴¹² In such a case, a party could invoke the Clause to insist that the probate court in Nevada defer to the statute of wills (and the choice-of-law statute) of the domicile. In the absence of such deference, a court in the domicile would have no obligation to honor letters testamentary or other orders issued by a court in Nevada regarding the disposition of a decedent's property located outside Nevada.⁴¹³

Three other doctrines raise different issues. If a testator executes a will on paper that incorporates by reference bequests on a computer file—what we have called a semi-electronic will—difficulties of proof and risks of fraud arise similar to those that would plague a fully-electronic will.⁴¹⁴ Yet, there is also a difference: Incorporation by reference comprises a remedial doctrine for testators who know no better than to express dispositive terms beyond the four walls of an executed will.⁴¹⁵ As such, the doctrine operates to waive formal requirements. And if we are waiving requirements, then allowing a testator to incorporate digital images along with writings appears but a small step.⁴¹⁶ Unlike legislation validating e-wills, a statute allowing semi-electronic wills

⁴¹¹ See *Dennis v. Circuit Court (In re Estate of Warner)*, 468 N.W.2d 736, 738–40 (Wis. Ct. App. 1991) (observing with regard to a petition for original probate outside the domicile that, were the petition granted, the court would apply the law of the domicile).

⁴¹² NEV. REV. STAT. § 136.185(1) (2017); see also H.B. 1403, 2018 Leg., Reg. Sess. § 64.2-443(C) (Va. 2018) (unenacted) (similar provision).

⁴¹³ Given the traditional restriction of probate either to the domicile or situs of real property, other states might reject Nevada's extraordinary claim of probate jurisdiction over e-wills executed in Nevada in any event. See UNIF. PROB. CODE § 3-408 (amended 2019), 8 pt.2 U.L.A. 101 (2013) (rendering determinative final orders from probate proceedings in another state only if "the decedent was domiciled at his death in the state where the order was made").

⁴¹⁴ Counsel raised the possibility of validating an electronic record via incorporation by reference in one of the extant e-will cases, where a paper suicide note accompanied the electronic one, but the court failed to address the argument. See Brief in Support of Standing and Recognition of Will, *supra* note 186, at 9; *Estate of Horton*, 925 N.W.2d at 207–15. In dicta, an Australian court asserted that an executed will referring to a preexisting audio-tape could incorporate the audio-tape by reference. See *Edwards* [2000] NSWSC 846, ¶¶ 32–36.

⁴¹⁵ "Incorporation by reference thus touches the lawyer's activities as a morbid anatomist of wills rather than as a draftsman . . ." Armistead M. Dobie, *Testamentary Incorporation by Reference*, 3 VA. L. REV. 583, 584 (1916).

⁴¹⁶ A computer file even has an advantage over paper vis-à-vis incorporation by reference: metadata can date the record a testator is incorporating, which is essential to applying the doctrine. See *supra* text accompanying note 59.

should have a marginal impact on behavior *ex ante*. Such a statute would function as a safety-net not for distressed, but for ignorant testators.

The same can be said of harmless-error rules. In those states that grant courts a dispensing power, lawmakers need to resolve the ambiguity reflected in the Uniform Probate Code's prototype.⁴¹⁷ Were they to amend the dispensing power to permit courts to probate electronic wills, as foreign jurisdictions have done,⁴¹⁸ and as *Estate of Horton* allowed,⁴¹⁹ lawmakers would not encourage their use. Remedial rules primarily affect events *ex post*, not behavior *ex ante*. Nor would a dispensing power applicable to e-wills facilitate their commercialization. Firms could scarcely market e-wills as standard vehicles if their validity hinged on a case-by-case evaluation of their authenticity and performative significance.

A dispensing power applicable to electronic wills would render unnecessary separate emergency-will legislation, and it has functioned well enough for this purpose in foreign jurisdictions. Canadian and Australian jurisdictions have favored this "middle ground" approach, as one Canadian report put it, and Canada's Uniform Law Conference along with Australia's National Committee on Uniform Succession Laws have endorsed it.⁴²⁰ To be sure, whether a decedent intended to give legal effect to an e-will that was not formalized, or to an audio- or video-will, may be unclear. This issue has arisen in a number of foreign cases resolved under the dispensing power.⁴²¹ Still, foreign courts do appear to have treated the issue thoughtfully, and evidence from California

⁴¹⁷ See *supra* notes 85–97 and accompanying text.

⁴¹⁸ See *supra* notes 197, 201 and accompanying text.

⁴¹⁹ See *supra* notes 176–186 and accompanying text.

⁴²⁰ BRITISH COLUMBIA LAW INST., WILLS, ESTATES AND SUCCESSION: A MODERN LEGAL FRAMEWORK 29–33 (2006) (quotation at 32); UNIF. WILLS ACT §§ 3, 10 (Uniform Law Conference of Canada 2015) (as amended in 2003); NAT'L COMM. FOR UNIF. SUCCESSION LAWS, REPORT 85, UNIFORM SUCCESSION LAWS: THE LAW OF WILLS pt. 1, at 3–4, pt. 3, at 3–6 (1998); see also LAW REFORM COMM'N OF SASKATCHEWAN, REPORT ON ELECTRONIC WILLS 26–33 (Oct. 2004), <https://lawreformcommission.sk.ca/electwills2.pdf> [<https://perma.cc/URX8-GFMU>] (advocating the same solution). For the relevant statutes, see *supra* notes 197, 201 and accompanying text.

⁴²¹ See *Yazbek* [2012] NSWSC 594, ¶¶ 110–112 (finding testamentary intent despite circumstance that electronic document was in the form of a letter); *Cassie* [2007] NSWSC 481, ¶¶ 14–15 (finding that a video recording lacked testamentary intent); *Nichol* [2017] QSC 220, ¶¶ 17, 61 (finding testamentary intent despite circumstance that text message was not sent); *Mahlo* [2011] QSC 243, ¶¶ 41–45 (finding that an electronic document lacked testamentary intent); *Estate of Standish* [2018] VSC 629, ¶¶ 40–41 (concerning an audio recording of instructions to a drafting attorney where decedent indicated that the record should comprise a will if he died before he could execute a will prepared on the basis of his instructions); *Hubschi Estate*, 52 E.T.R. 4th 216, ¶¶ 15, 58 (finding that an electronic document reflected the decedent's "testamentary intentions" despite the fact it began with the sentence "Get a will made out at some point"); *Pfaender* [2018] NZHC 161 at [33] (accepting an audio recording of instructions to a drafting attorney as "compelling" evidence of "the will maker's intentions"); *Estate of Feron* [2012] 2 NZLR 551 at [18] (HC) (accepting an e-mail by the decedent and attorney's notes as "the skeleton for a will").

suggests that a dispensing power can operate without amplifying rates of probate litigation.⁴²²

Thus far, the dispensing power has taken root in only a handful of American states, and it shows no signs of gaining traction.⁴²³ States disinclined to create a general dispensing power could nonetheless create a narrow one applicable to e-wills, along with audio- and video-wills.⁴²⁴ Such a move would represent a simple and concise alternative to emergency-will legislation.

Finally, there remains the matter of living trusts. By tradition, settlors can create living trusts without formalizing them in any way.⁴²⁵ In that context, electronic living trusts appear unobjectionable: If an oral declaration suffices to make a trust, then so should an electronic record. Accordingly, lawmakers have no reason to enact anti-electronic-trust legislation.

At the same time, we can question the decision to distinguish the formalizing rules applicable to living trusts from those pertaining to wills. Because they comprise simulacrum of wills, living trusts should operate under the substantive law of wills—a guideline the reporters of Uniform Acts and Restatements acknowledge.⁴²⁶ Yet even model lawmakers make an exception for formalizing rules, for no sound reason.⁴²⁷ Were they to endeavor to unify the law of wills and living trusts more fully, confining the fiction that living trusts operate inter vivos exclusively to the implication that they avoid probate, lawmakers could treat e-wills and e-trusts as counterparts. But this is a structural matter transcending the desirability of electronic instruments *qua* substantive law. At least in those states where lawmakers have heeded the call already and

⁴²² See David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2058–65 (2018). The drafters of the Uniform Act fear that reliance on a dispensing power to give effect to e-wills “requires a judicial decision” and thereby “could increase costs for parties and courts,” whereas a full-fledged e-wills act can “streamline the process of validating those wills.” UNIF. E-WILLS ACT, *supra* note 92, prefatory note. Empirical evidence of the functionality of the dispensing power in California should allay this concern.

⁴²³ Recent state adoptions and updates of the Uniform Probate Code have omitted the dispensing power. See ME. REV. STAT. ANN. tit. 18-C, § 2-502 & Me. cmt (enacted 2019); MASS. GEN. LAWS ANN. ch. 190B, § 2-503 (enacted 2012).

⁴²⁴ For an American proposal to permit electronic, audio-, and video-wills by way of an expanded dispensing power in a state where a limited dispensing power already exists for paper wills, see Julia Kelety, *California Can Lead the Way on Electronic Wills*, L.A. DAILY J., Apr. 15, 2019, at 6. In jurisdictions lacking a general dispensing power, one tailored singularly for e-wills could resemble a provision found in the Uniform Act (which drafters could expand also to cover audio- and video-wills), leaving out the rest of that act. See UNIF. E-WILLS ACT, *supra* note 92, § 6 (Alternative A) & Legislative Note.

⁴²⁵ See *supra* Part I.C.

⁴²⁶ See UNIF. TRUST CODE prefatory note, §§ 112, 601 (amended 2010); 7C U.L.A. 368, 453, 545 (2006); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 & cmt. a.

⁴²⁷ For a further discussion, see Hirsch, *supra* note 314, at 858–62. *But cf.* Charles A. Redd, *Are Will Execution Formalities Outmoded?*, TR. & EST., July, 2018, at 10, 11 (suggesting reconciliation by abolishing will formalities).

require settlors to formalize living trusts in a signed writing,⁴²⁸ e-trusts merit validation—and invalidation—to the same extent as e-wills.

CONCLUSION

From clay tablets to tablet computing, the technology of communication has evolved—and, in due course, so shall our law. This Article calls for a bifurcated approach to electronic wills. On one hand, lawmakers should allow them when needed to permit testation on the fly. They comprise a viable replacement for holographic wills, whose utility as emergency vehicles is fading. Indeed, lawmakers could go further and authorize other novelties: audio- and video-emergency wills. Under a two-track approach, an eight-track will becomes innocuous.

On the other hand, one does not have to be a Luddite to take alarm at the legalization of electronic wills for routine estate planning. Along with the evidentiary challenges posed by their proliferation lies the risk of misuse. Firms like Willing are all too willing to encourage naïve folk to pay for estate plans they hardly need and can ill afford. In the face of aggressive efforts to introduce e-will legislation, lawmakers should take to heart Sir Thomas More's purported counsel to "stand fast a little—even at the risk of being heroes."⁴²⁹

Of course, unlike More and his royal antagonist, lawmakers at odds over electronic wills are not locked in an eschatological conflict. But the stakes are high enough—for firms that stand to profit, and for society, which must foot the bill for the contests over e-wills that their enforcement would invite. Virtuous lawmakers cannot hesitate in their choice.

Politics aside, lawmakers might give the nod to e-wills out of a nebulous desire to modernize—"to be proactive," as a commentator advises.⁴³⁰ The drafters of the Uniform E-Wills Act highlight this theme,⁴³¹ as do industry advocates. The traditional requirements for will execution "predate the invention of the light bulb . . . [and] have remained largely unchanged for hundreds of years," an industry white paper observes.⁴³²

To be sure, attention to social transformation is all to the good; too often, our law has straggled behind the march of events. Still, the timelessness of a

⁴²⁸ See *supra* notes 73–77 and accompanying text.

⁴²⁹ ROBERT BOLT, *A MAN FOR ALL SEASONS* 141 (Vintage Int'l ed. 1990) (1960).

⁴³⁰ Stroh, *supra* note 399, at 3.

⁴³¹ See Unif. Act white paper, *supra* note 121, at 1 (averring that "[t]he . . . Act modernizes the law," whereas "traditional execution requirements . . . [are] an anomaly in the internet age"); Suzanne Walsh & Turney P. Berry, *Electronic Wills Have Arrived*, TR. & EST., Feb. 2020, at 12, 14 (promotional article by drafters of the Unif. E-Wills Act, characterizing a prohibition on e-wills as "conspicuously old-fashioned"); May 2019 Memo, *supra* note 138, at 1 (asserting, without reference to evidence, that "formal will signature and attestation requirements seem outdated and obsolete to many people").

⁴³² Modernizing the Law, *supra* note 220, text below n.5.

rule need not make it untimely. The law of fraudulent conveyances predates even the invention of gaslight and likewise has changed little since the statute of 13 Elizabeth—yet it remains just as functional today as it was in the sixteenth century.⁴³³ Modernity should influence law only insofar as it reshapes public policy in concrete ways. The moment for electronic wills may yet come, but unless and until the myriad of problems associated with them evaporates, and unless and until no alternative exists, lawmakers should treat them warily. For now, we can accept the silver lining presented by the feasibility of e-wills for testators who are pressed, but otherwise reject (as it were) the cloud.

I will give the last word to the late Julius Goebel, Jr., a distinguished legal historian who witnessed impetuous stabs at law reform in his own time. Goebel hoped that his scholarship would serve to restore lawmakers' sobriety. Said he, in a passage advocates of electronic wills should hearken to today: "The alien corn which seems so ravishing to many of our generation may be more green than the fields so long and so toilfully ploughed, but there have been good harvests here, and the tale of the reapings may move men to cherish the old seed."⁴³⁴

⁴³³ See 13 Eliz. c. 5 (1571) (Eng.).

⁴³⁴ JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK*, at xxxix (1944).

APPENDIX

I here report original translations of two electronic-will cases from France and Sweden, respectively. Neither case has previously been noted in the American legal literature, and neither one is available in American legal databases.⁴³⁵

* * * *

TRIBUNAL DE GRANDE INSTANCE [TGI] [ORDINARY COURT OF ORIGINAL JURISDICTION] METZ, CIV., AUG. 17, 2018, 17/01794:

Sophie Lebreton, Vice-President, pre-trial judge, assisted by Ms. Elodie Pierron, clerk:

Pursuant to article 61-1 of the Constitution, when it is asserted, while a case is pending before a court, that a legislative provision violates the rights and liberties guaranteed by the Constitution, the Constitutional Council can be asked to rule on the matter after the case is referred to it by the Council of State or the Court of Cassation, which decides whether to do so within an established timeframe.

Pursuant to article 23-1 of the decree 58-1067 dated November 7, 1958, passing the organic law defining the role of the Constitutional Council in cases filed within the jurisdictions of the Council of State or of the Court of Cassation, when a legislative provision violates the rights and liberties guaranteed by the Constitution, a separate written brief stating the reasons why it violates these rights and liberties should be submitted.

In this case, Ms. Bernadette G argues that article 970 of the civil code, which provides that a will is invalid if it is not entirely handwritten, dated and signed by the testator, and that no other form is valid, violates the rights and liberties provided by the Constitution because by denying the testator the possibility of making a will electronically, it essentially deprives him of his right to dispose of his assets, despite this right being part of the fundamental property rights protected by the provisions in articles 2 and 17 of the Declaration of the Rights of the Man and of the Citizen of August 26, 1789, also recognized by the Constitutional Council.

She argues the absolute nature of property rights guaranteed by the Declaration of the Rights of the Man and of the Citizen, rights reiterated in the Constitution; she also argues that the law of March 13, 2000 modernizing evidence law to include information technologies and related to electronic signatures,

⁴³⁵ The French case is translated by Lauren Dehasque, and the Swedish case is translated by Louise Lund, with additional editing of both translations by author. Following continental practice, neither case has a formal name; in France the parties' identities are also redacted. The original case reports are on file with author.

which resulted in the adoption of article 1316-3 of the civil code, and partially of article 1108-1 of the same code, gives equal weight to both written evidence and electronic evidence; she argues that a contradiction exists between article 970 of the civil code, an article that was never adapted to incorporate these changes and that limits the means of expression of a testator's last wishes, and the fundamental nature of the property rights which include the absolute right to dispose of one's assets.

In response, the members of the family G oppose the referral of the matter to decide whether the provisions are constitutional on the grounds that the request is neither justified nor serious, and that, on the contrary, the legislature acted with the intent to protect the testator and it is not against the Constitution.

The present case was submitted to the prosecutor's office which then sent a report.

Reasons:

About the admissibility of the brief:

The brief about the violation of the rights and liberties guaranteed by the Constitution is presented in a separate document and it states the reasons. It is thus admissible.

About the referral:

Article 23-2 of the decree previously mentioned provides that the court should refer without delay the constitutional question to the Court of Cassation if all the following conditions are present:

1. The provision contested applies to the dispute or procedure, or it constitutes the basis of the dispute.
2. The provision has not yet been declared to be in compliance with the Constitution by the Council of State, unless circumstances have changed since then.
3. The issue does not lack seriousness.

In this case, the provision at issue applies to the dispute questioning the validity of a will by text message.

The provision has not yet been ruled to be in compliance with the Constitution by the Constitutional Council.

In deciding whether the issue is serious enough, it is important to remember that pursuant to article 895 of the civil code, a will is an act by which the testator disposes of, in anticipation of when he will no longer live, all or part of his assets, or of his rights, and that he can revoke it.

A will can be holographic, made by public act, or it can be mystic. It can also be international. As far as holographic wills are concerned, article 970 of the civil code provides that the will is invalid if it is not entirely handwritten, dated and signed by the testator. It is not subject to any other requirements. The

will must be entirely handwritten and signed by the author, regardless of the format or material used.

Requiring that the will be handwritten limits the risks of falsifying the will, prevents mistakes, and ensures that the testator thought about it thoroughly. The handwritten document protects the testator's identity, his independence and his freedom of thought. It reflects his decision to approve the terms used and it gives them testamentary value.

Since it is an act that is free and with long-lasting consequences, aimed at being effective at the testator's death, and without the protections offered by an authentic or a mystic will, the legislator intended to give greater protections to the testator. Thus, being handwritten is required "*ad solemnitatem*," *i.e.*, in order for it to be valid, and not "*ad probationem*," *i.e.*, to prove whether it is valid.

It follows that no comparison can be made with the rules provided by the law of March 13, 2000, adapting evidence law to information technologies and related to electronic signatures, or more generally with the rules of evidence law.

Consequently, the provisions in article 970 of the civil code protect the expression of the last wishes of the testator and, as a result, his property rights and his right to dispose of his assets freely; thus, asking whether it is constitutional appears to be a frivolous question.

Therefore, the matter should not be submitted to the Court of Cassation. For these reasons:

The high court, pronouncing a different judgment, not appealable independently on the substance of the issue, declares the notice admissible, rules that because of the lack of serious legal argument, the following issue cannot be submitted to the Court of Cassation: article 970 of the civil code, which provides that a will is invalid if it is not entirely handwritten, dated and signed by the testator and that no other condition is required, violates the rights and liberties provided by the Constitution because by denying the possibility to the testator of a holographic will to type the will electronically, it essentially deprives him of his right to dispose of his assets, despite this right being part of the fundamental property rights protected by the provisions in articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789, also recognized by the Constitutional Council.

TINGSRÄTT [TR] [DISTRICT COURT] 2012-11-16 T5746-11:

Background:

In October 2010 Johnny Gullberg sent two messages on Facebook to his friend Ronny Tholander in connection with a parachute jump. The messages indicated what would happen to his estate if an accident happened. One of the messages indicated that the instructions would cease to apply if no accident occurred.

On December 18, 2010, Johnny Gullberg passed away by suicide leaving as his legal heir his mother, Susanne Miilto. At 04:05, a few hours before he died, he sent a text message from his mobile phone to Ronny Tholander. The text message read: “The apartment is to be sold.. Half goes to you Ronny.. The car to Christoffer Forsberg . . . 100,000 to Daniel Villa . . . 100,000 to [M]urre [, the] rest to Barbro Wathne[.]”

The parties agree that it was Johnny Gullberg who sent the text message. The parties further agree on the following. “Ronny” refers to Ronny Tholander. “Murre” refers to an acquaintance named Johan Muhrén. Ronny Tholander and Johan Muhrén have stated that they make no claim to Johnny Gullberg’s estate from the text message. Christoffer Forsberg and Daniel Villa Bégat are friends of Johnny Gullberg. Barbro Wathne is his grandmother. Johnny Gullberg’s surviving partner Nina Larsson and the estate have entered into an agreement regarding division of property. The car is with Johnny Gullberg’s grandmother Britt-Marie Gullberg. The apartment is sold for about 2.3 million kroner, of which about 700,000-800,000 kroner remains to be distributed since debts have been paid. All cash funds are in accounts in Johnny Gullberg’s name. Depending on the value of the car, the total value of the estate, after deduction of liabilities, amounts to approximately one million kroner.

The dispute concerns if the text message constitutes a so-called holographic will according to chap. § 3, first paragraph, last paragraph ÄB [inheritance code] and—if so—if the testament is invalid due to the fact that John Gullberg’s condition in establishing the text message was such that it equates with a mental disorder. The parties agree that the defendant parties have the burden of proof that the text message is a holographic testament and that Susanne Miilto has the burden of proof that Johnny Gullberg’s condition in establishing the text message was such that it equates with a mental disorder.

Judgment:

Does the text message constitute a holographic will?

Was Johnny Gullberg in a state of emergency when he drafted the message?

According to Chapter 10, § 3, ärvdabalken [inheritance code], in order to be an emergency will, the person who established the will out of illness or oth-

er emergency conditions has to have been prevented from establishing an ordinary will. Regardless of which of the two types of emergency wills are used—oral or holographic will—the scope is limited to cases where the testator cannot create a will according to the rules in Chapter 10, § 1 ärvdabalken, due to illness or other emergency conditions. In practice, the question has arisen as to whether persons who commit suicide can be considered to have been prevented from creating an ordinary will because they themselves induced the emergency. What has been indicated in practice as essential has been the testator's own perception of the situation, which means that the documents have been accepted as holographic wills (see NJA 1938 page 511 and NJA 1950 page 498).

The following facts are undisputed or clear. Johnny Gullberg has at times in his life been mentally ill. In 2006, he tried to take his own life. The night of December 18, 2010, Johnny Gullberg was heavily drunk and, separated from Nina Larsson, in a very upset state. He continued to send texts to her but did not receive any answers. He called Ronny Tholander who was asleep and therefore did not answer. He died around 5:30-6:00 am in the morning. The text message to Ronny was sent at 04:05, one and a half to two hours before his death. In summary, the District Court finds, in accordance with practice, that Johnny Gullberg had reason to perceive the situation as an emergency, which justifies deviation from the usual rules for wills.

Is it a self-written and signed action?

According to Chapter 10, § 3, last paragraph, ärvdabalken, a holographic will is created by a testator's self-written and signed action. The fact that the action has to be written with the testator's own hand has been interpreted by many as not to be typed or printed. This is considered to increase reliability because what has been ordained is genuine and seriously meant. In the commentary to ärvdabalken, Walin wonders whether the testator's wishes can be shown even if the order is written on a machine and signed by hand. Walin argues that the will is self-written if it was the testator who wrote the text. According to Walin, it should be possible, given that emergency situations call for liberalization. It is even contradictory to maintain unnecessary formal requirements when an emergency exists, if you can be assured that the act derives from the testator and his wishes are sufficiently clear (see Walin/Lind, Commentary to Ärvdabalken, part 1 page 293 et seq.).

The District Court makes the following observations. The current ärvdabalken was introduced in 1958 and the rules of its tenth chapter remain unchanged. Today, 45 years later, society has undergone technological development that is unprecedented and of course could not have been foreseen at the origin of the ärvdabalken. Internet, computers and cell phones have changed our way of communicating and, for most people, it is certainly more natural to search for information on the Internet instead of at the library, writing the

shopping list on the mobile phone instead of on paper, and e-mailing instead of plain letter writing. Those who have a mobile phone in their pocket are probably far greater in number than those with paper and pen. The purpose of the provision that a will shall be signed by the testator is to clarify that the testator performed the act and that the contents of the document constitute a final order, see NJA 1993, page 341. In recent cases self-written notes were rejected as holographic wills because they have not been signed. Two members of the Supreme Court dissented and would approve the acts as wills. They stated that the formal requirement should not be given a stricter meaning than the purpose of the rule indicates, namely to ensure that the order comes from the testator and that it is meant seriously.

It is undisputable that Johnny Gullberg wrote the text message on his mobile phone and sent it to Ronny Tholander, and that it was written a few hours before he took his own life. In the message it is clearly defined who will receive what and it ends with “the rest to Barbro Wathne.” The District Court concludes that there is no room for any interpretation other than that the content of the document constitutes a final act. The fact that Johnny Gullberg in his text message excluded people whom he previously expressed a wish to benefit cannot change that judgment. Both through the Facebook message sent by Johnny Gullberg before a parachute jump two months earlier and the text message he wrote just before his death, Johnny Gullberg clearly showed that it was important for him to declare his estate plan. By sending the text message to Ronny Tholander, Johnny Gullberg clearly indicated that what he wrote was a final act. Due to the unprecedented technological development that has taken place since the introduction of the current provisions on emergency wills and the impact of those developments on the way people communicate, it should, in the opinion of the District Court, be possible in this way to declare one’s will. It should be emphasized that this reasoning does not in any way refer to ordinary wills but should only apply in cases where the testator is in distress. The plaintiff’s reasoning in terms of the requirements for qualified electronic signatures in order for a digital signature to be considered valid does not apply in these situations. In summary, the District Court finds that the text message Johnny Gullberg prepared and sent on 18 December 2010 shall be deemed to meet the requirements of a self-written and signed act.

[Additional parts of the opinion concluding that the text message should be interpreted to comprise a will and that the testator was not suffering from a “mental disorder” as a result of alcohol consumption that would have disempowered him from making a will are omitted.]

The will is thus valid and the case shall be dismissed.

HOVRÄTT [HOVR] [COURT OF APPEAL] 2013-06-13 T11306-12:

Shortly before committing suicide, a man sent a text message showing how he wanted his estate to be distributed. The District Court considered this to be a valid will, but now the Court of Appeal invalidates it.

In the District Court, it was established that the text message sent by the man a couple of hours before he killed himself was a so-called holographic will, according to Chapter 10, § 3, first paragraph, ärvdabalken, and that the man did not suffer from a mental disorder when he sent the message. The will was therefore, according to the court, valid, and the man's mother's claim for annulment of the will was dismissed.

The Court of Appeal now concludes that the text message is indeed a legal document with a text that is clear and contains information on how the man's estate should be distributed. Furthermore, like the District Court, the Court of Appeal concludes that it is certain that the message expresses the man's utmost wishes and that he intended to declare his will. As a result, the text message is a will.

According to Chapter 10, section 3 of ärvdabalken, the will must be self-written and signed by the testator. The law permits no exception from these requirements. In the case, it was undisputed that it was the man who wrote and sent the will and the Court of Appeal, like the District Court, finds that the text message in itself fulfills the requirement to be self-written.

However, it is not possible to sign a text message. Based on the formal requirements of the statute, it is thus not possible to declare your will in the manner that the man has done here. The will must therefore be declared invalid.

